

This Opinion is Not a
Precedent of the TTAB

Mailed: August 28, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

—
Trademark Trial and Appeal Board
—

In Re Fourstar Group USA Inc.
—

Serial No. 86248063
—

Fourstar Group USA Inc., *pro se*.

Timothy Schimpf, Trademark Examining Attorney, Law Office 113,
Odette Bonnet, Managing Attorney.
—

Before Mermelstein, Wolfson and Adlin,
Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

Fourstar Group USA Inc. (“Applicant”) seeks registration of the mark FUNOVATIONS, in standard characters, for “Mechanical toys; Wind-up toys.”¹ The Examining Attorney refused registration under Section 2(d) of the Act on the ground that Applicant’s mark so resembles the registered mark shown below



¹ Application Serial No. 86248063, filed April 10, 2014 under Section 1(a) of the Act, based on first use on July 12, 2013 and first use in commerce on March 7, 2014.

for, *inter alia*, “Action skill games,”² 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. The appeal is fully briefed. We affirm the refusal to register.³

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. *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.”).

² Registration No. 3698713, issued October 20, 2009. The registration also covers “Entertainment services in the nature of an amusement park attraction, namely, a themed area,” and includes this description of the mark: “The mark consists of the letters ‘FUN’ in blue, the letters ‘OVATION’ in red, a left swirl in red with a background of gray and white, a right swirl in blue with a background of gray and white, and a shading of gray underneath the word ‘FUNOVATION’. The colors blue, red, gray and white are claimed as features of the mark.

³ The Examining Attorney’s objection to certain attachments to Applicant’s Appeal Brief is sustained and the materials have been given no consideration. Any materials submitted with the Appeal Brief which were not of record prior to the appeal are untimely, and any materials submitted with the Appeal Brief which were of record prior to the appeal are duplicative, unnecessary and inappropriate. Trademark Rule 2.142(d); *see also, Life Zone Inc. v. Middleman Group Inc.*, 87 USPQ2d 1953, 1955 n.4 (TTAB 2008).

Turning first 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).

However, different features may be analyzed to determine whether the marks are similar. *National Data*, 224 USPQ at 751 (nothing improper in giving more or less weight to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1740 (TTAB 2014); *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

Here, the marks are quite similar because Applicant’s mark is essentially identical to the literal portion of Registrant’s mark. In fact, Applicant’s mark is merely the plural version of the literal portion of Registrant’s mark, which in this case is a distinction with little if any material difference. *See Wilson v. DeLaunay*, 245 F.2d 877, 114 USPQ 339, 341 (CCPA 1957) (“It is evident that there is no material difference, in a trademark sense, between the singular and plural forms of the word ‘Zombie’ and they will therefore be regarded here as the same mark.”); *In*

re Sarjanian, 136 USPQ 307, 308 (TTAB 1962). Indeed, FUNOVATION and FUNOVATIONS look and sound almost identical and convey the same or highly similar meanings.

Furthermore, where a mark is comprised of both words and a design, such as Registrant's mark, the words are normally accorded greater weight, because consumers are likely to remember and use the word(s) to request the goods or services. *In re Appetito Provisions Co. Inc.*, 3 USPQ2d 1553, 1554 (TTAB 1987) (holding that "if one of the marks comprises both a word and a design, then the word is normally accorded greater weight because it would be used by purchasers to request the goods or services" and "because applicant's mark shares with registrant's mark that element responsible for creating its overall commercial impression, the marks are confusingly similar"); *see also, In re Viterra Inc.*, 671 F.2d 1358, 101 USPQ2d 1905, 1911 (Fed. Cir. 2012) ("the verbal portion of a word and design mark likely will be the dominant portion"). Here, this principle is particularly applicable because the design component of Registrant's mark is merely a "a left swirl in red with a background of gray and white," and "a right swirl in blue with a background of gray and white." These nondistinctive swirls are unremarkable, relatively small and serve merely to highlight the term FUN in Registrant's mark, thus further drawing attention to the word portion that Registrant's mark essentially shares with Applicant's mark.

In short, because the literal portion of the cited mark is essentially identical to Applicant's mark, and the marks otherwise look and sound quite similar and convey

Serial No. 86248063

highly similar or identical meanings, they create similar overall commercial impressions when viewed in their entirety. This factor weighs in favor of a finding of likelihood of confusion.

Turning to the goods and channels of trade, the cited mark is registered for, *inter alia*, “Action skill games,” and Applicant seeks registration for mechanical and wind-up toys. There is an obvious relationship between these goods, in that toys and games are often used for entertainment, especially by children. Moreover, Applicant’s toys involve some type of “action,” in that they are mechanical or wind-up, as shown by Applicant’s specimens:



Applicant's toys could be used to play "games" invented by Applicant's customers. The issue here, of course, is not whether purchasers would confuse the goods, but rather whether there is a likelihood of confusion as to the source of these goods. L'Oreal S.A., 102 USPQ2d at 1439; In re Rexel Inc., 223 USPQ 830 (TTAB 1984).

The evidence of record establishes that the goods are related. The Examining Attorney has introduced evidence that Applicant's and Registrant's goods are offered by the same sources under the same marks. For example:

HASBRO & Design (Reg. No. 3875236), is registered for "wind-up toys" on the one hand and "action skill games" on the other.

BYDICO! (Stylized) (Reg. No. 3592302) is registered for "mechanical action toys," "mechanical toys" and "wind-up toys" on the one hand and "action skill games" on the other.

MIGHTY MORPHIN POWER RANGERS in standard characters (Reg. No. 4091370) is registered for "action skill games" on the one hand and "mechanical toys" and "wind-up toys" on the other.

CHOOSE YOUR OWN ADVENTURE in standard characters (Reg. No. 3410278) is registered for "action skill games" on the one hand and "mechanical action toys," "mechanical toys" and "wind-up toys" on the other.

TINKER BELL in standard characters (Reg. No. 3636910) is registered for "action skill games" on the one hand and "mechanical toys" and "wind-up toys" on the other.

DEKKO TOYS in standard characters (Reg. No. 3568971) is registered for "mechanical action toys," "mechanical toys" and "wind-up toys" on the one hand and "action skill games" on the other.

PETER PIRATE in standard characters (Reg. No. 3496853) is registered for "plush toys with wind up

mechanisms” and “mechanical toys” on the one hand and “action skill games” on the other.

SMALL WORLD in standard characters (Reg. No. 3724296) is registered for “mechanical toys” and “mechanical action toys” on the one hand and “action skill games children’s party games” on the other.

BRAVO KIDS in standard characters (Reg. No. 3901903) is registered for “mechanical and electrical children’s multiple activity toys with or without electronic light or sounds,” “wind-up toys and parts thereof” and “mechanically, electrically, and battery-operated plastic action toys” on the one hand and “games, namely, plastic action skill games and manipulative games” on the other.

TUTTI CUTI in standard characters (Reg. No. 2998285) is registered for “action skill games” on the one hand and “mechanical action toys” on the other.

BOZ in standard characters (Reg. No. 3926939) is registered for “action skill games” on the one hand and “mechanical toys” on the other.

Office Actions of July 23 and August 20, 2014. “Third-party registrations which cover a number of differing goods and/or services, and which are based on use in commerce, although not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, may nevertheless have some probative value to the extent that they may serve to suggest that such goods or services are of a type which may emanate from a single source.” *See, In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1998); *see also In re Davey Prods. Pty. Ltd.*, 92 USPQ2d 1198, 1203 (TTAB 2009).

Similarly, the Examining Attorney has introduced Internet evidence of third-party trademark use which further establishes a relationship between the goods, including the following:

HASBRO offers BEYBLADE Tops and BEYWHEELZ Battlers, which are described as follows: “Wind it, aim it and launch it! ... The stable launcher design increases accuracy to help you spin your way to victory!” HASBRO also offers the JENGA game, described in part as follows: “Pull the block, stack it on top, and hope the tower doesn’t crash down!” HASBRO offers the MOUSE TRAP game, described as follows: “Can you build a better mousetrap? Find out in the fun-filled game of crazy mechanical gadgets and chain reactions!”

MATTEL offers the Bounce-Off game, the description of which states: “Flip over a challenge card to determine the pattern you must attempt, then race to recreate it by bouncing balls into the grid.” MATTEL also offers the BARBIE I CAN SPLASH AND SPIN DOLPHIN TRAINER DOLL, the description of which states: “Clip the dolphins to Barbie, wind them up and watch them spin around her.” MATTEL offers the POLLY POCKET Zipline Adventure Pool Playset, and provides this description: “This action-packed jungle set features multiple play areas connected with a zipline that Polly® doll loves to ride!”

TOYSMITH offers a Wooden Catch Ball, with this description: “Toss it up into the air and try to catch in the cup at the end of the handle.” TOYSMITH also offers Wooden Puzzle Fidget, Wind-Up Diver and Robot Claw toys.

LEGO offers a Minotaurus Game, with this description “Be the first to lead your heroes to the temple, avoiding the Minotaur and cleverly placing walls to block your opponents.” LEGO also offered the Mercedes-Benz Unimog 400 toy truck, with this description: “this mechanical monster is driven by LEGO® Power Functions.” And LEGO offers the Wild Wind-Up, with this description: “Build some wacky, working contraptions,

including various machines that stir drinks, roll dice, eat coins, and more! Includes wind-up motor!"

DISNEY offers the Beat the Parents Board Game as well as the Sassy Finding Nemo Wind Up Toy and the Disney/Pixar Cars Neon Racers Neon Vehicle 4-Pack.

SCHYLLING offers the Gone Fishing Game—Wind Up, with this description: "Wind up the game and hurry to catch as many fish as you can!"

ALEX BRANDS offers the Slinky Metal Slinky Jr. walking spring toy, as well as the Booby Trap Classic Wood Tabletop Game.

Office Actions of July 23 and August 20, 2014. In other words, the same sources offer, under the same marks, mechanical or wind-up toys and action skill games. Furthermore, several action skill games are played with or comprised in part of mechanical or wind-up toys. This evidence establishes that there is at least a relationship between Applicant's and Registrant's goods, and that those goods travel in the same channels of trade.

Applicant's argument that its goods are sold in "dollar stores" while Registrant's are sold to "amusement parks for the purpose to install and set-up laser mazes" is not well-taken. As the Examining Attorney points out, we are bound to consider Applicant's and Registrant's identifications of goods, neither of which is so limited. Indeed, Applicant's toys are identified without any limitation as to their channels of trade, as are Registrant's action skill games, which could include not only laser mazes but also the types of games which the record reveals are sold under the same marks as mechanical and wind-up toys and which make use of or include mechanical or wind-up toys. It is settled that where, as here, Applicant's and

Registrant's identifications contain no limitations with respect to the types of mechanical or wind-up toys or action skill games offered, we must presume that those identifications encompass all toys and games of the types identified, and the toys and games are presumed to move in all normal channels of trade and be available to all classes of consumers. *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 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). We cannot limit the goods, channels of trade or classes of customers to what Applicant's evidence shows them to be. *In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764-65 (TTAB 1986) ("It is well settled that in a proceeding such as this, the question of likelihood of confusion must be determined by an analysis of the marks as applied to the goods identified in the application vis-à-vis the goods recited in the registration, rather than what extrinsic evidence shows those goods to be."); *see also, Tuxedo Monopoly*, 209 USPQ at 988; *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1637-38 (TTAB 2009) ("we must also analyze the similarity or dissimilarity and nature of the goods based on the description of the goods set forth in the application and the registration at issue ... we may not limit or restrict the [goods] listed in the cited registration based on extrinsic evidence").

In short, the evidence establishes that the goods are related and the channels of trade overlap. These factors also weigh in favor of a finding of likelihood of confusion.

Applicant, apparently in an effort to establish that the cited mark is weak and not entitled to a broad scope of protection, introduced a third-party registration for the mark FUNNOVATION, in standard characters, for “Playground equipment, namely, play structures comprised of at least one or more of the following: climbing towers, monkey bars, platforms”⁴ We are not persuaded. Our primary reviewing court has held that “[a]s to strength of a mark, however, registration evidence may not be given *any* weight.” *Olde Tyme Foods Inc. v. Roundy’s Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1545 (Fed. Cir. 1992). Furthermore, Applicant relies on only one third-party registration, which in any event could not by itself be sufficient to establish that Registrant’s mark is weak, let alone so weak that it is not entitled to protection against Applicant’s highly similar mark for closely-related goods. *Cf. Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, ___ F.3d ___, ___ USPQ2d ___, 2015 BL 266516 (Fed. Cir. Aug. 19, 2015) (finding that Board “too quickly” dismissed “*extensive* evidence of third-party registrations” and third-party uses of similar marks) (emphasis supplied). In fact, this registrant’s playground equipment appears to be less related to Registrant’s goods than are Applicant’s—playground equipment is typically used outdoors, is more often purchased by municipalities or other large entities rather than ordinary

⁴ Registration No. 4170950, issued July 10, 2012.

consumers and may not be sold in the same channels of trade as typical consumer toys and games. At the very least, there is no evidence of a relationship between playground equipment and the goods identified in the cited registration, but there is a great deal of evidence that Applicant's goods are related to Registrant's goods.

Finally, we are not persuaded by the single declaration from Applicant's Operations Manager, who testified that he is unaware of any "instances of actual confusion" between Applicant's and Registrant's marks. Applicant's mark has only been in use in commerce since March 2014, which is a relatively short amount of time, and there is no evidence regarding the nature and extent of any contemporaneous use in the marketplace by Applicant and Registrant that would show that there has been an opportunity for confusion to occur if it were likely to occur. *In re Kangaroos U.S.A.*, 223 USPQ 1025, 1026-27 (TTAB 1984). In any event, the lack of evidence of actual confusion carries little weight, especially in an *ex parte* context. *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003). We therefore find that this *du Pont* factor is neutral.⁵

⁵ To the extent Applicant argues that Registrant's goods are expensive or otherwise not likely to be purchased on impulse, we are not persuaded. Neither Applicant's nor Registrant's identification of goods restricts them by cost or customers. Therefore, the identified goods must be presumed to encompass inexpensive and expensive varieties of the identified goods, and the goods are presumed to be offered to all types of customers for the identified goods. *See e.g., Stone Lion Capital*, 110 USPQ2d at 1162-63 ("Stone Lion effectively asks this court to disregard the broad scope of services recited in its application, and to instead rely on the parties' current investment practices ... the Board properly considered *all* potential investors for the recited services, including ordinary consumers seeking to invest in services with no minimum investment requirement.") (emphasis in original).

Conclusion

Applicant's and Registrant's marks are quite similar as their dominant, literal element is virtually identical, and at the very least the goods as identified in the application and cited registration are related and move in overlapping channels of trade.

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