

From: Schimpf, Timothy

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To: TTAB EFiling

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Subject: U.S. TRADEMARK APPLICATION NO. 85872412 - PROSPEROUS YEAR - 610/9-3222 - Request for
Reconsideration Denied - Return to TTAB - Message 2 of 2

Attachment Information:

Count: 8

Files: TTAB08.jpg, TTAB09.jpg, TTAB10.jpg, TTAB11.jpg, TTAB12.jpg, TTAB13.jpg, slotannuity.jpg,
slotannuity1.jpg

Ser. No. 76460411

1699 n.15; *Quaker Oats Co. v. Acme Feed Mills, Inc.*, 192 USPQ 653 (TTAB 1976).

Applicant, in its brief, cites to certain subsections of Regulation 14 which, according to applicant, show that the gaming industry is highly regulated, and that the purchasers of gaming devices such as applicant's are casino owners and their representatives who necessarily are professional, sophisticated purchasers. (We shall discuss the issues of trade channels, classes of purchasers and purchaser sophistication more fully below.)

However, Regulation 14 also is relevant to the issue of the relatedness of applicant's "gaming devices" and registrant's "computer game programs." Section 14.025 of the regulation pertains to themes which are allowable for gaming devices such as applicant's. It provides, at subsection 2(e), that the theme of a gaming device, in appropriate circumstances, may be based upon or derived from the theme of a computer game. That is, the regulation specifically contemplates that a gaming device and a

Ser. No. 76460411

computer game program could be based on the same theme.³ Thus, consumers who are aware of the practice that gaming devices can be based upon or derived from computer games are likely to believe that applicant's RED BARON gaming device is based upon or derived from registrant's RED BARON computer game, and that there is a connection in sponsorship or source of the gaming device and the computer game. This connection between applicant's and registrant's goods weighs in favor of a finding that the respective

³ The regulation provides, in pertinent part, as follows (subsections 2(a) and 2(d) are included for context):

14.025 Certain themes prohibited in association with gaming devices or slot machines.

1. A gaming device or gaming device modification submitted for approval by a manufacturer or made available for play by a licensee must not use a theme that:

(a) Is derived from or based on a product that is currently and primarily intended or marketed for use by persons under 21 years of age...

(b) is otherwise contrary to the public policy of the state or would constitute an unsuitable method of operation.

2. In addition to any other factors deemed relevant, the following factors may be considered in determining whether a gaming device theme is prohibited by subsection 1:

(a) The subject matter of a television program or cartoon and the rating given to it by the National Association of Broadcasters, the National Cable Television Association, the National Cable Association or comparable rating entity;

. . . .

(d) The subject matter of a movie or animated feature and the rating given to it by the Motion Picture Association of America or comparable rating entity;

(e) The subject matter of a video or computer game and the rating given to it by the Entertainment Software Rating Board or a comparable rating entity;

. . . .

Ser. No. 76460411

goods are related. Again, where the marks at issue are identical, as they are in this case, there need be only a viable relationship between the goods to support a finding of likelihood of confusion. Based on the evidence discussed above, we find that applicant's goods are related to the goods identified in the cited registration.

Regarding trade channels, classes of purchasers and the degree of care and sophistication with which the goods are purchased, applicant argues that its goods inherently are expensive, and that the sale, resale, licensing and operation of its goods are highly regulated by the state of Nevada and by the other states in which applicant does business, and that they are sold at trade shows to professionals who are careful, sophisticated purchasers, i.e., to casinos and other gaming establishments. The Nevada gaming regulations cited by applicant bear this out. In contrast, applicant argues, registrant's computer games presumably are marketed to young video game players who purchase the games, inter alia, online, at kiosks in shopping malls, and at specialty stores such as Circuit City and Best Buy. (Applicant's Oct. 20, 2003 response to the first Office action.) Applicant contends, therefore, that applicant's and registrant's goods are sold to

Ser. No. 76460411

different classes of purchasers and in different trade channels.

We find, however, that even if the initial purchasers of applicant's gaming devices are professional, careful purchasers such as casinos and other gaming establishments, the classes of purchasers for applicant's gaming devices also include the ultimate users of such gaming devices, i.e., the patrons of the casinos and other gaming establishments who encounter and use applicant's gaming devices. See, e.g., *In re Infinity Broadcasting Corporation of Dallas*, 60 USPQ2d 1214 (TTAB 2001) (even if initial purchasers of radio advertising time are sophisticated and careful purchasers, in determining likelihood of confusion consideration must also be given to the ultimate users, i.e., the listeners of applicant's radio station); and *In re Artic Electronics Co., Ltd.* 220 USPQ 836 (TTAB 1983) (although the initial purchasers, i.e., owners of arcades, are sophisticated and careful purchasers of arcade games and coin and bill changer equipment, in determining likelihood of confusion consideration must also be given to the ultimate users of the arcade games and coin and bill changers, i.e., the arcade's customers who are the end users of the goods).

Ser. No. 76460411

Similarly in this case, in determining likelihood of confusion, the classes of purchasers for applicant's gaming devices include not only the sophisticated initial purchasers of the gaming devices themselves, i.e., casinos and other gaming establishments, but also must include the ultimate users of such gaming devices, i.e., ordinary casino customers. Given the fact (of which we take judicial notice) that slot machines and other gaming devices may be played a penny, nickel or quarter at a time, these ultimate users of gaming devices must be deemed to be ordinary consumers and impulse purchasers who do not exercise more than an ordinary degree of care in deciding to play gaming devices in a casino. These casino patrons are also purchasers of registrant's computer games, either for their own use or the use of their children or others.

As discussed above regarding the relatedness of applicant's and registrant's respective goods, the Nevada gaming regulations specifically contemplate that the theme of a gaming device available in casinos may be based on or derived from the theme of a computer game. Thus, the casino patrons or ultimate users of gaming devices such as applicant's are among the class of purchasers of computer games such as registrant's. Applicant could offer a RED BARON gaming device that is based on or derived from

Ser. No. 76460411

registrant's RED BARON computer game. In such a situation, purchasers are likely to assume that a source or other connection exists.

After consideration of the relevant *du Pont* factors, we find that a likelihood of confusion exists.

Decision: The Section 2(d) refusal is affirmed.



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Sturgis man wins \$629K Wheel of Fortune progressive pot

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Sturgis man wins \$629K Wheel of Fortune progressive pot

Jeremiah Isbell of Sturgis put \$10 in a Wheel of Fortune Megajackpot slot machine at the Celebrity Hotel, bet the maximum bet of 75 cents and won \$659,888.16 on his first try. The game is part of a city-wide network, where combined play builds the grand prize until someone wins the jackpot. Courtesy photo

Posted: Thursday, February 23, 2012 2:26 pm

By Jaci Conrad Pearson Black Hills Pioneer |
0 comments

By Jaci Conrad Pearson

Black Hills Pioneer

DEADWOOD — Friday was, perhaps, the luckiest day of Jeremiah Isbell's life.

The 29-year-old Iraq veteran and father of three children ages 3, 2 and 8 months, won precisely \$659,888.16 at approximately 9:55 p.m. at the Celebrity Hotel & Casino when he put \$10 in a Wheel of Fortune Megajackpot 25-cent machine, placed a maximum bet of 75 cents and hit the city-wide progressive on the first shot while gaming with his wife Patsy and friends.

"I saw the first one come down and I was happy that I'd get a spin on the wheel," Isbell explained. "Then the second one came down and I thought I got a bigger spin. Then the third one came down and it started playing music. Then I started to check the icons, trying to figure out what you get for three and I'm like 'Oh my



Calendar

March 2014						
Su	Mo	Tu	We	Th	Fr	Sa
						1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29
30	31					

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9:56:21 AM 3/4/2014

to figure out what you get for three and I'm like 'Oh my God! It says progressive! I was in shock. I haven't been able to keep my breath. My wife heard and she came over and I was like, baby, I think I just won the

progressive. And she goes, 'hit the service button.'

Sure enough. Celebrity Hotel manager Ken Gienger was on duty the night the hit happened.

"We were here until 3:30 a.m.," Gienger said. "I was heading back to my office at around 10, when I heard a ruckus. Cory Iverson came around the corner and said someone just hit the Wheel of Fortune

progressive.

Gienger said the late night was due to procedures the gaming commission and IGT, slot machine company, follow to ensure the win was a valid one. They inspect the seals on the machine, verify that the chips in the machine are good and look at surveillance tape to make sure that the winner was in fact sitting at the machine at the time it hit.

Everything checked out and Isbell walked away with his first annuity check for \$31,423. Once he receives the paperwork and returns it to IGT, he can either opt for a lump sum payment or to keep the checks going for 21 years.

"I'm going with the lump sum," Isbell said. "I'm going to start putting it away for my kids."

When Isbell hit the jackpot, it was reset down to \$200,000. The pot is built by participating casinos city-wide contributing 5.3 percent of the coin in per machine plus sales tax.

"So if someone plays \$100 of coin in, IGT would get \$5.30 from us to help pay for machine fees and jackpot," Gienger said.

The first order of business for Isbell is to pay off his bills. And second, is all about family.

"I was in the Marine Corps for eight years, so it's time for me to take a break," Isbell said. "We're planning a possible road trip to Nevada and California and then we'll put away the money for the kids. The biggest thing for me is that we all have a secure future, my wife, my kids, my mother."

Isbell is currently a route sales driver for Coca-Cola and he and his family live in Sturgis. He moved to the area from California and visited South Dakota for the first time in 2007, when he became acquainted with the Celebrity Hotel, which is his favorite gaming establishment.

"I just love how the artifacts are displayed there. It's a great place to be. They're just great people," Isbell said. "When I walked in the next day, everybody knew who I was."

Gienger was pleased to finally have the progressive hit at the Celebrity.

"We've never had anything hit like that at our place before, so it was exciting for the staff and everyone gaming here," Gienger said. "One of the things I'm very happy about is that he's 29 years old, he's an Iraq veteran, he's got three kids and the guy could use the money to build his family's future. I think it's an excellent thing for Deadwood to work together to do these mega-progressives so we can have as big a winner as we can do."

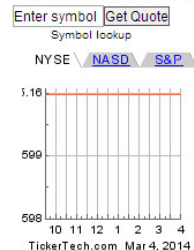
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Lt. Col Marius Gus Sorenson

Vita Dana

Evelyn Faith (Lackey) Maynard

Stocks



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UNCH	0.0
Nasd ETFs	428.47
UNCH	0.0
TTix S&P 500 ETFs	1867.55
Index	
17.20	0.93%
Russell 2K	1176.359
6.669	0.564%
10 Yr Treasury	2.607
Note EOD	
0.05	1.88%

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