



TRADE MARKS ACT 1955

DECISION OF A DELEGATE OF THE REGISTRAR OF TRADE MARKS WITH REASONS

Re: Opposition by POG UNLIMITED to registration of trade mark application number 631258 in the name of LARRY POWELL for the words CAP SLAMMERS in Class 28

As provided for in the transitional provisions of Part 22 of the *Trade Marks Act 1995*, the provisions of the *Trade Marks Act 1955* continue to govern this opposition. Accordingly, unless otherwise specified, any reference to "the Act" in this decision is a reference to the 1955 legislation.

Background

Application number 631258 was lodged on 31 May 1994, in the name of LARRY POWELL (the applicant). The applicant sought to register, in Class 28, the mark CAP SLAMMERS for the statement of goods which was subsequently amended to read:

Games and amusement goods in this class; components of games sold individually or in a set such as discs and playing boards but not including any goods which use toy percussion caps, such as cap pistols.

The mark was advertised as accepted in the *Official Journal* of 25 August 1994.

Notice of opposition to the mark's registration was lodged, following an extension of time to do so, on 23 December 1994, by POG UNLIMITED (the opponent). The opposition was based on several separate grounds but the only one of these that I will discuss in detail - for reasons which will later become apparent - is under s.24 of the Act, that the mark is not distinctive of the applicant's goods.

The present matter was deferred, pending the outcome of the Federal Court action referred to above. Following the receipt of Court Orders to expunge that mark from the Register, the Office reactivated the present case. Because the applicant did not file any evidence in answer within the time allowed under the Act, the Trade Marks Hearings Support Unit subsequently wrote to both the opponent and the applicant, saying that the matter would be decided upon the material on file, unless either side requested a hearing. Neither party did so, nor did they file any submissions in relation to the opposition. Consequently, I have been delegated to decide the matter on behalf of the Registrar.

The evidence

The service and lodgment of the evidence in support in the matter was completed by 23 September 1995. The opponent did not serve any evidence in answer.

The evidence in support included a declaration by Gerald Crown, a director of Crown and Andrews Pty Ltd, a game manufacturing company. He declared as to his company's dealings with the opponent and also gave the history of, and details about, the game of CAPS. He said that the word CAPS was a generic one and that one of the heavier caps in the game was known as a SLAMMER. He further related dealings which his company and the opponent had had with the applicant. Also included in the evidence in support was a declaration by Glenn Howard, a part owner and director of a company dealing in trading cards, accessories and novelties. He declared as to the alleged generic nature of the words CAP and SLAMMER. Completing the evidence in support was a declaration by Graham Smith of Aroni Colman Solicitors, who included, as exhibits, affidavits by various people in relation to Federal Court infringement proceedings involving the applicant and the opponent. This court action resulted in an order for the expungement of another of the applicant's marks, registration number 631259, for the words CAPS THE GAME from the Australian Trade Marks Register. Claims were made in those affidavits regarding the alleged generic nature of the words CAP and SLAMMER.

Analysis

Section 24 (1) of the Act reads:

A trade mark is registrable in Part A of the Register if it contains or consists of:

- (a) the name of a person represented in a special or particular manner;
- (b) the signature of the applicant for registration or of some predecessor in his business;
- (c) an invented word;
- (d) a word not having direct reference to the character or quality of the goods or services in respect of which registration is sought and not being, according to its ordinary meaning, a geographical name or a surname; or
- (e) any other distinctive mark.

The basic requirement for the registration of any trade mark in Part A is that it is distinctive, i.e. adapted to distinguish the goods of its owner from the similar goods of other traders. The test as to whether, or not, a mark is adapted to distinguish is well established. If the mark is one which other traders would desire to use, without improper motive, upon or in connection with their own goods, then registration will generally be denied - *Clark Equipment Co v Registrar of Trade Marks*, 111 CLR 511 (the MICHIGAN case).

I think, from the opponent's evidence, that the words CAP and SLAMMERS, either together or separately, when used in relation to such a game as has been described in the evidence as being the applicant's goods of interest, are ones which other traders would have wished to use in referring to their own similar games, as at the date of application. This evidence was not countered by any evidence from the applicant, nor by any submissions on his behalf. I therefore find that the applicant's mark CAP SLAMMERS was not adapted to distinguish, nor was it capable of distinguishing, the applicant's goods as at the relevant date. Accordingly it is not distinctive. The opponent is therefore successful under this ground of opposition.

Conclusion

I have found that the opponent has succeeded on the s.24 ground. There is therefore no need for me to further discuss the other grounds included in the notice of opposition, as only one ground needs to be shown for the opposition as a whole to prevail. Therefore, subject to any appeal from this decision, I find that the opposition here has been successful and that the present mark should not proceed to registration.

Costs

No submissions were made as to costs, and I make no award here in relation to the matter.

Ian Forno
Hearing Officer

22 January 1999