

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

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October 29, 2013

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re MWR Holdings, LLC

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Serial No. 85490234

Susan Paik of Tutunjian & Bitetto, P.C. for MWR Holdings, LLC.

Jennifer Hazard Dixon, Trademark Examining Attorney, Law Office 110 (Chris A. F. Pedersen, Managing Attorney).

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Before Mermelstein, Ritchie, and Masiello, Administrative Trademark Judges.

Opinion by Masiello, Administrative Trademark Judge:

MWR Holdings, LLC filed an application to register on the Principal Register the trademark BONGO BEAR in standard character form for “plush toys.”¹

The trademark examining attorney refused registration under § 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that applicant’s mark, as used in connection with applicant’s goods, so resembles the registered marks BONGO CATS

¹ Application Serial No. 85490234, filed under Trademark Act § 1(a), 15 U.S.C. § 1051(a), on December 8, 2011, with a claim of first use and first use in commerce of January 1, 2006. Applicant has claimed acquired distinctiveness under Section 2(f). Applicant has disclaimed the exclusive right to use BEAR apart from the mark as shown.

and BONGO BI-LINGO BUDDY. The cited marks are registered in standard character form in the name of the same owner. The cited marks are registered for the goods set forth below:

BONGO CATS	Plush toys, stuffed toy animals, musical toy instruments. ²
BONGO BI-LINGO BUDDY	Plush toys, hand puppets, board games, card games, stuffed toy animals, musical toy instruments, namely, drums, brass and percussion. ³

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

Our determination 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 issue of likelihood of confusion as set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). Two key considerations are the similarities between the marks and the similarities between the goods and services at issue. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

Addressing first the goods of applicant and registrant, we find that they are legally identical. “Plush toys” are identified in the application and in each of the cited registrations. Moreover, applicant’s “plush toys” are defined with sufficient breadth to encompass the more specifically identified “stuffed toy animals” that are

² Reg. No. 3538521, issued on November 25, 2008. No claim is made to the exclusive right to use CATS apart from the mark as shown.

³ Reg. No. 3551765, issued on December 23, 2008.

included in the cited registrations. In the context of an analysis under Section 2(d), it is sufficient if likelihood of confusion is found with respect to use of the mark on any item that comes within the description of goods in the application or registration. *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *Apple Computer v. TVNET.Net, Inc.*, 90 USPQ2d 1393, 1398 (TTAB 2007). Accordingly, the *du Pont* factor of the similarity or dissimilarity of the goods favors a finding of likelihood of confusion.

As applicant's goods are legally identical to those of registrant, we must presume that the channels of trade and classes of purchasers are the same. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *American Lebanese Syrian Associated Charities Inc. v. Child Health Research Institute*, 101 USPQ2d 1022, 1028 (TTAB 2011); *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994). Accordingly, the two *du Pont* factors relating to classes of customers and relevant trade channels favor a finding of likelihood of confusion.

We next consider the similarity or dissimilarity of the marks at issue. In comparing the marks, we are mindful that where, as here, the goods are identical, the degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the goods. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Jansen Enterprises Inc. v. Rind*, 85 USPQ2d 1104, 1108 (TTAB 2007); *Schering-Plough HealthCare Products Inc. v. Ing-Jing Huang*, 84 USPQ2d 1323, 1325 (TTAB 2007).

We turn first to a consideration of applicant's mark BONGO BEAR and the cited mark BONGO CATS. The marks are manifestly not identical. However, they do share the distinctive element BONGO, so that to the extent of this shared term they are similar in appearance, sound, and meaning. Applicant rightly urges us not to dissect the marks at issue in our analysis of their similarity or dissimilarity. However, 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 that our ultimate conclusion rests upon a comparison of the marks in their entireties. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). In comparing BONGO BEAR with BONGO CATS, we find the word BONGO to be the dominant element of each mark, not only because it is in the initial position (*See Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005)), but also because it has stronger source-identifying potential than the other wording of the marks. As the examining attorney has shown, one definition of the word "bear" is "teddy bear";⁴ and applicant's specimen of use shows that one of applicant's products is a plush toy bear. Accordingly, BEAR is a generic or descriptive name for applicant's goods and, as such, is given less weight in an analysis of likelihood of confusion. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000); *In re National Data Corp.*, 224 USPQ at 752.

⁴ Definition from <collinsdictionary.com>, submitted with Office action dated March 20, 2012.

There is no evidence in the record to show that registrant's BONGO CATS plush toys are in the shape of cats.⁵ Nevertheless, we note that "plush toys [and] stuffed toy animals," as identified in the registration, may include such items as stuffed toy cats, and that the word CATS has been disclaimed. Overall, viewing the mark BONGO CATS in the context of "plush toys" and "stuffed toy animals," we find that the designation CATS would likely be interpreted as a term that describes the nature of the goods and, as such, it would be less important than the designation BONGO in identifying the source of the goods.

We note further that BONGO BEAR and BONGO CATS are conceptually similar in that each consists of the name of an animal preceded by the word BONGO. Applicant correctly points out that BEAR and CATS differ substantially in appearance, sound and meaning.⁶ However, if these terms are perceived as descriptions of the goods, as seems likely, they will be less significant in distinguishing the sources of the goods. Applicant also points out that the plural form of CATS affects the connotation of the mark, as compared to the singular word BEAR.⁷ However, the distinction between plural and singular is rarely, if ever, sufficient to prevent confusion. *Wilson v. Delaunay*, 114 USPQ 339, 341 (CCPA 1957); *In re Pix of America, Inc.*, 225 USPQ 691, 692 (TTAB 1985); *In re Sarjanian*, 136 USPQ 307, 308 (TTAB 1962).

⁵ While the examining attorney urges us to consider the specimens of use filed in connection with the cited registrations, those specimens are not of record and we do not take judicial notice of such documents.

⁶ Applicant's brief at 8.

⁷ Applicant's brief at 7.

Applicant cites *In re Best Products*, 231 USPQ 988 (TTAB 1986), and *Bank of America National Trust v. American National Bank of St. Joseph*, 201 USPQ 942 (TTAB 1978), as cases in which confusion was found not likely despite nearly identical marks. However, the distinctive components of the marks in those cases (BEST and AMERICA) are substantially less distinctive and have substantially less source-indicating power than the designation BONGO. The other cases cited by applicant relate to marks used on substantially different goods and services, unlike the case before us in which the goods of applicant and registrant are legally identical.

Applicant sums up its argument by pointing out that BONGO BEAR and BONGO CATS “each have an aura of suggestion but each suggests something different to the buyer....”⁸ When these two marks are considered in the context of plush toys and stuffed toy animals, we think it very likely that customers would interpret them as designating, respectively, BONGO brand toy bears and BONGO brand toy cats, and that consumers are likely to perceive applicant’s BONGO BEAR as an addition to the line of registrant’s BONGO CATS. Accordingly, we find that the *du Pont* factor relating to the similarity or dissimilarity of the marks weighs in favor of a finding of likelihood of confusion.

Having considered all of the evidence and arguments of record and all relevant *du Pont* factors, including those not specifically discussed herein, we find that applicant’s mark, as applied to applicant’s goods, so closely resembles the

⁸ Applicant’s brief at 8, 11.

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registered mark BONGO CATS as to be likely to cause confusion, mistake or deception as to the source of applicant's goods.

Inasmuch as we have found that registration must be refused because of likelihood of confusion with respect to the mark BONGO CATS, there is no need for us to determine whether there would be likelihood of confusion with respect to the mark BONGO BI-LINGO BUDDY.

Decision: The refusal to register is affirmed on the basis of Registration No. 3538521 for BONGO CATS.