

**This Opinion is Not a  
Precedent of the TTAB**

Mailed: November 20, 2013

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re Wahl*

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Serial No. 85485701

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Matthew H. Swyers of The Trademark Company, PLLC,  
for Candace J. Wahl.

Jennifer D. Richardson, Trademark Examining Attorney, Law Office 113,  
Odette Bonnet, Managing Attorney.

—————  
Before Bucher, Ritchie and Lykos,  
Administrative Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

Candace J. Wahl (“applicant”), a U.S. citizen and resident of North Hollywood, California, seeks registration on the Principal Register of the mark **FLUTTER FAERIES** (*in standard character format*) for “doll accessories; dolls,” in International Class 28.<sup>1</sup>

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<sup>1</sup> Application Serial No. 85485701 was filed on December 2, 2011, based upon applicant’s allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Act. No claim is made to the exclusive right to use the word “Faeries” apart from the mark as shown.

The examining attorney has taken the position that applicant's mark so resembles the following registered marks (the registrations being owned by unrelated parties), as to be likely to cause confusion, to cause mistake or to deceive under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), when the respective marks are used in connection with the various identified goods:

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<b>Flitter Fairies</b>	for "fantasy character toys" in International Class 28; <sup>2</sup> and
<b>FLUTTER BEARS</b>	for "stuffed animals" in International Class 28; <sup>3</sup>

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When the refusal was made final, applicant appealed and requested reconsideration. After the examining attorney denied the request for reconsideration, the appeal was resumed. We affirm the refusal to register.

Our determination under Trademark Act § 2(d) is based upon an analysis of the probative facts in evidence that are relevant to the factors bearing on a likelihood of confusion. *See In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973); *see also Palm Bay Imp., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); and *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997). In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry

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<sup>2</sup> Registration No. 3670819 issued to William Mark Corporation on August 18, 2009. No claim is made to the exclusive right to use the word "Fairies" apart from the mark as shown.

<sup>3</sup> Registration No. 2806925 issued to PBC International, Inc. on January 20, 2004; Section 8 affidavit (six-year) accepted and Section 15 affidavit acknowledged. No claim is made to the exclusive right to use the word "Bears" apart from the mark as shown.

mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.” *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); *see also In re Azteca Rest. Enters., Inc.*, 50 USPQ2d 1209 (TTAB 1999).

**Registration No. 3670819:**  
**Flitter Fairies for “fantasy character toys”**

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**A. Comparison of the Marks**

Applicant has applied to register the mark **FLUTTER FAERIES**. The registered mark is **Flitter Fairies**. In comparing the marks, we must consider the marks in their entirety as to appearance, sound, connotation and commercial impression, to determine the similarity or dissimilarity between them. *du Pont*, 177 USPQ at 567, *Palm Bay*, 73 USPQ2d at 1692. 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. *H.D. Lee Co. v. Maidenform Inc.*, 87 USPQ2d 1715, 1727 (TTAB 2008). Because the similarity or dissimilarity of the marks is determined based on the marks in their entirety, the analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entire marks, not just part of the marks. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). On the other hand, 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 entireties. *In re National Data Corp.*, 224 USPQ at 751. 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 argues that these marks have different appearances inasmuch as its leading word is “Flutter” while the ’819 registration leads with the word “Flitter.”

By contrast, the examining attorney contends that the two marks are confusingly similar because the marks differ visually by only two letters (the letter “u” in the word “Flutter” and the letter “i” in the word “Flitter,” and the letter “e” in “Faeries” vs. the letter “i” in the word “Fairies”). As to sound, the marks have only a small difference in the vowel sound of the first word inasmuch as the words contain six identical letters. As to connotation, the examining attorney demonstrated with dictionary entries that the words “FLUTTER” and “FLITTER” are synonyms, and points out that the words “FAERIES” and “FAIRIES” are merely alternate spellings of the same word. “Thus, the overall commercial impression of the marks is the same, as the marks both convey [the impression] that the goods flutter or flitter about (such as by wings) and feature fairy-like characteristics.” Examining attorney’s brief at 5.

We agree with the examining attorney that these minor visual and aural dissimilarities between these two marks are far outweighed by the strong

similarities as to connotations and overall commercial impressions, and this critical *du Pont* factor favors a finding of likelihood of confusion.

**B. Relationship of the Goods, Trade Channels and Common Purchasers**

We next turn our attention to an evaluation of the relationship of the goods in the cited registration to the goods identified in the application. *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). *See also Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002). It is settled that it is not necessary that the respective goods be identical or even competitive in order to find that they are related for purposes of our likelihood of confusion analysis. That is, the issue is not whether consumers would confuse the goods themselves, but rather whether they would be confused as to the source of the goods. *See In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984). The goods need only be sufficiently related that consumers would be likely to assume, upon encountering the goods under similar marks, that the goods originate from, are sponsored or authorized by, or are otherwise connected to the same source. *See In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991).

The goods identified in the **FLUTTER FAERIES** application are “dolls” and “doll accessories.” The goods in the cited registration are “fantasy character toys.”

Applicant argues that these goods are considerably different:





The Applicant uses its mark exclusively in connection with half butterfly, half fairy dolls and associated accessories. Applicant's dolls may include a cocoon for the

doll to live in, as well as removable butterfly wings made from materials such as: silk, feathers or fabric. Applicant's dolls are fashion dolls with clothing changes, jewelry, and accessories and do not have battery-operated wings or other battery-operated moving parts. *See* Exhibit 1, Affidavit of Candace Wahl. Alternatively, the cited mark for FLITTER FAIRIES owned by the William Mark Corporation is used only in connection with a flying fantasy toy, which has battery-operated moving wings and comes with a wand to help it fly. The William Mark's toys main feature is the flying function, not changeable doll accessories, clothing or jewelry. *See* Exhibit B of Exhibit 1, Affidavit of Candace Wahl.

As noted above, this *du Pont* factor must be based on the identifications of the respective goods as listed in the application and registration at issue, not on extrinsic evidence of actual use. *See, e.g., Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012); *Octocom Sys. Inc.*, 16 USPQ2d at 1787. Moreover, unrestricted and broad identifications are presumed to encompass all goods of the type described. *See In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006) (*citing In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981)); *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992). Based on this guidance, the examining attorney argues that we must presume that applicant's "dolls" and "doll accessories" and registrant's "fantasy character toys" will be available to the same classes of purchasers.


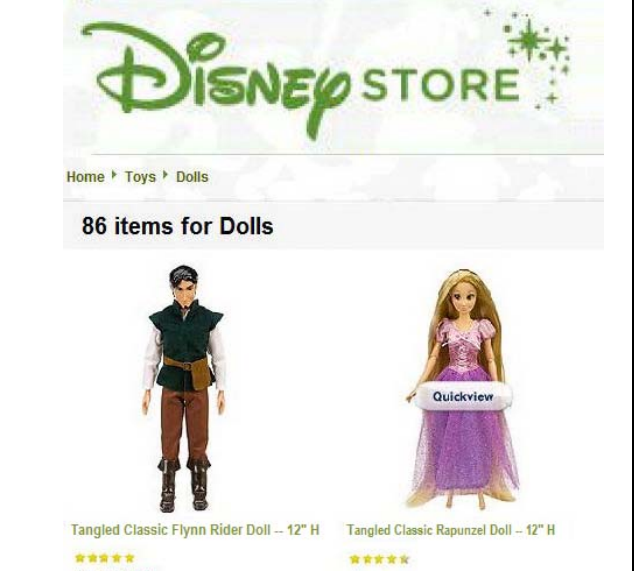


In addition to employing dictionary definitions (e.g., a "doll" is actually "a children's toy in the shape of a small person") to support the logic that registrant's "fantasy character toys" must be presumed to include applicant's "dolls," the examining attorney also included the following screenshots to establish that

“fantasy character dolls” are a subset of “dolls,” and that consumers are accustomed to encountering “dolls” and “doll accessories” in the same trade channels in the marketplace as toys generally:

<p><b>pcBangles</b> oak artist bears and other characters. Unique patterns created and designed by Angela Jardine.</p> <p>Tuesday, 16 August 2011 <a href="#">New Fantasy character dolls</a> Here's the first in my new Fantasy Character Range. Gambol is a cloth sculpture, 24 inch dwarf.</p>  <p>He has a rugged needle sculpted and hand painted face with a tumbling beard.</p> 	<p><b>me</b>  a bear maker and crafter!</p> <p><b>Pages</b> <a href="#">Home</a> <a href="#">Hug of bears</a> <a href="#">Bears in the Workshop</a> <a href="#">Patterns</a></p> <p><b>Blog Archive</b></p>	<p><b>Barbie collector</b> HOME SHOP SHOWCASE NEWS COMMUNITY Showcase » Fantasy</p> <p><b>More Fantasy Dolls</b></p>  <p><b>The Mermaid Barbie® Doll</b> Sure to make waves wherever she goes, Mermaid Barbie® doll wears a sheer bodice accented with beads and rhinestones in iridescent blue and silver...</p>  <p><b>Couture Angel™ Barbie® Doll</b> Second in the series, Couture Angel Barbie doll is a heavenly vision of romance in dramatic colors. She seems to float on air in a strapless gown with golden foil printed tulle...</p>  <p><b>2007 Angel Barbie® Doll</b> Meet 2007 Angel Barbie® doll, a celestial beauty from the heavenly world. Created by designer Bill Greening, this ethereal messenger represents peace, harmony, beauty and joy...</p> <p><b>Goddess of the Galaxy™ Barbie® Doll</b> Get ready to go gaga for Goddess of the Galaxy Barbie doll, with out of the world, over the top glamour courtesy of designer Bill Greening...</p> <p>5</p> <p><b>The Artist Marsha Hedrick</b></p> <p>In 1994 she began creating the <a href="#">Tiny Fantasies</a> collection. This is a series of fantasy characters that are much smaller than the Fairyland characters. The Tiny Fantasies characters were envisioned as fill in characters to be used to fill out a fantasy scene. These characters were designed so that they could be sold at a price which would allow the collector to include several of them in a larger fantasy scene. For these reasons the majority of the Tiny Fantasies characters are limited only by the fact that all are individually handmade by the artist.</p> <p>In 1992 after returning from Australia Marsha began creating her <a href="#">Fairyland Dolls</a> collections. This is a series of collections of 1 inch scale <b>fantasy character dolls</b>. The collections are grouped by the type of character and each character is produced in a Limited Edition. Marsha also began creating hand painted china for the miniature collector in 1992. Her china is produced from molds falling into two broad categories; Original sculpture, and Reduction. For more clarification on these terms please refer to the FAQ page.</p> <p>After using commercial molds for about 3 years she was encouraged to try her hand at making her own original sculpture dolls. The first dolls which resulted from her own sculptures were made in 1990. In 1991 she created the <a href="#">Forest Fairies</a> Collection for the miniature fair in Adelaide, South Australia. The Forest Fairies are a collection of 20 1" scale children fairies produced in a Limited Edition of 25 each.</p> <p>6</p>
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<sup>5</sup> Excerpts from <http://www.barbiecollector.com/collection/more-fantasy-dolls> as captured by the examining attorney on April 3, 2012, attached to Office action of April 5, 2012.

<sup>6</sup> Excerpt from <http://www.porcelainfantasies.com/index.php?inc=24>, as captured by the examining attorney on October 25, 2012, attached to Office action of October 26, 2012.

<p>Here he is "guarding" my garden path. Pass if you dare!</p>  <p>Gambol has fixed legs to enable him to stand and jointed head and arms. His fingers are wired so that he can keep his weapon ready.</p> <p>More fantasy characters will be joining pcBangles shortly for sale and commissions can be taken too : )</p> <p><u>You can see all my dolls, bears and fancies here</u> ☺<sup>4</sup></p>		 <p>Disney STORE</p> <p>Home ▶ Toys ▶ Dolls</p> <p>86 items for Dolls</p> <p>Tangled Classic Flynn Rider Doll -- 12" H</p> <p>Tangled Classic Rapunzel Doll -- 12" H</p>
 <h3>How to Make Fantasy Fairy Dolls</h3> <p>Fairies have been a treasured part of Western folklore for centuries and continue to enchant us to this day; the longstanding tradition of rendering fairies in art has been passed on to modern doll makers. A popular medium for fairy dolls is polymer clay, an oven-hardened craft material whose vibrant colors, consistency and semitranslucent textures can capture the delicate features of a fairy.</p> <p>8</p>		 <p>Tangled Rapunzel Wardrobe and Friends Set -- 5-Pc.</p> <p>Tangled Maximus Action Figure -- 12" H</p>

<sup>4</sup> Reprint of web pages from <http://pcbangles.blogspot.com/>, as captured by the examining attorney on October 25, 2012, attached to Office action of October 26, 2012.

<sup>7</sup> <http://www.disneystore.com/toys/dolls/mn/1000259/?CMP=KNC-DSPDollsGoogle&s?kwcid=TC%7c12111%7ctoys%2520dolls%7c%7cS%7cb%7c11608977072> as captured by the examining attorney on April 3, 2012, attached to Office action of April 5, 2012.

<sup>8</sup> Excerpt from [http://www.ehow.com/how\\_6503985\\_make-fantasy-fairy-dolls.html](http://www.ehow.com/how_6503985_make-fantasy-fairy-dolls.html), as captured by the examining attorney on October 25, 2012, attached to Office action of October 26, 2012.





The examining attorney also points to copies of use-based, third-party registrations (all attached to the Office action of October 26, 2012), suggesting that the respective goods (“dolls” and “doll accessories” versus “fantasy character toys”) 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):

<p><b>HAPPINESS IN SMALL HANDS</b></p>	<p>for, <i>inter alia</i>, “ ... doll accessories; doll cases; doll clothing; doll costumes; dolls; dolls and accessories therefor; dolls and playsets therefor; dolls for playing ... fantasy character toys ... ” in International Class 28;<sup>11</sup></p>
<p><b>Elfling</b></p>	<p>for, <i>inter alia</i>, “ ... doll accessories; doll cases; doll clothing; doll costumes; doll furniture; dolls; dolls and accessories therefor; dolls and dolls’ clothing; dolls and playsets therefor; dolls for Christmas; dolls for playing; dolls’ clothes; dolls’ houses; dolls’ rooms; fantasy character toys; ... ” in International Class 28;<sup>12</sup></p>

<sup>9</sup> Reprint of Hammond Toy logo from <http://www.hammondtoy.com/> as captured by the examining attorney on April 3, 2012, attached to Office action of April 5, 2012.

<sup>10</sup> Reprint of Today’s Dolls and Toys logo from <http://www.todaysdollsandtoys.com/> as captured by the examining attorney on April 3, 2012, attached to Office action of April 5, 2012.

<sup>11</sup> Registration No. 3528740 issued on November 4, 2008.

<sup>12</sup> Registration No. 3639143 issued on June 16, 2009.



for, *inter alia*, “collectable toy figures; doll accessories; doll clothing; dolls; dolls and accessories therefor; dolls and playsets therefor; fantasy character toys ...” in International Class 28;<sup>13</sup>

**P.J. SPARKLES**

for “dolls; doll accessories; fantasy character playsets consisting of miniature environments and associated characters, figures, and objects; fantasy character toys” in International Class 28;<sup>14</sup>

**BABY GENIUS**

for, *inter alia*, “ ... doll accessories; doll cases; doll furniture; doll houses; dolls; dolls and accessories therefor; dolls and doll accessories ... fantasy character toys ...” in International Class 28;<sup>15</sup>



for “toys, games and playthings, namely, dolls and doll accessories; plush toys; fantasy character toys; musical and talking toys and accessories therefor; party games” in International Class 28;<sup>16</sup>

**TEACUP PIGGY**

for, *inter alia*, “ ... dolls and doll accessories, namely, clothing for dolls, doll rooms, doll beds, doll houses, toy fabrics and linens for dolls and strollers for dolls; ... fantasy character toys ...” in International Class 28;<sup>17</sup>

**Ninja Mom**

for, *inter alia*, “ ... dolls and doll accessories, namely, clothing for dolls; ... fantasy character toys ...” in International Class 28;<sup>18</sup> and

**ANGRY DOLL**

for, *inter alia*, “ ... doll accessories; doll houses; dolls; dolls and accessories therefor; dolls and doll accessories, namely, clothing for dolls, doll rooms, doll beds, doll houses, toy fabrics and linens for dolls and strollers for dolls; dolls for Christmas; dolls for playing; ... fantasy character toys ...” in International Class 28.<sup>19</sup>

<sup>13</sup> Registration No. 3894917 issued on December 21, 2010.

<sup>14</sup> Registration No. 3610275 issued on April 21, 2009.

<sup>15</sup> Registration No. 4093126 issued on January 31, 2012. No claim is made to the exclusive right to use the word “Baby” apart from the mark as shown.

<sup>16</sup> Registration No. 4120975 issued on April 3, 2012.

<sup>17</sup> Registration No. 4165057 issued on June 26, 2012. No claim is made to the exclusive right to use the word “Piggy” apart from the mark as shown.

<sup>18</sup> Registration No. 4147324 issued on May 22, 2012.

<sup>19</sup> Registration No. 4149243 issued on May 29, 2012. No claim is made to the exclusive right to use the word “Doll” apart from the mark as shown.

From the totality of this evidence, we find an overlap between applicant's "dolls" and registrant's "fantasy character toys." Furthermore, absent restrictions in the application and registration, the identified goods are "presumed to travel in the same channels of trade to the same class of purchasers." *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (quoting *Hewlett-Packard Co.* 62 USPQ2d at 1005). Evidence from third-party registrations and from Internet websites supports the conclusion that consumers are accustomed to encountering "dolls," "doll accessories," and "fantasy character toys" sold under the same mark and/or sold through the same channels of trade. Hence, applicant's "dolls" and "doll accessories" are considered closely related to registrant's "fantasy character toys," and these several *du Pont* factors weigh in favor of a finding of likelihood of confusion.

### **C. Third-party Uses**

As to the strength of the cited mark, the sixth *du Pont* factor requires consideration of any evidence pertaining to the number and nature of similar marks in use on similar goods or services. Based upon at least sixteen extant federal trademark registrations<sup>20</sup> having marks (shown in table below) incorporating variations on the terms "Flutter," "Fairy/Fairies" or "Flitter," on goods in International Classes 16 and 28, applicant argues that the cited mark is commercially weak:

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<sup>20</sup> Registration No. 3159200 has been cancelled and Registration No. 4004739 issued under Section 44(e) of the Act.

<b>FLUTTERBYE FAIRY</b>	<b>FLOWER 'N FLUTTER</b>	<b>HEARTS-A-FLUTTER</b>
<b>FLUTTERSHY</b>	<b>Flutter Pro</b>	<b>E Z FLUTTER</b>
<b>FLUTTERFRENZY</b>	<b>FLUTTER FLICKER</b>	
<b>GARDEN FAIRIES</b>	<b>FAIRY-ETTES</b>	<b>FAIRYFLY</b>
<b>DISNEY FAIRIES</b>	<b>HORSEFAIRIES</b>	<b>FOLLOW-ME FAIRIES</b>
<b>GEM FAIRIES</b>		<b>FLITTER DOODLES</b>

Of course, third-party registrations by themselves are not evidence of actual use of the marks and we therefore cannot conclude that consumers are even familiar with these registered marks. Bearing this in mind, we clearly cannot say that consumers have become accustomed to the existence of similar marks in the marketplace and are thus able to distinguish between similar marks based on slight differences. *Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462 (CCPA 1973); and *Richardson-Vicks, Inc. v. Franklin Mint Corp.*, 216 USPQ 989 (TTAB 1982).

Additionally, the correct focus of this *du Pont* factor is actually on registrant's cited registration for the mark **Flitter Fairies**. The word "Fairies" is disclaimed in this registration, and the only third-party mark above with the word "Flitter" is FLITTER DOODLES, used in connection with "craft kits for children containing coloring supplies and glitter" – goods quite different from registrant's identified goods. While it is true that the cited registered mark has co-existed and continues to co-exist with a number of marks containing the words "Flutter" or "Fairies" within composite marks registered for goods in International Classes 16 and 28, none of these marks is as similar to registrant's mark as is applicant's mark. Moreover, even within these two classes of goods, some of the goods involved in these third-

party registrations (having *applicant's* “Flutter” formative) are not related to toys and dolls (e.g., **Flutter Pro** for “artificial fishing lures,” **E Z FLUTTER** for “hunting game calls,” and **FLUTTER FLICKER** for “confetti”). Finally, we note that most of these composite marks contain other distinguishing matter, creating quite disparate commercial impressions (e.g., **HEARTS-A-FLUTTER**, **GARDEN FAIRIES**, **HORSEFAIRIES**, **DISNEY FAIRIES**, etc.).

Accordingly, to the extent that applicant seeks to persuade us that the cited registered mark is commercially weak, we remain unconvinced based upon the totality of this record, and we find this to be, at best for applicant, a neutral *du Pont* factor.

#### **D. Conditions Surrounding Sales**

The fourth *du Pont* factor focuses on the conditions under which and buyers to whom sales are made, i.e., “impulse” versus careful, sophisticated purchasing.

Applicant argues that its goods are marketed to girls between the ages of five- and ten-years old, who are seeking a unique fashion doll with changeable accessories, clothing, and jewelry, priced at \$10.00 to \$40.00 apiece. Applicant represents that registrant’s toys are priced around \$20.00 apiece. Given the ages of the children, the relatively low price points of the goods at retail, and the striking similarity of the marks, we are not convinced that purchasers of applicant’s and registrant’s goods will be at all sophisticated or discerning consumers. Moreover, in light of the relatively inexpensive nature of these goods, even the parent or other consumer who intends to purchase a **Flutter Fairies** fantasy character toy at the

behest of a young child cannot be presumed to be sophisticated enough to avoid the purchase of applicant's **FLUTTER FAERIES** merchandise by mistake. At best for applicant, this *du Pont* factor is deemed to be neutral.

**E. Lack of Actual Confusion**

As to the eighth *du Pont* factor, applicant argues that she is not aware of any instances of actual confusion as to the source of these respective goods despite her having used the mark **FLUTTER FAERIES** since 2000 in connection with stationery and paper goods<sup>21</sup> in a contemporaneous fashion with registrant's use of its **Flutter Fairies** mark on both toys and unspecified paper products.

However, applicant's cancelled registration is not evidence of anything except that it issued, *Time Warner Entertainment. Co. v. Jones*, 65 USPQ2d 1650, 1654 n.6 (TTAB 2002), and the alleged absence of likelihood of confusion based upon her prior usage of the mark in connection with stationery and paper goods is irrelevant to the determination before us.

Even in the hypothetical case where applicant would have established contemporaneous usage of similar marks on closely-related goods, "[t]he fact that an applicant in an *ex parte* case is unaware of any instances of actual confusion is generally entitled to little probative weight in the likelihood of confusion analysis, inasmuch as the Board in such cases generally has no way to know whether the registrant likewise is unaware of any instances of actual confusion ... ." *In re Opus*

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<sup>21</sup> Registration No. 2720825 for the **FLUTTER FAERIES** mark (registered in connection with stationery and other paper goods such as calendars, and notebooks in International Class 16) issued on June 3, 2003 and was cancelled under Section 8 of the Act in 2010.

*One Inc.*, 60 USPQ2d 1812, 1817 (TTAB 2001). Furthermore, beyond the challenge of considering the possible relevance of contemporaneous marketing of admittedly different goods (e.g., registrant's fantasy character toys versus applicant's alleged stationery and paper goods), there is no evidence about the nature, extent or substantial geographical overlap of applicant's and registrant's actual usage of their marks in the marketplace on *any* type of goods so as to render the apparent absence of actual confusion legally significant. See *In re Thomas*, 79 USPQ2d 1021, 1028 (TTAB 2006); *In re Continental Graphics Corp.*, 52 USPQ2d 1377 (TTAB 1999); *Gillette Canada, Inc. v. Ranir*, 23 USPQ2d 1768 (TTAB 1992).

Finally, we do note that actual confusion is not necessary to show a likelihood of confusion. See *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 396 (Fed. Cir. 1983).

Accordingly, we conclude that the eighth *du Pont* factor is neutral in this case.

#### **F. Balancing the factors**

In view of the facts that the cited registered mark has not been shown to be diluted, the fact the marks are quite similar, and the fact the goods are closely related, if not overlapping, we find that applicant's registration of the mark **FLUTTER FAERIES** for dolls is likely to cause confusion with the cited **Flutter Fairies** for fantasy character toys. Any other *du Pont* factors, at best for applicant, are neutral. Inasmuch as registration must be refused on the basis of this finding, we need not address whether there is a likelihood of confusion with respect to the

cited mark **FLUTTER BEARS** (Registration No. 2806925), registered in connection with stuffed animals.

**Decision:** The refusal to register applicant's mark under Section 2(d) of the Trademark Act based on Registration No. 3670819 is hereby affirmed.