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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Dennis Binkley

Serial No. 86429294

Clark A. Puntigam of Jensen & Puntigam PS,
for Dennis Binkley.

Michael Ebaugh, Trademark Examining Attorney, Law Office 108,
Andrew Lawrence, Managing Attorney.

Before Wolfson, Greenbaum and Coggins,
Administrative Trademark Judges.

Opinion by Greenbaum, Administrative Trademark Judge:

Dennis Binkley ("Applicant") seeks registration on the Principal Register of the mark BUNGEE BLAST (in standard characters, BUNGEE disclaimed) for:

> Foam flying toy; Hand-powered non-mechanical flying toy in International Class 28.[1]

The Trademark Examining Attorney has refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that

[1] Application Serial No. 86429294 was filed on October 21, 2014, based upon Applicant's allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

Applicant's mark, when applied to Applicant's goods, so resembles the previously registered mark, BUNGEE GLIDERZ (standard characters, GLIDERS disclaimed) for "Toy airplanes; Toy gliders; Toy sling planes" in International Class 28, as to be likely to cause confusion, mistake or deception.[2]

After the Examining Attorney made the refusal final, Applicant appealed to this Board. We reverse the refusal to register.

I. Applicable Law

When the question is likelihood of confusion, we analyze the facts as they relate to the relevant factors set out in *In re E.I. du Pont de Nemours & Co.,* 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). *See also In re Majestic Drilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.,* 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

A. Similarity or Dissimilarity of the Goods, Channels of Trade and Classes of Consumers

We begin with the *du Pont* factors of the relatedness of the goods, and trade channels and classes of consumers. We base our evaluation on the goods as they are identified in the registration and application. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Houston Computers Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787

[2] Registration No. 4688210 issued on February 17, 2015.

(Fed. Cir. 1990). *See also Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002).

We find that the goods identified in the application as "foam flying toy" and "hand-powered non-mechanical flying toy" are broad enough to encompass, and therefore are legally identical to, the "toy airplanes," "toy gliders," and "toy sling planes" identified in the registration. Given the legal identity of the goods, and the lack of restrictions in the application and registration, we must presume that the goods travel through the same channels of trade (e.g., toy stores) and are offered to the same potential purchasers (e.g., ordinary consumers). *See Stone Lion,* 110 USPQ2d at 1161; *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (absent restrictions in an application and/or registration, legally identical goods are "presumed to travel in the same channels of trade to the same class of purchasers.") (quoting *Hewlett-Packard*, 62 USPQ2d at 1005). Moreover, Applicant has not presented argument on these factors.

B. The Similarities and Dissimilarities of the Marks

We next compare Applicant's mark BUNGEE BLAST and Registrant's mark BUNGEE GLIDERZ "in their entireties as to appearance, sound, connotation and commercial impression." *Viterra*, 101 USPQ2d at 1908 (quoting *du Pont*, 177 USPQ at 567). *See also Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005). The marks "'must be considered . . . in light of the fallibility of memory . . . .'" *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quoting *San Fernando Elec. Mfg.*

Co. v. JFD Elecs. Components Corp., 565 F.2d 683, 196 USPQ 1 (CCPA 1977)). The correct focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Winnebago Indus., Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). "[S]imilarity is not a binary factor but is a matter of degree." *St. Helena Hosp.*, 113 USPQ2d at 1085 (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059 (Fed. Cir. 2003)). "The proper test is not a side-by-side comparison of the marks, but instead 'whether the marks are sufficiently similar in terms of their commercial impression' such that persons who encounter the marks would be likely to assume a connection between the parties." *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (quoting *Leading Jewelers Guild, Inc. v. LJOW Holdings, LLC,* 82 USPQ2d 1901, 1905 (TTAB 2007)).

In order to properly analyze the marks in their entireties, it is instructive to review the definitions of each term.

"Bungee" is a noun defined as a "bungee cord."[3]

We take judicial notice of the following relevant definitions of "bungee cord," "blast," and "glider" from THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2017):[4]

[3] Dictionary.com based on RANDOM HOUSE DICTIONARY (2015), February 11, 2015 Office Action, TSDR 6. "Bungee" also is defined as an aeronautical term for "springs or elastic tension devices, as the spring attached to movable controls of aircraft to facilitate their manipulation." *Id.*

[4] https://ahdictionary.com/word/search.html?q=bungee+cord, https://ahdictionary.com/word/

"Bungee cord" is a noun defined as "an elasticized rubber cord, often fitted with hooks at the ends, used to fasten, bear weight, or absorb shock."

"Blast" is defined variously as a noun meaning: "a very strong gust of wind or air," and "the effect of such a gust;" "a sudden loud sound, especially one produced by a stream of forced air: a piercing blast from the steam whistle," and "the act of producing such a sound;" "a violent explosion, as of dynamite or a bomb," "the violent effect of such an explosion, consisting of a wave of increased atmospheric pressure followed immediately by a wave of decreased pressure," and "an explosive charge;" "a powerful hit, blow, or shot;" and a slang term meaning "[a] highly exciting or pleasurable experience or event, such as a big party." This entry also lists the "Phrasal Verb: blast off," which means "to take off, as a rocket," and the "Idiom: full blast," which means "at full speed, volume, or capacity: turned the radio up full blast."

"Glider" is a noun defined as "a light engineless aircraft designed to glide after being towed aloft or launched from a catapult."

Although the marks are similar in that they both begin with the term BUNGEE, we find that the distinct second terms, BLAST and GLIDERZ, result in marks that, when viewed in their entireties, differ significantly in appearance, sound, meaning, and overall commercial impression. Registrant's mark BUNGEE GLIDERZ, as a whole, is rather straightforward in its meaning, connoting a toy glider featuring a

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search.html?q=blast, and https://ahdictionary.com/word/search.html?q=glider, respectively, all accessed May 25, 2017. The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

bungee cord or similar mechanism to help the toy launch. On the other hand, Applicant's mark BUNGEE BLAST has multiple meanings, connoting a flying toy with a bungee cord that "blasts off" like a rocket, flies at "full blast," and also is "a blast," i.e., a lot of fun.

We note the Examining Attorney's argument that the word BUNGEE is the dominant term in each mark because it appears in the initial position in each mark. While we often consider the first part of a mark to be the dominant element because it is "most likely to be impressed upon the mind of a purchaser and remembered" (*see Presto Prods. Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988)), we do not always reach that conclusion. Instead, we must decide each case on its own merits. *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001). In this case, we find consumers would be more likely to remember the term BLAST in Applicant's mark BUNGEE BLAST due to its various suggestive meanings, and that the term GLIDERZ in Registrant's mark BUNGEE GLIDERZ also makes a distinct impression due to its unusual spelling.

The marks also look and sound different when viewed in their entireties, largely because of the alliteration in Applicant's mark and the unexpected substitution of the letter "Z" for the letter "S" in Registrant's mark. These differences sufficiently distinguish the meaning and overall commercial impression of Applicant's mark from Registrant's mark. On the record before us, we cannot find that BUNGEE BLAST would be viewed as designating a variant of flying toys from the same source as Registrant's mark BUNGEE GLIDERZ.

II. Conclusion

The authority is legion that "when marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines." *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010) (citing *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992)). However, Applicant's mark is so different from Registrant's mark that even when used on legally identical goods, confusion is unlikely. "No mechanical rule determines likelihood of confusion, and each case requires weighing of the facts and circumstances of the particular mark." *Mighty Leaf Tea*, 94 USPQ2d at 1259.

In sum, we find the first *du Pont* factor, the differences between the marks, to outweigh the other factors. *See Oakville Hills Cellar, Inc. v. Georgallis Holdings, LLC*, 826 F.3d 1376, 119 USPQ2d 1286, 1290 (Fed. Cir. 2016) (quoting *Odom's Tenn. Pride Sausage, Inc. v. FF Acquisition, LLC*, 600 F.3d 1343, 93 USPQ2d 2030, 2032 (Fed. Cir. 2010) ("[A] single *DuPont* factor 'may be dispositive in a likelihood of confusion analysis, especially when that single factor is the dissimilarity of the marks.'")). *See also Champagne Louis Roederer S.A. v. Delicato Vineyards*, 148 F.3d 1373, 47 USPQ2d 1459, 1460 (Fed. Cir. 1998) ("[O]ne *DuPont* factor may be dispositive in a likelihood of confusion analysis, especially when that single factor is the dissimilarity of the marks."); *Kellogg Co. v. Pack'em Enters. Inc.,* 951 F.2d 330, 21 USPQ2d 1142, 1145 (Fed. Cir. 1991) ("We know of no reason why, in a particular case, a single *DuPont* factor may not be dispositive," holding that "substantial and undisputed

differences" between two competing marks justified a conclusion of no likelihood of confusion). We have considered the marks in their entireties, and in doing so, find that the differences between them are substantial and sufficient to distinguish the marks.

Decision: The refusal to register Applicant's mark BUNGEE BLAST is reversed.