

This Opinion is not a
Precedent of the TTAB

Mailed: February 23, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Worldwide, Inc.

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Serial No. 87063609

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Nathan P. Koenig of Bay Area Technology Law Group PC,
for Worldwide, Inc.

Tabitha Messick, Trademark Examining Attorney, Law Office 104,
Dayna Browne, Managing Attorney.

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Before Zervas, Ritchie and Masiello,
Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

Worldwise, Inc. (“Applicant”) seeks registration on the Principal Register of the
mark GLOWFETCH in standard characters for “Pet toys” in International Class 28.¹

¹ Application Serial No. 87063609, filed June 7, 2016, pursuant to Trademark Act § 1(b), 15 U.S.C. § 1051(b), claiming an intent to use the mark in commerce.

The Examining Attorney refused registration of Applicant's mark under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), based on Registration No. 4035541² for the standard character mark GO FETCH for "Pet toys, excluding throwing sticks for dogs" in International Class 28.

After the Examining Attorney issued a Final Office Action, Applicant appealed the refusal to register. Both Applicant and the Examining Attorney filed briefs. We reverse the refusal to register.

Likelihood of confusion

Our determination under Trademark Act Section 2(d) is based on 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); *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 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 Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014).

² Registered October 4, 2011; Section 8 and 15 affidavits accepted and acknowledged.

Similarity of the Goods, Classes of Consumers and Trade Channels

With regard to the goods, we must make our determinations under this factor based on the goods identified in the cited registration and in the application. *See In re Dixie Rests. Inc.*, 41 USPQ2d at 1534. *See also Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). Applicant's goods are "pet toys," and registrant's goods are "Pet toys, excluding throwing sticks for dogs." With the exception of throwing sticks for dogs, the goods are identical. Applicant has not offered any argument that the goods are not related.

When an applicant's goods are overlapping with a registrant's goods, we must presume that the channels of trade and classes of purchasers for those overlapping goods are the same. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same). The Internet evidence in the record demonstrates that pet toys are offered to the general public. Thus, both Applicant's and the registrant's goods are sold to the general public, and travel in the same trade channels.

The factors regarding the goods, trade channels and classes of consumers weigh in favor of a finding of likelihood of confusion.

The Number and Nature of Similar Marks in Use on Similar Goods/Strength of the Cited Mark

The sixth *du Pont* factor requires us to consider evidence pertaining to the number and nature of similar marks in use on similar goods. “The purpose of [an applicant] introducing third-party uses is to show that customers have become so conditioned by a plethora of such similar marks that customers ‘have been educated to distinguish between different such marks on the bases of minute distinctions.’” *Palm Bay*, 73 USPQ2d at 1691. “Third party registrations are relevant to prove that some segment of the composite marks which both contesting parties use has a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak.” *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015) (quoting 2 *McCarthy on Trademarks and Unfair Competition* § 11:90 (4th ed. 2015)). See also *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 917 (CCPA 1976) (even if “there is no evidence of actual use” of “third-party registrations,” such registrations “may be given some weight to show the meaning of a mark in the same way that dictionaries are used.”). “The weaker [a registrant’s] mark, the closer an applicant’s mark can come without causing a likelihood of confusion and thereby invading what amounts to its comparatively narrower range of protection.” *Juice Generation*, 115 USPQ2d at 1674.

Applicant placed the following third-party registrations into the record:³

MARK	REG. NO.	GOODS
FETCH PET PRODUCTS (With Design)	4803153	Cat toys; Dog toys; Pet toys; Pet toys containing catnip; Pet toys made of rope; Plush toys; Stuffed and plush toys; Stuffed toy animals; Stuffed toys; Toys for domestic pets; Water toys
SEA AND FETCH	4776848	Dog toys
FETCH & CHEW	4559166	Dog toys
KICK FETCH	4258756	Pet toys
FETCH MACHINE	4635266	Pet toy in the nature of a mechanical ball launcher for propelling objects to be caught and retrieved by dogs
FETCHDOG (With Design)	3815776	Pet toys
FETCHDOG	3716897	Pet toys
FETCH BOY! THE BALL LAUNCHER (With Design)	3685862	Pet toys
FETCH-N-GO ⁴	4016488	Dog toys
GO FETCH	4035541	Pet toys, excluding throwing sticks for dogs

³ Other third-party registrations introduced by Applicant are not relevant because they concern goods and services not relevant to the goods involved in this appeal, or concern marks which have a substantially different commercial impression.

⁴ Although the Examining Attorney maintains that that this mark has a different commercial impression than that of the cited mark, we include this mark because “fetch” has the same meaning in both marks.

In addition, the Examining Attorney introduced one webpage showing use of the mark FETCH & GLOW for a glow-in-the-dark ball as a dog toy.⁵

FETCH is highly suggestive of a toy which one would use to play “fetch” with a dog. “Fetch” is defined in the online version of *Merriam-Webster’s Dictionary* as “to go or come after and bring or take back.”⁶ The third-party marks listed above suggest the same meaning of “fetch” in the context of pet toys, which of course include toys for playing a game of “fetch.” See the following description of “Glow Dog Toys” on the FETCH & GLOW webpage:

Two glow-in-the-dark balls offer your dog safe, fun fetching day or night. Playing fetch with your dog improves your bond and gives your dog much-needed activity and exercise. Glow-in-the-dark latex Fetch & Glow ball is an ideal fetch toy, indoors or out, and offered in two sizes. To activate, simply expose the ball to light.⁷

We find the term FETCH to be highly suggestive for pet toys, and is not a strong basis for finding the marks are similar. Rather, we have a situation here where customers “have been educated to distinguish between different such [FETCH] marks on the bases of minute distinctions.” *Palm Bay*, 73 USPQ2d at 1691.

Similarity or Dissimilarity of the Marks

We next compare the marks for similarities and dissimilarities in appearance, sound, connotation and commercial impression. *Id.* at 1692. The test is not whether

⁵ www.drsofostersmith.com. Sept. 1, 2016 Office Action, TSDR 10-11.

⁶ <https://www.merriam-webster.com/dictionary/fetch>. See *In re Red Bull GmbH*, 78 USPQ2d 1375, 1378 (TTAB 2006) (Board may take judicial notice of dictionary definitions). See also *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co.*, 213 USPQ 594, 596 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

⁷ www.drsofostersmith.com. Sept. 1, 2016 Office Action, TSDR 10.

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 services offered under the respective marks is likely to result. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012). Under actual marketing conditions, consumers do not necessarily have the luxury of making side-by-side comparisons between marks, and must rely upon their imperfect recollections. *Dassler KG v. Roller Derby Skate Corp.*, 206 USPQ 255, 259 (TTAB 1980). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *In re Association of the United States Army*, 85 USPQ2d 1264 (TTAB 2007); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Where the goods of an applicant and registrant are “similar in kind and/or closely related,” the degree of similarity between the marks required to support a finding of likelihood of confusion is not as great as in the case of diverse goods. *In re J.M. Originals Inc.*, 6 USPQ2d 1393, 1394 (TTAB 1987).

The marks we address in the present case, GLOWFETCH and GO FETCH, share the word FETCH. GLOW in Applicant’s mark, and GO in registrant’s mark are both common English language words with different, readily understood meanings. The Examining Attorney maintains:

[T]he first term of applicant’s mark, GLOW, is highly similar in sound and appearance to the wording GO, the first term in registrant’s mark. Specifically, both words begin with the letter “g,” the “g” in both marks is pronounced with a hard “g” sound and both words end with letters that will sound like the word “oh,” when

pronounced. When the words GLOW and GO are combined with the word FETCH in their respective marks, both marks will sound similar when pronounced. Although the “l” in “glow” sounds a little different than “go,” when combined with FETCH the difference is barely noticeable. Slight differences in the sound of similar marks will not avoid a likelihood of confusion.⁸

The Examining Attorney also argues that “consumer confusion has been held likely for marks that convey the same idea, stimulate the same mental reaction, or may have the same overall meaning,” citing *Downtowner Corp. v. Uptowner Inns, Inc.*, 178 USPQ 105, 109 (TTAB 1973) (UPTOWNER for motor inn and restaurant services likely to be confused with DOWNTOWNER for the same services).⁹

The terms GO and GLOW are the first terms in the respective marks; their placement as the first terms is not without a consequence because the first term in a mark is often the most prominent part of a mark. See *Palm Bay* 73 USPQ2d at 1692 (“Veuve” is the most prominent part of the mark VEUVE CLICQUOT because “veuve” is the first word in the mark and the first word to appear on the label); *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (upon encountering the marks, consumers will first notice the identical lead word); *Presto Prod. Inc. v. Nice-Pak Prod., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered”). The dominance of the words GO and GLOW is increased, in each mark, by the relative weakness of the second term,

⁸ Examining Attorney Brief, 6 TTABVUE 5.

⁹ *Id.* at 7.

FETCH. As noted by the Examining Attorney, the terms GO and GLOW have different sounds due to the inclusion of the letter “L” in GLOW. The letters “L” and “W” in GLOW are not likely to be missed. The different terms GO and GLOW impart different appearances and meanings, and a different commercial impression to each mark, with one using the command “go fetch,” and the other based on the same command but with a clever and noticeable difference of fetching a glow toy. This difference is not at all subtle and would be readily noticed and understood by purchasers. We therefore find that the marks differ more than they are similar and resolve the *du Pont* factor regarding the marks against a finding of likelihood of confusion.

Balancing the factors

In summary, while we have found the goods to be overlapping, and the trade channels and classes of purchasers to be identical, we have also found the marks to be dissimilar, with the common component of the marks being highly suggestive. In view thereof, we find that Applicant’s mark for its recited goods is *not* likely to cause confusion with the cited registrant’s mark for its recited goods.

Decision: The refusal to register is reversed.