

This Opinion Is Not a  
Precedent of the TTAB

Mailed: December 12, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Game On International, LLC*  
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Application Serial No. 87606762  
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Jennifer L. Mozwez of SRM Law, PC for Game On International, LLC.

Yatsye I. Lee, Trademark Examining Attorney, Law Office 107,  
J. Leslie Bishop, Managing Attorney.  
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Before Bergsman, Adlin and English, Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Game On International, LLC (Applicant) filed a Principal Register application for  
the mark GAME ON! INTERNATIONAL and design, shown below,



for the services set forth below:

Consulting in sales techniques and sales programmes; Consulting services relating to publicity; Advertising and promotion services and related consulting; Brand imagery consulting services; Business consulting and information services; Business consulting in the consumer products industry; Business consulting, management, planning and supervision; Business development consulting services; Business management consulting; Business management consulting and advisory services; Business marketing consulting services; Business organization consulting; Consumer marketing research and consulting related thereto; Marketing consulting; Professional business consulting; Promotion and marketing services and related consulting; Providing organizational development consulting services, in Class 35.<sup>1</sup>

The application includes the description of the mark set forth below:

The mark consists of the phrase “GAME ON!” in white letters on the face of a blue and green globe, and the word “INTERNATIONAL” in white letters within a blue arrow circling the blue and green globe.

The color(s) blue, green, and white is/are claimed as a feature of the mark.

Applicant disclaims the exclusive right to use the word “International.”

The Examining Attorney refused to register Applicant’s mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground of likelihood of confusion with two previously registered marks, listed below, owned by two separate entities:

1. Registration No. 5110104 for the mark GAME ON, in standard character form, for “advertising and marketing services, namely, promoting the goods, services

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<sup>1</sup> Application Serial No. 87606762 filed September 13, 2017, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), claiming October 1, 2016 as its date of first use anywhere and October 20, 2016 as its date of first use in commerce.

and interests of others in the field of billiards via print and electronic media,”  
in Class 35;<sup>2</sup> and

2. Registration No. 4558259 for the mark GAME ON! LEARNING, in standard character form, for “Business training; Interactive on-line training services in the field of business and sales skills; Teaching and training in business, industry and information technology,” in Class 41.<sup>3</sup> Registrant disclaimed the exclusive right to use the word “Learning.”

#### I. Preliminary Issue

In its January 24, 2019 Request for Reconsideration, Applicant proposed amending its description of services contingent upon the Examining Attorney withdrawing the likelihood of confusion refusals. The proposed amendment reads as follows:

In further effort to overcome the final rejection, Applicant, if necessary, in the Examiner’s opinion, to proceed to publication, shall amend and narrow the description of services to read as follows:

Consulting in sales techniques and sales program related to toys, games, and children’s products; Business consulting and information services for manufacturers of toys, games, and children's products; Business consulting, management, planning and supervision for manufacturers of toys, Games, and children’s products.<sup>4</sup>

The Examining Attorney did not accept the proposed amendment.

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<sup>2</sup> Registered December 27, 2016.

<sup>3</sup> Registered July 1, 2014.

<sup>4</sup> 4 TTABVUE 9.

In the request for reconsideration, the applicant has offered to amend and narrow the identification of services if the examining attorney believes that doing so would overcome the refusal. Despite the amendment proposed by the applicant however, the examining attorney believes the services would still be related to those of the registrants because sales technique consulting and business consulting services that “relate to toys and games” presumably encompass marketing and advertising services that are in the field of billiards, as identified in U.S. Registration No. 5110104. ...

The examining attorney remains unpersuaded. Because the applicant has conditioned the amendment of its services on the examiner’s withdrawal of the refusal, the identification of services remains as originally identified in the application.<sup>5</sup>

Nevertheless, in its Appeal Brief, Applicant seems to believe that its proposed amendment is still in play.

Applicant in its Request for Reconsideration offered to amend the description of services to narrow the field to all of the described services but specifically in the field of children’s games and toys. However, the Examining Attorney responded that such amendment would not change her opinion as to the likelihood of confusion for consumers when encountering the marks. We respectfully disagree.<sup>6</sup>

We find that Applicant’s original description of services is the operative description of services. Applicant proposed a provisional amendment effective upon the Examining Attorney withdrawing the refusals to register based on likelihood of confusion. The Examining Attorney did not agree to withdraw the likelihood of confusion refusals as a prerequisite for Applicant’s amendment to the description of

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<sup>5</sup> February 14, 2019 Denial of Request for Reconsideration (5 TTABVUE 4).

<sup>6</sup> Applicant’s Brief, p. 11 (10 TTABVUE 12).

services and expressly stated that she was rejecting the proposed amendment and that the original description of services was the operative description of services. Considering the ease with which Applicant could have amended the description of services, had Applicant wished to prosecute the application with the restricted description of services, it should have clearly stated that it was amending the description of services without any prerequisites or preconditions. Accordingly, the original description of services is the operative description of services.

## II. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”) cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015); see also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). “Not all of the *DuPont* factors are relevant to every case, and only factors of significance to the particular mark need be considered.” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1800 (Fed. Cir. 2018) (quoting *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010)); see also *M2 Software, Inc. v. M2 Commc’ns, Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006); *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1242 (TTAB 2015) (“While we have considered each factor for which we have evidence, we focus our analysis on those factors we find to be relevant.”). “[E]ach case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386, 387 (CCPA

1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. *See In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”); *see also In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods’”) (quoting *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)).

A. Registration No. 5110104 for the mark GAME ON for “advertising and marketing services, namely, promoting the goods, services and interests of others in the field of billiards via print and electronic media.”

1. The similarity or dissimilarity and nature of the services.

As noted above, Applicant’s description of services includes, inter alia,

Advertising and promotion services and related consulting;  
Business marketing consulting services; Marketing consulting; and Promotion and marketing services and related consulting.

Registrant’s description of services is “advertising and marketing services, namely, promoting the goods, services and interests of others in the field of billiards via print and electronic media.”

Applicant’s broadly worded advertising, promotion, and marketing services are broad enough to encompass Registrant’s “advertising and marketing services,

namely, promoting the goods, services and interests of others in the field of billiards via print and electronic media.” In other words, Applicant’s advertising, promotion, and marketing services are broad enough to include such services in the field of billiards. Where services are broadly identified in an application or registration, “we must presume that the services encompass all services of the type identified.” *Sw. Mgmt., Inc. v. Ocinomled, Ltd.*, 115 USPQ2d 1007, 1025 (TTAB 2015); *see also In re Hughes Furniture Indus., Inc.*, 114 USPQ2d 1134, 1137 (TTAB 2015) (“Applicant’s broadly worded identification of ‘furniture’ necessarily encompasses Registrant’s narrowly identified ‘residential and commercial furniture.’”); *Venture Out Props. LLC v. Wynn Resorts Holdings, LLC*, 81 USPQ2d 1887, 1893 (TTAB 2007).

Under this *DuPont* factor, the Examining Attorney need not prove, and we need not find, similarity as to each activity listed in the description of services. It is sufficient for a refusal based on likelihood of confusion that relatedness is established for any activity encompassed by the identification of services in a particular class in the application. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1409 (TTAB 2015), *aff’d* 866 F.3d 1315, 123 USPQ2d 1744 (Fed. Cir. 2017); *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015) (“it is sufficient for finding a likelihood of confusion if relatedness is established for any item encompassed by the identification of goods within a particular class in the application.”).

Applicant argues that Registrant operates a billiard blog rather than rendering the services identified in the description of services.<sup>7</sup> However, we must consider the services as they are described in the application and registration. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1321, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Sys, Inc. v. Houston Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) (“The authority is legion that the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed.”); *Paula Payne Prods. v. Johnson Publ’g Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) (“Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods”). We do not consider extrinsic evidence about Registrant’s actual goods, customers, or channels of trade. *E.g.*, *In re Dixie Rests. Inc.*, 105 USPQ2d, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997); *In re Fisher Sci. Co.*, 440 F.2d 43, 169 USPQ 436, 437 (CCPA 1971); *In re La Peregrina Ltd.*, 86 USPQ2d 1645, 1646 (TTAB 2008); *In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986).

We find that the services are in part identical.

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<sup>7</sup> Applicant’s Brief, pp. 8, 12 and 14-15 (10 TTABVUE 9, 13 and 15-16).

2. Established, likely-to-continue channels of trade and classes of consumers.

Because the services described in the application and the cited registration are in part identical, we presume that the channels of trade and classes of purchasers are the same. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (legally identical goods are presumed to travel in same channels of trade to same class of purchasers); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same); *In re Inn at St. John's, LLC*, 126 USPQ2d 1742, 1745 (TTAB 2018), *aff'd mem.* (No. 18-2236) (Fed. Cir. September 13, 2019) (“Because the services described in the application and the cited registration are identical, we presume that the channels of trade and classes of purchasers are the same.”); *United Glob. Media Grp., Inc. v. Tseng*, 112 USPQ2d 1039, 1049 (TTAB 2014); *Am. Lebanese Syrian Associated Charities Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011).

3. The number and nature of similar marks in use in connection with similar services.

Applicant did not submit any evidence of actual third-party use of GAME ON formative marks used in connection with advertising or marketing services. However, in its January 24, 2019 Request for Reconsideration and June 21, 2018 Response to Office Action Applicant identified 27 registered marks and four pending applications for marks including the term “Game On” for a wide variety of goods and services

unrelated to Registrant's services.<sup>8</sup> The third-party registrations and applications identified by Applicant are of little, if any, probative value because they do not cover the same services. *See Omaha Steaks Int'l v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1693-94 (Fed. Cir. 2018) (error to rely on third-party evidence of similar marks for dissimilar goods, as Board must focus "on goods shown to be similar"); *In re i.am.symbolic, LLC*, 123 USPQ2d at 1751 (disregarding third-party registrations for other types of goods where the proffering party had neither proven nor explained that they were related to the goods in the cited registration); *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1639 (TTAB 2009) (the third-party registrations are of limited probative value because the goods identified in the registrations appear to be in fields which are far removed from the goods at issue).

Second, the "existence of [third party] registrations is not evidence of what happens in the market place or that customers are familiar with them." *AMF Inc. v.*

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<sup>8</sup> Applicant did not submit copies of the registrations. To make registrations of record, the offering party must submit copies of the registrations or the complete electronic equivalent (i.e., complete printouts taken from the USPTO's Trademark database). *In re Ruffin Gaming LLC*, 66 USPQ2d 1924, 1925 n.3 (TTAB 2002); *In re Volvo Cars of N. Am. Inc.*, 46 USPQ2d 1455, 1456 n.2 (TTAB 1998); *In re Broadway Chicken Inc.*, 38 USPQ2d 1559, 1561 n.6 (TTAB 1996); *In re Smith & Mehaffey*, 31 USPQ2d 1531, 1532 n.3 (TTAB 1994). However, because the Examining Attorney did not object to the improper evidence of third-party registrations and, in fact, addressed them in her brief (12 TTABVUE 16), the Examining Attorney waived any objection to the third-party registrations. *See In re Houston*, 101 USPQ2d 1534, 1536 (TTAB 2012) (finding that the examining attorney's failure to advise applicant of the insufficiency of the list of registrations when it was proffered during examination constituted a waiver of any objection to consideration of that list); *In re 1st USA Realty Prof'ls*, 84 USPQ2d 1581, 1583 (TTAB 2007) (allowing evidence of a list of third-party registrations because the examining attorney did not advise applicant of the insufficiency of the list while there was still time to correct the mistake); *In re Broyhill Furniture Indus., Inc.*, 60 USPQ2d 1511, 1513 n.3 (TTAB 2001) (finding examining attorney's objection to a listing of third-party registrations waived because it was not raised in the Office action immediately following applicant's response in which applicant's reliance on the list was indicated).

*Am. Leisure Prods., Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973). The probative value of third-party trademarks depends entirely upon their usage. *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1693 (Fed. Cir. 2005), quoting *Scarves by Vera, Inc. v. Todo Imports, Ltd.*, 544 F.2d 1167, 192 USPQ 289, 294 (2d Cir. 1976) (“The significance of third-party trademarks depends wholly upon their usage. Defendant introduced no evidence that these trademarks were actually used by third parties, that they were well promoted or that they were recognized by consumers.”). As the Court of Appeals for the Federal Circuit has recognized, where the “record includes no evidence about the extent of [third-party] uses ... [t]he probative value of this evidence is thus minimal.” *Han Beauty, Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 57 USPQ2d 1557, 1561 (Fed. Cir. 2001).

Finally, pending applications are evidence only that the applications were filed on a certain date; they are not evidence of use of the marks. *Nike Inc. v. WNBA Enters. LLC*, 85 USPQ2d 1187, 1193 n.8 (TTAB 2007); *Interpayment Servs. Ltd. v. Docters & Thiede*, 66 USPQ2d 1463, 1468 n.6 (TTAB 2003); *In re Juleigh Jeans Sportswear, Inc.*, 24 USPQ2d 1694, 1699 (TTAB 1992).

We find that the number and nature of similar marks in use in connection with advertising or marketing services is a neutral *DuPont* factor.

4. The similarity or dissimilarity of the marks.

We now turn to the *DuPont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation

and commercial impression. *DuPont*, 177 USPQ at 567. “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014); *accord Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”) (citation omitted).

In comparing the marks, we are mindful that where, as here, the services are in part identical, the degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the services. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Jansen Enters. Inc. v. Rind*, 85 USPQ2d 1104, 1108 (TTAB 2007); *Schering-Plough HealthCare Prod. Inc. v. Ing-Jing Huang*, 84 USPQ2d 1323, 1325 (TTAB 2007).

“The proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *Cai v. Diamond Hong, Inc.*, 127 USPQ2d at 1801 (quoting *Coach Servs.*, 101 USPQ2d at 1721); *see also Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012); *San Fernando Elec. Mfg. Co. v. JFD Elec. Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Rests. Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff’d mem.*, 972 F.2d 1353 (Fed. Cir. 1992).

The marks are similar because they share the term “Game On.” Although we consider the marks in their entirety, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, such as a common dominant element, provided the ultimate conclusion rests on a consideration of the marks in their entirety. *Viterra Inc.*, 101 USPQ2d at 1908; *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). In this case, the words GAME ON! INTERNATIONAL are the dominant part of Applicant’s mark because the words are likely to make a greater impression upon purchasers, would be remembered by them, and would be used by them to request the services. *See Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1134 (Fed. Cir. 2015); *Viterra*, 101 USPQ2d at 1908 (citing *CBS Inc. v. Morrow*, 708 F. 2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983)).

The term GAME ON! is the dominant part of the word portion of the mark because it is presented in the largest letters and it covers almost the entire globe. In addition, the term GAME ON! has added significance in Applicant’s mark because it is the lead term and, as such, relevant purchasers are likely to notice and remember GAME ON!. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 1305, 128 USPQ2d 1047, 1048 (Fed. Cir. 2018) (finding “the identity of the marks’ two initial words is particularly significant because consumers typically notice those words first”); *Palm Bay Imps.*, 73 USPQ2d at 1692 (“Veuve” is the most prominent part of the mark VEUVE CLICQUOT because “veuve” is the first word in the mark and the first word to appear on the label);

*Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (upon encountering the marks, consumers will first notice the identical lead word); *In re Integrated Embedded*, 120 USPQ2d 1504, 1513 (TTAB 2016) (noting that the dominance of BARR in the mark BARR GROUP is reinforced by its location as the first word in the mark); *Presto Prods. Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered”).

Moreover, the geographically descriptive word “International” has less significance in Applicant’s mark. See *In re Detroit Athletic Co.*, 128 USPQ2d at 1050 (citing *In re Dixie Rests., Inc.*, 41 USPQ2d at 1533-34); *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) (“Regarding descriptive terms, this court has noted that the ‘descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.’”).

Under these circumstances, the fact that Applicant’s mark incorporates Registrant’s entire mark increases the similarity between the two. See, e.g., *China Healthways Inst. Inc. v. Xiaoming Wang*, 491 F.3d 1337, 83 USPQ2d 1123, 1125 (Fed. Cir. 2007) (applicant’s mark CHI PLUS is similar to opposer’s mark CHI both for electric massagers); *Coca-Cola Bottling Co. of Memphis, Tennessee, Inc. v. Joseph E. Seagram and Sons, Inc.*, 526 F.2d 556, 188 USPQ 105 (CCPA 1975) (applicant’s mark BENGAL LANCER for club soda, quinine water and ginger ale is similar to BENGAL for gin); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1271 (TTAB 2009) (applicant’s mark VANTAGE TITAN for medical magnetic resonance imaging

diagnostic apparatus confusingly similar to TITAN for medical ultrasound diagnostic apparatus); *Broadcasting Network Inc. v. ABS-CBN Int'l*, 84 USPQ2d 1560, 1568 (TTAB 2007) (respondent's mark ABS-CBN is similar to petitioner's mark CBN both for television broadcasting services); *In re El Torito Rests., Inc.*, 9 USPQ2d 2002, 2004 (TTAB 1988) (applicant's mark MACHO COMBOS for food items confusingly similar to MACHO for restaurant entrees); *In re Riddle*, 225 USPQ 630, 632 (TTAB 1985) (RICHARD PETTY'S ACCU TUNE for automotive service centers is similar to ACCU-TUNE for automotive testing equipment).

We find that the marks are similar in their entirety in terms of appearance, sound, connotation and commercial impression.

5. The conditions under which sales are made.

Applicant contends that its "clients (consumers) are sophisticated, knowledgeable business people operating in the field of children's games and toys."<sup>9</sup> There are three problems with this argument. First, Applicant's contention is attorney argument; it is not supported by any evidence. As the Federal Circuit has held, "Attorney argument is no substitute for evidence." *Zheng Cai, d/b/a Tai Chi Green Tea Inc. v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (quoting *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 1284 (Fed. Cir. 2005)); *see also In re U.S. Tsubaki, Inc.*, 109 USPQ2d 2002, 2006 (TTAB 2014) (finding that there was no proof to support the statements in the record by counsel).

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<sup>9</sup> Applicant's Brief, p. 12 (10 TTABVUE 13).

Second, even assuming that we could accept counsel's argument as fact, Applicant did not explain the purchasing process. *Compare Edwards Lifesciences Corp. v. VigiLanz Corp.*, 94 USPQ2d 1399, 1413 (TTAB 2010) (products cost \$14,000 and \$47,000 respectively and testimony established that purchases of both products involve significant study and negotiation).

Finally, Applicant relies on extrinsic evidence or argument by asserting that its clients operate in the field of children's games and toys. That fact is not reflected in its description of services. See the discussion above. We may not read limitations or restrictions into the description of services. *See In re i.am.symbolic, LLC*, 123 USPQ2d at 1748; *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983) ("There is no specific limitation and nothing in the inherent nature of Squirtco's mark or goods that restricts the usage of SQUIRT for balloons to promotion of soft drinks. The Board, thus, improperly read limitations into the registration"); *In re Thor Tech*, 90 USPQ2d at 1638 ("We have no authority to read any restrictions or limitations into the registrant's description of goods."); *see also In re Opus One Inc.*, 60 USPQ2d 1812, 1817 (TTAB 2001) (while the applicant "offered evidence to show that registrant's OPUS ONE wine is an expensive wine... 'wine' must be presumed to encompass inexpensive or moderately-price wine."); *In re Bercut-Vandervoort & Co.*, 229 USPQ at 764 (evidence that relevant goods are expensive wines sold to discriminating purchasers must be disregarded given the absence of any such restrictions in the application or registration). Therefore, we must presume that Applicant's advertising, promotion, and marketing services include all types of

advertising, promotion, and marketing services, including those types of services for small businesses and unsophisticated individuals who are not experienced purchasers of advertising and marketing services.

We find this *DuPont* factor to be neutral.

## 6. Conclusion

Because the marks are similar, the services are in part identical and we presume the services are offered in the same channels of trade to the same classes of consumers, we find that Applicant's mark GAME ON! INTERNATIONAL and design for, inter alia, "advertising and promotion services and related consulting; business marketing consulting services; marketing consulting; and promotion and marketing services and related consulting" is likely to cause confusion with the registered mark GAME ON for "advertising and marketing services, namely, promoting the goods, services and interests of others in the field of billiards via print and electronic media."

B. Registration No. 4558259 for the mark GAME ON! LEARNING for "business training; interactive on-line training services in the field of business and sales skills; teaching and training in business, industry and information technology."

### 1. The similarity of the marks.

Applicant's mark is GAME ON! INTERNATIONAL and design. The mark in the cited registration is GAME ON! LEARNING. The marks are similar in that they share the term GAME ON! followed by a descriptive word (i.e., International or Learning). Thus, the word portion of Applicant's mark and Registrant's mark have the same structure. As discussed above, the term GAME ON! is the dominant part of Applicant's mark. Likewise, the term GAME ON! is the dominant part of Registrant's

mark because GAME ON! is the first part of the mark, and because the word “Learning” is descriptive, it has less significance as a source indicator. Consumers familiar with Applicant’s mark upon encountering Registrant’s mark may mistakenly believe that Registrant’s GAME ON! LEARNING service is the educational part of Applicant’s GAME ON! line of services.

Applicant argues that “there is no discernable evidence that the ‘GAME ON! LEARNING’ mark is being used in commerce at all, let alone in the specific services it claims in its registration.”<sup>10</sup> According to Applicant, Registrant has been dissolved, its telephone number is no longer in service, and Applicant could not find any evidence of Registrant’s use of the mark.<sup>11</sup> In essence, Applicant contends that Registrant has abandoned its mark. This is an improper collateral attack on the cited registration. As the Federal Circuit held when dismissing an applicant’s contentions that the cited registered mark was no longer in use in *In re Dixie Rests., Inc.*, 41 USPQ2d at 1535, “the present ex parte proceeding is not the proper forum for such a challenge.” “[I]t is not open to an applicant to prove abandonment of [a] registered mark” in an ex parte proceeding; thus, the “appellant’s argument . . . that [a registrant] no longer uses the registered mark . . . must be disregarded.” *See also Cosmetically Yours, Inc. v. Clairol Inc.*, 424 F.2d 1385, 165 USPQ 515, 517 (CCPA 1970).

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<sup>10</sup> Applicant’s Brief, p. 11 (10 TTABVUE 12).

<sup>11</sup> *Id.*

We find that the marks are similar in their entireties in terms of appearance, sound, connotation and commercial impression.

2. The similarity or dissimilarity and nature of the services.

Applicant's description of services includes "consulting in sales techniques and sales programmes," "business consulting and information services," "business consulting in the consumer products industry," "business consulting, management, planning and supervision," "business development consulting services," "business management consulting," "business marketing consulting services," "business organization consulting," and "organizational development consulting services."

The description of services in the cited registration is "business training; interactive on-line training services in the field of business and sales skills; teaching and training in business, industry and information technology."

The Examining Attorney submitted excerpts from third-party websites showing that the same parties offer services similar to Applicant's consulting services and Registrant's training services under the same mark. For example,

- Cap Rock Global Services (caprockglobal.com) offers business management consulting services and customized training programs.<sup>12</sup>
- The Rain Group (rainsalestraining.com) markets itself as "a global leader in sales training and consulting."<sup>13</sup>

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<sup>12</sup> December 21, 2017 Office Action (TSDR 7-10).

<sup>13</sup> December 21, 2017 Office Action (TSDR 11-14).

- Cohegic Corporation (cohegic.com) advertises sales strategy, process, and organization services, as well as sales training.<sup>14</sup>

- Creative Sales + Management Incorporated (csm4tqs.com) advertises its “Business Development Consulting, Sales, Service and Management Training” services.<sup>15</sup>

- Steven Rosen Star Results (starresults.com) advertises its sales training and consulting services.<sup>16</sup>

The Examining Attorney has submitted numerous use-based, third-party registrations for services listed in both the involved application and cited registration.<sup>17</sup> Third-party registrations based on use in commerce that individually cover a number of different services often have probative value to the extent that they serve to suggest that the listed services are of a type that may emanate from the same source. *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-1786 (TTAB 1993); *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988), *aff’d mem.* 864 F.2d 149 (Fed. Cir. 1988). Representative registrations, with relevant portions of the identifications, are listed below.

<b>Mark</b>	<b>Reg. No.</b>	<b>Services</b>
IGNITE BRILLIANCE	4045774	Advertising and promotion services and related consulting; brand imagery consulting services; business consulting and business information services;

<sup>14</sup> December 21, 2017 Office Action (TSDR 18-19).

<sup>15</sup> December 21, 2017 Office Action (TSDR 23-24).

<sup>16</sup> December 21, 2017 Office Action (TSDR 25).

<sup>17</sup> July 24, 2018 Office Action (TSDR 50-211).

Mark	Reg. No.	Services
		Business training; conducting classes in the field of sales and business
GLOBAL RAINMAKING	3786411	Advertising and promotion services and related consulting; brand imagery consulting services; business advisory services, consultancy and information; business consultation services; marketing consulting;  Business training; conducting classes, conferences, workshops and seminars in the field of business and client development
MARKETFRAMES	3092325	Advertising and promotion services; market research services;  Training in the field of marketing and business planning
GENERGRAPHICS	3092961	Market research services, business marketing consulting services, advertising and promotion services and related consulting;  Conducting workshops, seminars, and training relating to advertising, promotion, marketing and business
OUR VALUES DRIVE OUR SUCCESS	4229383	Advertising, marketing and promotion services;  Teaching and training in business, industry and information technology

We find that the services are related.

3. Established, likely-to-continue channels of trade and classes of consumers.

The third-party websites discussed in the previous section show that Applicant's business consulting and Registrant's training services are offered together to the same classes of consumers.

#### 4. Conclusion

Because the marks are similar, the services are related, and the services are offered in the same channels of trade to the same classes of consumers, we find that Applicant's mark GAME ON! INTERNATIONAL and design for, inter alia, "consulting in sales techniques and sales programmes," "business consulting and information services," "business consulting in the consumer products industry," "business consulting, management, planning and supervision," "business development consulting services," "business management consulting," "business marketing consulting services," "business organization consulting," and "organizational development consulting services" is likely to cause confusion with the registered mark GAME ON! LEARNING for "business training; interactive on-line training services in the field of business and sales skills; teaching and training in business, industry and information technology."

**Decision:** The refusal to register Applicant's mark GAME ON! INTERNATIONAL and design based on each of the cited registrations is affirmed.