

<p>THIS OPINION IS NOT A PRECEDENT OF THE T.T.A.B.</p>

Mailed:
January 18, 2012

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Source Interlink Magazines, LLC

Serial No. 77879157

Scott J. Spooner, Esq. for Source Interlink Magazines, LLC.

James Ringle, Trademark Examining Attorney, Law Office 111
(Robert Lorenzo, Managing Attorney).

Before Bucher, Zervas and Bergsman,
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Source Interlink Magazines, LLC ("applicant") filed an intent-to-use application for the mark ULTIMATE PUZZLE SOURCE, in standard character form, for a "magazine containing puzzles," in Class 16. Applicant disclaimed the exclusive right to use the term "Puzzle Source."

The examining attorney refused registration under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. § 1052(d), on the ground that applicant's mark, when used in connection with a "magazine containing puzzles" so resembles the registered mark THE ULTIMATE PUZZLE and

design, shown below, for "puzzles," in Class 28,¹ as to be likely to cause confusion. Registrant disclaimed the exclusive right to use the word "Puzzle."



Preliminary Issue

In its brief, applicant argues, in essence, that because the goods at issue are categorized in different International Classes (*i.e.*, Class 28 vs. Class 16), by operation of law, they are not related.²

The International Classification of Goods and Services was created specifically to define the scope of a party's trademark rights by limiting a particular registration to the particular classes of goods and services covered by the registration.³

Applicant's argument is incorrect. Section 30 of the Trademark Act of 1946, 15 U.S.C. § 1112, provides that the

¹ Registration No. 3103446, issued June 13, 2006.

² Applicant's Brief, pp. 2-3.

³ Applicant's Brief, p. 2.

classification of goods and services does not "limit or extend applicant's or registrant's rights." Thus, the classification of goods is not controlling insofar as likelihood of confusion is concerned. *In re Knapp-Monarch Co.*, 296 F.2d 230, 132 USPQ 6, 7 (CCPA 1961); *Graco Inc. v. The Warner-Graham Co.*, 164 USPQ 400, 402 (TTAB 1969).

Likelihood of Confusion

Our determination of likelihood of confusion 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). *See also, In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

- A. The similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.

We turn first to the *du Pont* factor focusing on the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and

commercial impression. *In re E. I. du Pont De Nemours & Co.*, 177 USPQ at 567. In a particular case, any one of these means of comparison may be critical in finding the marks to be similar. *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988); *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1042 (TTAB 1987). In comparing the marks, we are mindful that the test 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 overall commercial impression so that confusion as to the source of the goods offered under the respective marks is likely to result. *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1835, 1741 (TTAB 1991), *aff'd unpublished*, No. 92-1086 (Fed. Cir. June 5, 1992).

Although the mark in the cited registration features a design element and the words are displayed in a distinctive style, the marks THE ULTIMATE PUZZLE and design and ULTIMATE PUZZLE SOURCE are similar to the extent that they both feature the term "Ultimate Puzzle." Thus, the primary question is whether the difference in appearance caused by registrant's design and distinctive display of the words "The Ultimate Puzzle" is sufficient for consumers to

distinguish between applicant's mark ULTIMATE PUZZLE SOURCE and the mark in the cited registration THE ULTIMATE PUZZLE and design. In this regard, it is a well-established principle that there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entirety. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985); *see also Dixie Rest.*, 105 F.3d at 1407, 41 USPQ2d 1531 (affirming TTAB finding that DELTA was the dominant feature of the mark THE DELTA CAFE and design, and that the design element and generic word "CAFE" were insufficient to overcome likelihood of confusion with the registered mark DELTA).

We find that the word "THE ULTIMATE PUZZLE" is the dominant portion of the mark in the cited registration and that is entitled to greater weight than its design elements because it is the term "The Ultimate Puzzle" by which consumers will refer to registrant's goods. *See In re Appetito Provisions Co.*, 3 USPQ2d 1553, 1554 (TTAB 1987). *See also CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983) ("in a composite mark comprising a design and words, the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it

is affixed"); *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 395-96 (Fed. Cir. 1983).

With respect to the distinctive display of the term "The Ultimate Puzzle" in registrant's mark (*i.e.*, the comparatively small font for the word "Ultimate" and the letter "E" in the word "Puzzle" formed by a puzzle piece), these features of the mark do not alter the manner in which consumers would view or pronounce the mark, especially consumers who are interested in solving puzzles.

Furthermore, a customer who has been satisfied with registrant's goods would recommend them by referring to the word portion of the mark, THE ULTIMATE PUZZLE. In this regard, we note that a "puzzle" is defined as "a toy, problem, or other contrivance designed to amuse by presenting difficulties to be solved by ingenuity or patient effort."⁴ The relevant consumers would appreciate the intricacies of the display of the registrant's mark, appreciating the mark itself as a puzzle; they would get it that the letter "E" is last letter of the word "puzzle" (although the E is an integral part of a design) and would they would perceive the last word as "puzzle."

⁴ The Random House Dictionary of the English Language (Unabridged), p. 1572 (2nd ed. 1987). The Board may take judicial notice of dictionary evidence. *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co.*, 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

With regard to applicant's mark, ULTIMATE PUZZLE SOURCE, the term "Ultimate Puzzle" is the dominant feature of applicant's mark because the adjective "Ultimate" modifies the word "Puzzle." The word "Ultimate" is defined as "maximum; decisive; conclusive: *the ultimate authority* ... not to be improved upon or surpassed; greatest; unsurpassed; *the ultimate vacation spot*." (Emphasis in the original).⁵ Thus, applicant's mark means and engenders the commercial impression of the greatest puzzle; the same commercial impression engendered by registrant's mark.

The significance of the term ULTIMATE PUZZLE is reinforced by its position as the first part of applicant's mark. See *Presto Products Inc. v. Nice-Pak Products, 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"); see also *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) ("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 America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir.

⁵ The Random House Dictionary of the English Language (Unabridged), p. 2050.

1992) (upon encountering the marks, consumers must first notice the identical lead word).

Moreover, because applicant's mark is displayed in standard character form, it is not limited to any special stylization and we must assume that it could be displayed in a style that takes on the appearance of a puzzle similar to the display adopted by registrant. *In re RSI Systems LLC*, 88 USPQ2d 1445, 1448 (TTAB 2008).

As indicated above, the process of comparing the marks does not rest on a side-by-side analysis or a point-by-point comparison of the mark isolating the similarities and differences. The focus is on the average purchasers who do not memorize marks and "there is a tendency for individuals to equate a new mark or experience with one that they have long experienced without making an effort to ascertain whether or not they are the same marks." *Cumberland Packing Corp. v. Estee Corp.*, 224 USPQ 50, 52 (TTAB 1984). Therefore, it is highly unlikely that consumers would differentiate applicant's mark from the registered mark.

In view of the foregoing, we find that when the marks are compared in their entirety, they are more similar than dissimilar in terms of appearance, sound, meaning and commercial impression.

B. The similarity or dissimilarity and nature of the goods, channels of trade and classes of consumers.

The mark in the cited registration is for puzzles and applicant is seeking to register its mark for a "magazine containing puzzles." Registrant's goods and applicant's goods are related because they are both puzzles albeit in different forms: toys and games [Class 28] vs. written form [Class 16]. It is well settled that applicant's goods and registrant's goods do not have to be identical or directly competitive to support a finding that there is a likelihood of confusion. It is sufficient if the respective products are related in some manner and/or that the conditions surrounding their marketing are such that they would be encountered by the same persons under circumstances that could, because of the similarity of the marks used in connection therewith, give rise to the mistaken belief that they emanate from or are associated with a single source. *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785 (TTAB 1993); *In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978).

The Examining Attorney submitted six use-based, third-party registrations for products listed in both the

application and registration at issue.⁶ Third-party registrations which individually cover a number of different goods that are based on use in commerce may have some probative value to the extent that they serve to suggest that the listed goods are of a type that may emanate from the same source. *In re Albert Trostel & Sons Co.*, 29 USPQ2d at 1785-86; *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988).

The Examining Attorney also submitted the following evidence to show that the goods in the application and registration move in the same channels of trade and are sold to the same classes of consumers, namely the general public:

1. An excerpt from the THINKS.COM website, "the place for family-friendly puzzles and games." The website offers free access to Sudoku puzzles, crossword puzzles, jigsaw puzzles, chess, and checkers.

**Puzzles & Games:
Sudoku, Crosswords,
Chess, Checkers & More**

Welcome to Thinks.com, the place for
family-friendly puzzles and games!

⁶ We did not consider the registrations based on applications filed under Section 44 of the Trademark Act (foreign registrations). *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d at 1470 n.6.

Whether you are young or old,
Thinks.com offers an incredible
collection of free online puzzles and
games. Enjoy Sudoku, crossword puzzles
and jigsaw puzzles. Play great online
games like chess, checkers and even
Chinese checkers. Thinks will keep you
happily entertained for hours.

Explore Thinks, solve puzzles and enjoy
game!

2. An excerpt from the CHRON ENTERTAINMENT website
(chron.com) providing access to online crossword puzzles,
Sudoku puzzles and jigsaw puzzles;

3. An excerpt from the JIGSAW JUNGLE website
(jigsawjungle.com) advertising the sale of jigsaw puzzles,
3D puzzles, crossword puzzles and "word searches."

In addition to jigsaw puzzles we
feature an excellent selection of
specialty hobbies for your
entertainment including:

Quality Paint by numbers kits,
Needlepoint, Cross Stitch kits,
Matchitecture, Scraperfoils, 3D Puzzle
Spheres, Games, Arts and Crafts,
Construction Kits, Educational Products
and Brainteasers (Mind puzzles, logic
puzzles, Crossword puzzles, Word
searches and more).

4. An excerpt from the FAT BRAIN TOYS website
(fatbraintoys.com) advertising the sale of a wide variety
of puzzles including jigsaw puzzles and "brainteaser"
puzzles. The website provides the listing of categories
set forth below.

Puzzles Sub-Categories:

3-D Puzzles	Brainteaser Puzzles
Floor Puzzles	Geography Puzzles
Jigsaw Puzzles	Toddler & Preschool Puzzles

We take judicial notice that crossword puzzles, Sudoku puzzles and brainteasers appear in newspapers, magazines and books.

While the evidence submitted by the examining attorney is not particularly compelling, we find that it is sufficient to establish a *prima facie* case that the goods are related, that they move in the same channels of trade and that they are sold to same classes of consumers. Applicant did not present any evidence regarding the relationship of the goods and, as discussed above, its only argument regarding the goods was that because the goods at issue are categorized in different International Classes (*i.e.*, Class 28 and Class 16), they are not related.

C. Balancing the factors.

The *du Pont* factors require to us to consider the factors for which evidence has been made of record in likelihood of confusion cases. In view of the facts that the marks are similar and the goods are related, move in the same channels of trade and are sold to the same classes of consumer, we find that applicant's mark ULTIMATE PUZZLE

Serial No. 77879157

SOURCE applied to "magazines containing puzzles" is likely to cause confusion with the mark THE ULTIMATE PUZZLE and design for "puzzles."

Decision: The refusal to register is affirmed.