

This Opinion is Not a  
Precedent of the TTAB

Mailed: November 17, 2014

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

*In re Wildgame Innovations, LLC*

Serial No. 85651686

Robert L. Waddell of Jones Walker LLP for Wildgame Innovations, LLC.

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Mary I. Sparrow, Managing Attorney.

Before Ritchie, Wolfson and Adlin, Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

Wildgame Innovations, LLC (“Applicant”) seeks registration of the mark FLEXTONE GAME CALLS DIRTY LIL’ HEN, in standard characters and with “game calls” and “hen” disclaimed, for “hunting game calls.”<sup>1</sup> The Examining Attorney refused registration under Section 2(d) of the Act, on the ground that Applicant’s mark so resembles the previously registered mark DIRTY LITTLE DOE, in standard characters and with “doe” disclaimed, also for “hunting game

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<sup>1</sup> Application Serial No. 85651686, filed June 14, 2012 based on an intent to use the mark in commerce under Section 1(b) of the Trademark Act, and later amended to allege first use dates of February 7, 2013.

calls,”<sup>2</sup> that use of Applicant’s mark in connection with Applicant’s goods is likely to cause confusion or mistake or to deceive. After the refusal became final, Applicant appealed and filed a motion for reconsideration which was denied. Applicant and the Examining Attorney filed briefs.

### **Likelihood of Confusion**

Our determination under Section 2(d) is based on an analysis of all probative facts in evidence that are relevant to the factors bearing on the issue of 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 and services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”).

The goods are identical. Furthermore, because Applicant’s and Registrant’s identifications of goods contain no limitations, they are presumed to encompass all goods of the type described, and the goods are presumed to move in all normal channels of trade and be available to all classes of consumers for those goods. *Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (“An application with ‘no restriction on trade channels’ cannot

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<sup>2</sup> Registration No. 4210243, issued September 18, 2012.

be ‘narrowed by testimony that the applicant’s use is, in fact, restricted to a particular class of purchasers.”); *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981); *see also In re Viterro Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade, the Board was entitled to rely on this legal presumption in determining likelihood of confusion). In short, it is not relevant that Applicant’s game calls are intended and used to attract turkeys while Registrant’s are intended and used to attract deer, because the identifications of goods in the application and cited registration are identical. In any event, the Examining Attorney has established that hen calls and deer calls are in fact offered in the same channels of trade. Office Action of October 22, 2013 (printout from “opticsplanet.com”). And Applicant “does not dispute ... the similarity of established, likely-to-continue trade channels.” Applicant’s Appeal Brief at 5.

The legal identity of Applicant’s and Registrant’s goods and their overlapping channels of trade not only weigh heavily in favor of finding a likelihood of confusion, but also reduce the degree of similarity of the marks necessary to find a likelihood of confusion. *In re Viterro*, 101 USPQ2d at 1908; *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010); *In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1248 (TTAB 2010).

With respect to the marks, we must compare them “in their entireties as to appearance, sound, connotation and commercial impression.” *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). That is, we may not dissect the marks into their various components. *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985); *see also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981).

Here, the marks both include a form of the term “dirty little”<sup>3</sup> followed by the particular animal that hunters intend to call with the goods, i.e. a “hen” or a “doe.” Registrant has disclaimed “doe” which merely describes the animal whose sound Registrant’s game call mimics, while Applicant has for the same reason disclaimed “hen,” and Applicant has also disclaimed the generic term “game calls.” These disclaimers and the evidence of record make clear that “doe” in Registrant’s mark and “hen” and “game calls” in Applicant’s mark are merely descriptive. *Bass Pro Trademarks LLC v. Sportsman’s Warehouse Inc.*, 89 USPQ2d 1844, 1851 (TTAB 2008). It is settled that descriptive words such as these are entitled to less weight than the distinctive elements of a mark, in this case the term “dirty little” and Applicant’s abbreviated version thereof. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) (“Regarding descriptive terms, this court has noted that the ‘descriptive component of a mark may be given little weight

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<sup>3</sup> The Examining Attorney has established that the “lil” in Applicant’s mark is an abbreviation for “little.” Office Action of October 22, 2013 (printout from the Online Slang dictionary); Office Action of March 19, 2013 (printout from Wikipedia).

in reaching a conclusion on the likelihood of confusion.”) (quoting *In re Nat’l. Data*, 224 USPQ at 752); *In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997); *In re Binion*, 93 USPQ2d 1531, 1534 (TTAB 2009) (BINION’S, not disclaimed word ROADHOUSE, is dominant element of BINION’S ROADHOUSE); *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001) (disclaimed matter is often “less significant in creating the mark’s commercial impression”). Consumers may perceive Applicant’s mark as referring to a version of Registrant’s game call which is intended to call turkeys rather than deer.

While Applicant’s mark also includes and begins with FLEXTONE, this is insufficient to avoid confusion, and may very well exacerbate it. In fact, while FLEXTONE may be perceived as identifying the source of Applicant’s game calls,<sup>4</sup> consumers familiar with Registrant’s game calls would be likely to believe that FLEXTONE “is simply the now identified source of the previously anonymous” DIRTY LITTLE game calls, or of another product in the same line. *In re Fiesta Palms LLC*, 85 USPQ2d 1360, 1367 (TTAB 2007) (affirming refusal to register CLUB PALMS MVP for casino services based on prior registration of MVP for casino services offered to preferred customers identified by special identification cards); *see also, In re Chatam International Inc.*, 380 F.3d 1340, 71 USPQ2d 1944

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<sup>4</sup> Applicant introduced evidence that it owns registrations for the marks FLEXTONE GAME CALLS BABY DADDY (Reg. No. 4313978), FLEXTONE GAME CALLS BABY MAMA (Reg. No. 4313977) and FLEXTONE GAME CALLS YO’BABY (Reg. No. 4243319), and claims to own a registration for FLEXTONE GAME CALLS HUSTLER as well. Office Action response of August 30, 2013 Exs. A-D. We assume for purposes of this decision that Applicant in fact owns a registration for FLEXTONE GAME CALLS HUSTLER even though the registration was not introduced into evidence prior to the filing of the appeal, as required by Trademark Rule 2.142(d).

(Fed. Cir. 2004) (affirming refusal to register JOSE GASPAR GOLD for tequila based on prior registration of GASPAR'S ALE for beer); *In re Toshiba Medical Systems Corp.*, 91 USPQ2d 1266, 1271 (TTAB 2009) (affirming refusal to register VANTAGE TITAN for medical magnetic resonance imaging diagnostic apparatus based on prior registration of TITAN for medical diagnostic apparatus, namely, medical ultrasound device, stating “[i]t is not clear why the addition of the word VANTAGE would avoid confusion. It is more likely to be considered another product from the previously anonymous source of TITAN medical diagnostic apparatus, namely, medical ultrasound devices”); *In re Pierce Foods Corp.*, 230 USPQ 307, 309 (TTAB 1986) (in dicta, finding that even if Applicant's proposed amendment to its drawing was accepted, “Applicant's institutional purchasers, aware of registrant's CHICKEN BAKE coating mix, may well believe that applicant's PIERCE CHICK'N BAKE pre-seasoned chicken is a product produced under license from registrant or otherwise sponsored or produced by registrant.”); *Key West Fragrance & Cosmetic Factory, Inc. v. The Mennen Company*, 216 USPQ 168 (TTAB 1982) (finding likelihood of confusion between SKIN SAVERS for face and throat lotion and MENNEN SKIN SAVER for cosmetic and toilet preparations, namely, hand and body lotion).

Considered in their entirety, Applicant's mark and Registrant's mark are sufficiently similar that confusion is likely when the marks are used on identical products sold in the same channels of trade. In fact, because both marks include forms of DIRTY LITTLE, they look and sound somewhat similar. Perhaps more

importantly, they have a similar connotation and commercial impression. *See Proctor & Gamble Co. v. Conway*, 419 F.2d 1332, 164 USPQ 301, 304 (CCPA 1970) (finding MISTER STAIN for stain remover likely to be confused with MR. CLEAN for cleaning products, despite “both aural and optical dissimilarity between ‘stain’ and ‘clean,’” because MR. STAIN conveys “the same idea, or stimulates the same mental reaction, or in the ultimate has the same meaning”); *Ralston Purina Co. v. Old Ranchers Canning Co.*, 199 USPQ 125, 128 (TTAB 1978) (holding TUNA O’ THE FARM for canned chicken likely to be confused with CHICKEN OF THE SEA for canned tuna and stating “In essence, we are holding with a broad interpretation of the expression that ‘TUNA O’ THE FARM’ is a ‘colorable imitation’ of ‘CHICKEN OF THE SEA.’”).

Applicant argues that DIRTY LITTLE is itself merely descriptive, based on Registrant’s “webpage advertising,” which states:

The DIRTY LITTLE DOE is a Breeding Bellow call designed to be used during the late pre-rut phase and the rutting or breeding cycle. Unlike other estrus calls which say “I am here, come chase me,” the Dirty Little Doe produces the sound of a doe when she is ready to stand for breeding and is much more effective for mature, wary bucks.

Request for Reconsideration of March 6, 2014 Ex. 1. According to Applicant, based on a dictionary definition of “dirty” as “relating to sex in an indecent or offensive way,” Registrant “appears to have intended ‘dirty little’ to be understood in the vernacular or crude sense to convey the image of promiscuity or sexuality.” *Id.* Ex. 2. As this is an *ex parte* proceeding, Applicant “is not permitted to overcome a

refusal by arguing that a cited registration is merely descriptive ... inasmuch as the cited mark is registered on the Principal Register, we must assume that it is at least suggestive.” *In re Fiesta Palms*, 85 USPQ2d at 1363 (citing *In re Dixie Restaurants*, 41 USPQ2d at 1534-35). Furthermore, to the extent DIRTY LITTLE is conceptually weak, it conveys the same meaning in each mark.

Finally, Applicant argues that confusion is unlikely because the relevant consumers are sophisticated, but there is no evidence supporting this argument, and it is therefore not well-taken. The consumers for hunting game calls include sophisticated hunters and unsophisticated and even first-time hunters who have no special knowledge and would not necessarily exercise heightened care in their purchasing decisions. *See Stone Lion Capital*, 110 USPQ2d at 1162-63. Furthermore, even if we were to assume that all hunters are sophisticated and careful purchasers, it is settled that even careful purchasers can be confused as to source where similar marks are used on identical goods. *See In re Research Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) (citing *Carlisle Chemical Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970)) (“Human memories even of discriminating purchasers ... are not infallible.”).

There is no relevant evidence or argument concerning the remaining likelihood of confusion factors, and we therefore treat them as neutral.

### **Conclusion**

After considering all of the evidence of record as it pertains to the relevant *du Pont* factors, including all of Applicant’s arguments and evidence, even if not



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specifically discussed herein, we find that confusion is likely because the goods and channels of trade are identical and the marks are similar.

*Decision:* The Section 2(d) refusal to register Applicant's mark is affirmed.