

**THIS OPINION IS  
NOT A PRECEDENT  
OF THE TTAB**

Decision Mailed:  
April 9, 2013

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

In re Wildgame Innovations, LLC

Serial No. 85136181

Robert L. Waddell of Jones, Walker, Waechter, Poitevent, Carrere & Denegre for Wildgame Innovations, LLC.

Courtney M. Alvarez, Trademark Examining Attorney,  
Law Office 108 (Andrew Lawrence, Managing Attorney).

Before Quinn, Wellington and Wolfson,  
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Wildgame Innovations, LLC (applicant) has filed an application to register the mark BOOTIE CALL (in standard character format) on the Principal Register for "hunting game calls" in International Class 28.<sup>1</sup> The term CALL has not been disclaimed.<sup>2</sup>

<sup>1</sup> Serial No. 85136181, filed on September 23, 2010, which alleges a date of first use anywhere and in commerce of June 16, 2011.

<sup>2</sup> The examining attorney presumably determined that the mark as a whole is unitary or creates a "double entendre" and, appropriately so, did not require a disclaimer of "call" despite this clearly being a generic term for the identified goods. See TMEP Section 1213 (rev.

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that applicant's mark, when applied to its goods, so resembles the mark BOOTY CALL (in standard character format) on the Principal Register for "fishing tackle" in International Class 28,<sup>3</sup> as to be likely to cause confusion, or to cause mistake, or to deceive.

Applicant has appealed and briefs have been filed.

Our determination 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).

With respect to the marks, they are phonetic equivalents and extremely similar visually.

As to connotation and commercial impression, applicant contends that its mark will be understood differently by consumers because its use of "bootie" conjures the "softness of a baby's knitted shoe" and is thus suggestive of the game call's

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October 2012); in particular, see Section 1213.05(c) ("Double Entendre").

<sup>3</sup> Reg. No. 3901673, issued January 4, 2011.

soft features. Brief, p. 6. Applicant submitted the definition of "bootie" as "a soft, usually knitted shoe for a baby" and points to its advertising touting certain features of the game call that are soft.

We are not persuaded by applicant's argument. Rather, we agree with the examining attorney in that both marks will be understood by consumers as a play on the slang term "booty call," meaning "a phone call, text message, e-mail, etc., whose purpose is to arrange a meeting to have casual sex."<sup>4</sup> This slang reference is especially appropriate given both marks are being used on goods that attract or "call" the intended target, whether it be fish or wild game. Thus, in the context of hunting game calls, we find it highly unlikely that consumers will associate the term "bootie" with knitted baby shoes. Rather, viewing applicant's mark as a whole, it is far more likely consumers will understand the mark in the nature of the aforementioned slang term.

Any possible distinction between the marks based on registrant's use of "booty" versus applicant's "bootie," has minimal significance. We must consider the reality that consumers are seldom afforded the opportunity to compare the marks alongside each other.

The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether

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<sup>4</sup> The examining attorney attached a printout containing the defined meaning from the online dictionary website, [www.dictionary.com](http://www.dictionary.com), with the Office action issued on January 23, 2012.

the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods or services 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.

*Baseball America Inc. v. Powerplay Sports Ltd.*, 71 USPQ2d 1844, 1848 (TTAB 2004). See also *Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller*, 477 F.2d 586, 177 USPQ 573, 574 (CCPA 1973).

In this case, the consumer's general recollection of applicant's mark is likely to be the same as that of registrant's mark, namely, a play on the slang expression "booty call."

Because of the near identity of the marks, this *du Pont* factor weighs strongly in favor of finding a likelihood of confusion.

Insofar as the goods are concerned, if the marks are identical or nearly so, as in the present case, it is only necessary that there is a viable relation between the goods to support a holding of likelihood of confusion. See *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993); and *In re Opus Wine Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001).

Upon review of the record, we conclude that applicant's hunting game calls are sufficiently related to fishing tackle. As described and detailed by the examining attorney in her brief, she previously submitted printouts from several online retail websites featuring outdoors sporting goods that includes fishing

tackle and hunting game calls.<sup>5</sup> A few of these websites, such as Hunting Fishing Direct ([www.huntingfishingdirect.com](http://www.huntingfishingdirect.com)), are specifically geared to selling goods for hunting and fishing. Another retail website identifies a "hunting equipment & fishing" as a separate drop-down menu category. See [www.meijer.com](http://www.meijer.com). In addition, the examining attorney submitted eight third-party registrations for marks covering both fishing tackle and hunting game calls to show that the same mark has been registered for these goods. While these registrations are not evidence that the marks are in use or that consumers are familiar with them, they do suggest that applicant's and registrant's goods are of a type that may emanate from a single source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988).

In sum, the evidence demonstrates that there is a sufficient relationship between hunting game calls and fishing tackle. Accordingly, this *du Pont* factor also weighs in favor of finding a likelihood of confusion.

As to the trade channels and classes of purchasers, applicant argues that the registrant sells its goods "to fisherman in the cold weather climates of the northern part of the United States" and that "applicant markets its hunting game calls to hunters." Brief, p. 7. Applicant also asserts that there is a "division of products" and that this is reflected in

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<sup>5</sup> Attached to the Office actions dated July 11, 2011 and January 23,

the "consumers' attitudes" to the extent that "hunters views themselves as being different from fisherman and vice versa."

*Id.* Applicant also suggests that consumers of both products are "sophisticated."

Applicant's arguments are not well-taken. First, because there are no restrictions or limitations in the identifications of goods, we must presume the identified goods in the registration as well as in the application are offered in all channels of trade which would be normal therefor, and that they would be purchased by all potential buyers thereof. *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). Furthermore, the cited registration is unrestricted geographically and we must assume registrant's goods are sold nationally. Second, the record does not support applicant's argument that game hunters and fisherman view themselves differently such that there would be less likelihood of confusion when the respective products are being sold under similar marks. In fact, the record tends to show that hunting and fishing are related activities and there are third-party retail websites specializing in the provision of hunting and fishing supplies, including specifically hunting game calls and fishing tackle. These websites will be visited by the same consumers. Finally, there is insufficient evidence to support applicant's argument that the relevant consumers are

sophisticated or that the respective products are so expensive to presume a higher degree of care in their purchasing decisions.

Accordingly, the *du Pont* factor involving trade channels weighs in favor of finding a likelihood of confusion. The factor involving classes of purchasers, or any sophistication thereof, remains neutral.

We have considered all evidence of record as well as the arguments put forth by applicant and the examining attorney. Ultimately, we conclude that there is a likelihood of confusion between applicant's mark BOOTIE CALL on hunting game calls and the registered mark BOOTY CALL on fishing tackle.

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