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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re California Costume Collections, Inc.

Serial No. 77838682

Anthony O. Cormier for California Costume Collections, Inc.

David Yontef, Trademark Examining Attorney, Law Office 105
(Thomas G. Howell, Managing Attorney).

Before Quinn, Wellington and Wolfson, Administrative
Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

California Costume Collections, Inc. filed, on
September 30, 2009, an intent-to-use application to
register the mark ENCHANTED PRINCESS (in standard
characters) for "board games; collectable toy figures;
molded toy figures; parlour games; plastic character toys;
positionable toy figures; soft sculpture toys; [and]
talking toys" (in International Class 28).

The trademark examining attorney refused registration
under Section 2(d) of the Trademark Act, 15 U.S.C.

§1052(d), on the ground that applicant's mark, when applied to applicant's goods, so resembles the previously registered mark DISENCHANTED PRINCESS (in standard characters) for "toys, namely, stuffed dolls, stuffed toys, and plush toys" (in International Class 28)¹ as to be likely to cause confusion.

When the refusal was made final, applicant appealed. Applicant and the examining attorney filed briefs.

Before turning to the substantive merits of the appeal, we first address an evidentiary matter. The examining attorney, in his brief, objected to applicant's references in its brief to registrant's website, and to an "urban" dictionary definition on the ground that the evidence was not properly made of record prior to appeal.

So as to be clear, these materials were not submitted during prosecution of the application. Moreover, applicant's brief was not accompanied by either an excerpt from registrant's website or a dictionary listing.² If the materials were submitted with the brief, however, they would not be considered. *In re Quantum Foods Inc.*, 94

¹ Registration No. 2908762, issued December 7, 2004; section 8 affidavit accepted, section 15 affidavit acknowledged.

² If applicant had submitted the dictionary definition, the Board may have considered it by way of judicial notice. In the present case, however, applicant neither submitted the dictionary evidence nor requested that the Board take judicial notice of the definition.

USPQ2d 1375, 1377 n.2 (TTAB 2010). See Trademark Rule 2.142(d); and TBMP §1203.02(e) (3d ed. 2011). Insofar as applicant's references to these materials are concerned, factual statements made in its brief can be given no consideration unless they are supported by evidence properly made of record. See TBMP §704.06(b) (3d ed. 2011). Accordingly, in this case, any of applicant's arguments, which are based on evidence that is not in the record, have not been considered.

Applicant contends that the marks are distinguishable because applicant's mark "conjures up expected images of fairies, fairytales, princes, castles, knights in shining armor, positive hopes and dreams" in the manner of a fanciful, storybook reference. This commercial impression is contrasted with that engendered by registrant's mark, which "conveys to consumers the concept of disillusionment, the idea of being an outcast and of being a non-conformer or a nihilist." (Brief, p. 1). In sum, applicant argues, "the odd, atypical, unforeseen combination of words in registrant's mark belies likelihood of confusion with applicant's typical and more predictable combination that carries with it a pleasant expectation." (Brief, p. 6). Applicant submitted excerpts from the USPTO's Trademark

Identification Manual, and two pages from a third-party website.

The examining attorney maintains that the marks are similar, with the terms "enchanted" and "disenchanted" having related, albeit different meanings. The examining attorney also points out that the goods are related and are presumed to travel in the same or similar trade channels. In support of the refusal the examining attorney introduced dictionary definitions of the words "enchant," "enchanted" and "disenchant," as well as third-party registrations and applications.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

We first turn to compare applicant's goods with registrant's goods. It is well settled that the goods need

not be identical or competitive, or even offered through the same channels of trade, to support a holding of likelihood of confusion. It is sufficient that the respective goods are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same source. See *Hilson Research, Inc. v. Society for Human Resource Management*, 27 USPQ2d 1423 (TTAB 1993); and *In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978). The question of likelihood of confusion is determined based on the identification of goods in the application vis-à-vis the goods as set forth in the cited registration. *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 n.4 (Fed. Cir. 1993); and *In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006). The issue, of course, is not whether purchasers would confuse the goods, but rather whether there is a likelihood of confusion as to the source of the goods. *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984).

We find that applicant's "collectable toy figures; molded toy figures; plastic character toys; positionable

toy figures; soft sculpture toys; [and] talking toys" are closely related to registrant's "toys, namely, stuffed dolls, stuffed toys, and plush toys." Applicant does not seriously dispute the close relationship between the goods.

Lest there be any doubt regarding this second *du Pont* factor, the examining attorney submitted numerous use-based third-party registrations showing that the same entity has registered the same mark for the types of goods involved in this appeal. "Third-party registrations which cover a number of differing goods and/or services, and which are based on use in commerce, although not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, may nevertheless have some probative value to the extent that they may serve to suggest that such goods or services are of a type which may emanate from a single source." *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988), *aff'd*, 864 F.2d 149 (Fed. Cir. 1988). *See also In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993).

Because applicant's and registrant's toys are closely related, we presume that they travel in the same trade channels (e.g., toy stores and online toy retailers), and that they are bought by the same classes of purchasers. Given that there are no limitations as to price, we must

presume that the toys include inexpensive ones. Purchasers would include ordinary consumers who would be expected to exercise nothing more than ordinary care when buying the toys.

The *du Pont* factors relating to the similarity between the goods, and the identity in trade channels and purchasers, as well as the conditions of sale, weigh heavily in favor of a finding of a likelihood of confusion.

We next turn to compare the marks in their entireties as to appearance, sound, connotation and commercial impression to determine the similarity or dissimilarity between them. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). The test, under the first *du Pont* factor, is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

Applicant's mark ENCHANTED PRINCESS and registrant's mark DISENCHANTED PRINCESS have some obvious similarities. Both begin with ENCHANTED and a variation thereof, DISENCHANTED, followed by the identical word PRINCESS. Thus, the marks are similar in sound and appearance.

Applicant's arguments focus on purported differences between the meanings and commercial impressions conveyed by the marks. In attempting to distinguish the marks, applicant attributes a meaning to registrant's mark by its reference to registrant's website. However, as indicated above, registrant's website is not of record, and reference thereto is not entitled to any probative value.³ Even if the argument were considered, registrant's identification of goods is not limited to any connection with the cartoon characters "Angry Little Girls" and, thus, applicant's argument is irrelevant.

For his part, the examining attorney relies upon dictionary definitions of "enchant" and "enchanted": "put somebody or something under spell; to influence by or as if

³ Applicant contends that registrant's website is "designed to exploit the commercial impression of the Angry Little Girls cartoon characters as 'outcasts, and of being non-conformers or nihilists' and cartoon characters that 'have a negative outlook.'" (Brief, p. 1). Applicant asserts that a "disenchanted princess" is not a "princess" in the fanciful storybook sense, but rather a spoiled brat or a character doll that has a disposition that is in some respects difficult to get along with.

by charms and incantation; affected by magic or seeming to be affected by magic." (www.encarta.msn.com;

www.dictionary.cambridge.org; www.merriam-webster.com).

The examining attorney also made of record dictionary definitions of "disenchant": "free somebody from spell: to free somebody from an enchantment or magic spell; to free from illusion." (www.encarta.msn.com; www.merriam-webster.com).

As acknowledged by applicant, "[m]agic spells and enchantments are fanciful things about which storybooks and fairy tales are written." (Brief, p. 3). Even though the words "enchanted" and "disenchanted" have opposite meanings, the marks as a whole, when used on closely related toys, evoke similar commercial impressions. The words are associative, and both marks engender similar overall commercial impressions, namely of princess-like toys marketed under a shared theme of fairytale magic and spells; the "enchanted princess" is under a spell, and the "disenchanted princess" is free from the spell. See *The Procter & Gamble Co. v. Conway*, 419 F.2d 1332, 164 USPQ 301 (CCPA 1970) (MR. CLEAN and MR. STAIN for cleaning products held confusingly similar as the marks convey the same idea, "stimulating the same mental reaction"); and *The Downtowner Corp. v. Uptowner Inns, Inc.*, 178 USPQ 105 (TTAB 1973)

(UPTOWNER and DOWNTOWNER for hotel services are likely to cause confusion because, while they have different dictionary meanings, "uptown" and "downtown" are "associative terms").

The similarities between the marks in sound, appearance and commercial impression outweigh any difference in meaning. This first *du Pont* factor weighs in favor of a finding of likelihood of confusion.

We conclude that consumers familiar with registrant's toys sold under the mark DISENCHANTED PRINCESS would be likely to believe, upon encountering applicant's mark ENCHANTED PRINCESS for toys, that the goods originated from or are associated with or sponsored by the same entity.

Lastly, to the extent that any of the points raised by applicant raise a doubt about likelihood of confusion, that doubt is required to be resolved in favor of the prior registrant. *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988); and *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984).

Decision: The refusal to register is affirmed.