

This Opinion is not a  
Precedent of the TTAB

Hearing: March 15, 2018

Mailed: June 18, 2018

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

*In re Funko, LLC*

Serial No. 87171228

Serial No. 87171233

John B. Crosetto of Garvey Schubert Barer,  
for Funko, LLC.

Katerina D. Satanovsky, Trademark Examining Attorney, Law Office 120,  
David Miller, Managing Attorney.

Before Zervas, Shaw and Heasley,  
Administrative Trademark Judges.

Opinion by Heasley, Administrative Trademark Judge:

Funko, LLC (“Applicant”) seeks registration on the Principal Register of the  
standard character mark PINT SIZE HEROES and the stylized mark



, both for the same identified goods, “collectable toy figures”

in International Class 28.<sup>1</sup>

The Trademark Examining Attorney has refused registration of Applicant's marks under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's marks, as used on its identified goods, so resembles the previously registered word and design mark



(with PRODUCTIONS disclaimed) for “plush toys; stuffed and plush toys; stuffed toy animals” in International Class 28, among other goods, as to be likely to cause confusion, mistake, or deception.

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<sup>1</sup> Application Serial Nos. 87171228 and 87171233 were filed on September 14, 2016, based upon Applicant's claim of first use anywhere and use in commerce since at least as early as August 15, 2016. Color is not claimed as a feature of the mark in Serial No. 87171233.

<sup>2</sup> Registration No. 4034009 issued on the Principal Register on October 4, 2011, Section 8 and 15 declarations accepted and acknowledged. Its identified goods, including those other than toys, are: “Baby books; Bookbindings; Children's books; Children's storybooks; Memory books; Picture books; Story books” in Class 16; “Plush toys; Stuffed and plush toys; Stuffed toy animals” in Class 28; “Digital on-demand printing services of books and other documents; Printing of books” in Class 40; “Book publishing” in Class 41; and “Preparation of custom memory books, scrapbooks, personal archives, family archives, wedding albums, diaries, vacation albums, family albums, family histories, photograph albums, birthday albums, and special event albums for others” in Class 45. The colors green, blue, white and pink are claimed as a feature of the mark. The mark consists of the word “pint” in green with the letter “I” in “pint” being elongated, the word “size” with the letters “s”, “z” and “e” in blue and with the “i” in size in white located within the elongated “i” of “pint” and the word “productions” in white, stylized letters located in a pink box below the words “pint” and “size”.

When each refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the requests for reconsideration, the appeals were resumed. Applicant's counsel and the Examining Attorney filed briefs and appeared at a hearing before the Board, at which both applications were discussed. These appeals involve common questions of law and fact and the records are substantially similar. Accordingly, we consolidate and decide each appeal in this single decision. *See In re Binion*, 93 USPQ2d 1531, 1533 (TTAB 2009); TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 1214 (June 2017).<sup>3</sup> We affirm the refusals to register.

#### I. Evidentiary Issue

Before proceeding to the merits of the refusals, we address an evidentiary matter. Applicant attached to its briefs on appeal exhibits depicting the results pages of Google® search engine searches for the terms “pint size heroes” and “pint size productions” (exhibit A), a depiction of the cited mark on Facebook, contrasted with Applicant's stylized mark (exhibit B), a depiction of Registrant's “board books” for very young children (exhibit C), and a screenshot from Disney's online shop showing Applicant's collectable toy figures for sale (exhibit D).<sup>4</sup>

The Examining Attorney objects to inclusion of any additional evidence with

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<sup>3</sup> Unless otherwise stated, all references to the record will be to Application Serial No. 87171233. Page references to the application record are to the .pdf version of the USPTO's Trademark Status & Document Retrieval (TSDR) system. References to the briefs, motions and orders on appeal are to the Board's TTABVUE docket system.

<sup>4</sup> Applicant's brief, 9 TTABVUE 13-20.

Applicant's appeal brief on the ground that it is untimely.<sup>5</sup> Applicant responds that if the Examining Attorney is referring to exhibit A, it "merely duplicates, for convenience, citations to a Google search and the parties' respective websites. Additionally, the websites were cited in the prior pleadings and are therefore, already of record."<sup>6</sup> Alternatively, if exhibit A is considered new evidence, Applicant asks that we take judicial notice of these facts or remand the matter so that the Examining Attorney may consider it.<sup>7</sup>

We decline Applicant's invitations. The record in an application should be complete prior to the filing of an appeal. Trademark Rule 2.142(d), 37 CFR § 2.142(d). Exhibits attached to a brief that were not made of record during examination are untimely, and generally will not be considered. *Id. In re Compania de Licores Internacionales S.A.*, 102 USPQ2d 1841, 1843 (TTAB 2012). Applicant could have placed additional evidence in the record when it sought reconsideration. *In re Pedersen*, 109 USPQ2d 1185, 1188 (TTAB 2013); TBMP § 1207.01. Furthermore, evidence that is already of record should not be resubmitted as an exhibit to a brief. TBMP § 1203.02(e). Consequently, we will disregard the exhibits appended to Applicant's brief.

Applicant moves to strike the Examining Attorney's evidence regarding Applicant's "Hero Plushies," attached to the denials of the requests for

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<sup>5</sup> Examining Attorney's brief, 11 TTABVUE 3-4.

<sup>6</sup> Applicant's reply brief, 12 TTABVUE 2.

<sup>7</sup> *Id.* at 3.

reconsideration. Applicant contends that the Examining Attorney erroneously relied upon the evidence as those goods are not sold under its PINT SIZE HEROES marks.<sup>8</sup> The Examining Attorney responds, however, that she introduced this evidence not to show that Applicant sells “Hero Plushies” under the applied-for marks, but to show that it sells plush toys and its PINT SIZE HEROES collectable toy figures on the same website, through the same channels of trade, to the same classes of consumers, in the same fields of use.<sup>9</sup> Since this evidence is properly of record and relevant to the applicable *DuPont* factors, we overrule Applicant’s motion to strike.

## II. Applicable Law

We base our determination of likelihood of confusion under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”) cited in *B&B Hardware, Inc. v. Hargis Ind., Inc.*, 575 U.S. \_\_\_, 135 S.Ct. 1293, 113 USPQ2d 2045, 2049 (2015); see also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003).

We have considered each relevant *DuPont* factor for which there is evidence or argument, and have treated the other factors as neutral. See *M2 Software, Inc. v. M2 Commc’ns, Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006). Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261

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<sup>8</sup> Applicant’s brief p. 2 n.1, 9 TTABVUE 3.

<sup>9</sup> Examining Attorney’s brief, 11 TTABVUE 9 n.2. See Sept. 5, 2017 Office Action TSDR pp. 5-9, 5 TTABVUE 6-10.

(Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (factors “may play more or less weighty roles in any particular determination”); *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1242 (TTAB 2015) (“While we have considered each factor for which we have evidence, we focus our analysis on those factors we find to be relevant.”).

In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375 (Fed. Cir. 2002)) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods.’”); *Primrose Ret. Cmtys., LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030, 1032 (TTAB 2016) (citing *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976)).

#### A. Relatedness of the Goods

Under the second *DuPont* factor, we consider “[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration....” *DuPont*, 177 USPQ at 567. “This factor considers whether ‘the consuming public may perceive [the respective goods and services of the parties] as related enough to cause confusion about the source or origin of the goods and services.’” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1086 (Fed. Cir. 2014). Here, the goods are, once

again, “collectable toy figures” in the applications and “plush toys; stuffed and plush toys; stuffed toy animals” in the cited registration.

Applicant insists that it is not seeking registration for plush or stuffed animals.<sup>10</sup> However, “[w]hen analyzing the similarity of the goods, ‘it is not necessary that the products of the parties be similar or even competitive to support a finding of likelihood of confusion.’ *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007). Likelihood of confusion can be found ‘if the respective products are related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source.’ *Id.*” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012). In this case, the identifications are not mutually exclusive, as collectable toy figures can consist of stuffed and/or plush toys. Applicant’s “Pint Size Heroes” collectable toy figures appear as follows:



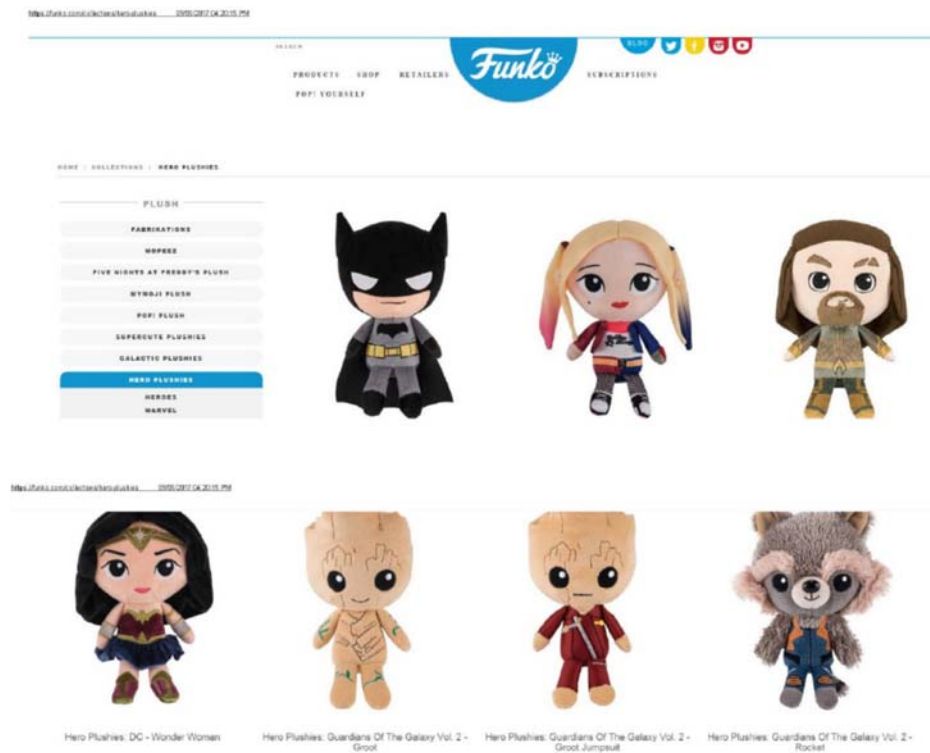
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<sup>10</sup> Applicant’s brief p. 7, 9 TTABVUE 8.

<sup>11</sup> Applicant’s Jan. 25, 2017 Response to Office Action TSDR p. 11.

Applicant's "Hero Plushies" are very similar toys:



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As these toy figures illustrate, it is apparent that stuffed or plush toys can be collectable toy figures. "Stuffed" means "(of a toy) made of fabric stuffed with a soft filling."<sup>13</sup> "Plush" means "a fabric with an even pile longer and less dense than velvet pile," as in "[t]heir favorite *plush*-toy animal friends can tag along in a bike basket or backpack."<sup>14</sup> "Collectable" means "suitable for being collected."<sup>15</sup> The goods in the two

<sup>12</sup> Sept. 5, 2017 Office Action TSDR pp. 5-9, 5 TTABVUE 6-10.

<sup>13</sup> Oxford Living Dictionaries, en.OxfordDictionaries.com, 6/14/2018. 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, 596 (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).

<sup>14</sup> Merriam-Webster online dictionary, Merriam-Webster.com 6/8/2018.

<sup>15</sup> *Id.* (spelled "collectible").

identifications can overlap. As the Board found in *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593 (TTAB 2001), “applicant’s figurine collectibles, on the one hand, and registrant’s Christmas ornaments and full line of toys, including plush stuffed toys, on the other, are related products which, if sold under the same or similar marks, would result in likelihood of confusion.” *Id.* at 1595.

Applicant argues that Registrant’s “customers are shopping for baby board books and the Boynton stuffed animals sold in conjunction with them,”<sup>16</sup> such as the stuffed and plush toys shown below:



But we must consider the goods as they are described in the applications and the cited registration, not extrinsic evidence of actual use. *In re i.am.symbolic*, 123 USPQ2d at 1749; *Octocom Sys., Inc. v. Houston Computs. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). “[W]here the goods in an application or registration are broadly described, they are deemed to encompass all the goods of the nature and type described therein . . . .” *In re Solid State Design Inc.*, 125 USPQ2d 1409, 1413 (TTAB

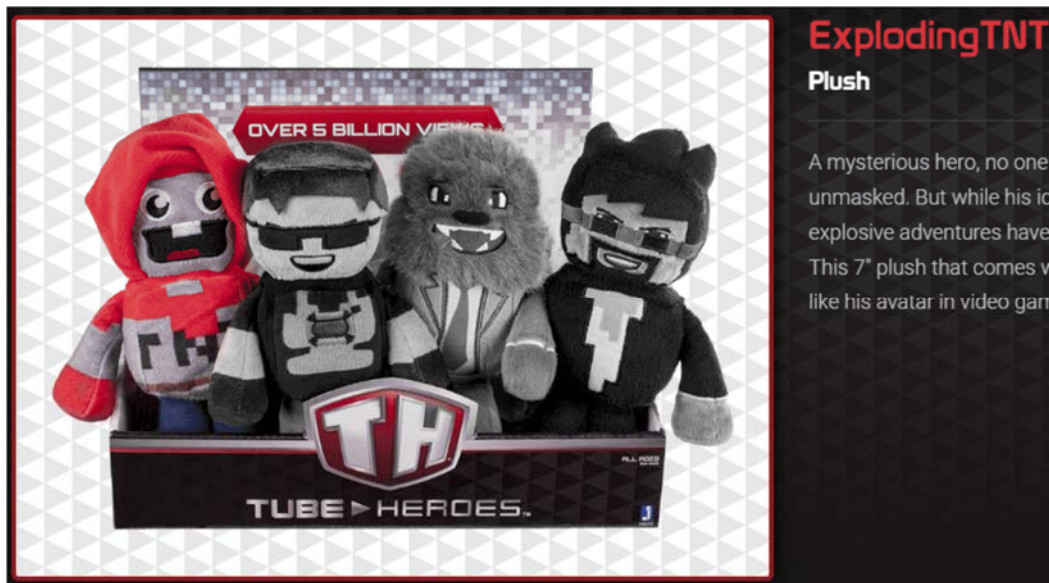
<sup>16</sup> Applicant’s brief p. 9, 9 TTABVUE 10.

<sup>17</sup> Aug. 16, 2017 Response to Office Action TSDR p. 6.

2018) (quoting *In re Jump Designs LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006) (internal punctuation omitted)). Hence, Registrant's broadly described "plush toys, stuffed and plush toys" may include collectable toy figures, and vice versa.

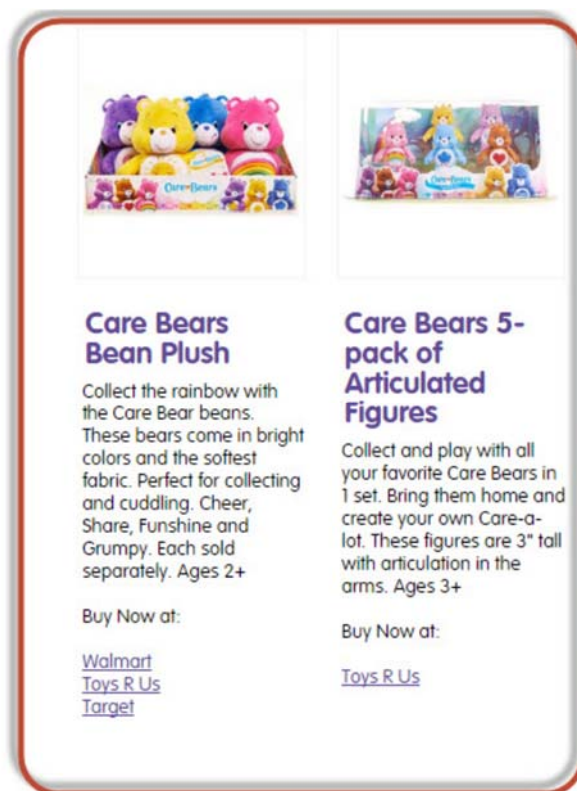
Furthermore, the sort of toys identified in the subject applications and the cited Registration are often offered by the same source under the same mark. To demonstrate this point, the Examining Attorney submits screenshots from nine Internet websites showing the same entity offering stuffed or plush toys, as well as collectible toy figures similar to Applicant's, under the same mark. For instance:

- Web pages from Tube Heroes showing plush toys and collectible toy figures provided under the same Tube Heroes mark.



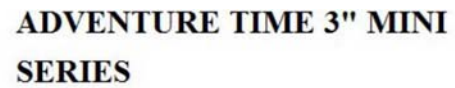


- Web pages from AG Kid Zone showing plush toys and toy figures provided under the same Care Bears mark. Both are described as collectible:



<sup>18</sup> TubeHeroes.com, 2/16/2017, Feb. 16, 2017 Office Action TSDR pp. 11-12.

<sup>19</sup> AGKidzone.com 2/16/2017, Feb. 16, 2017 Office Action TSDR p. 14.



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Each Blind Box features one of eighteen 3-inch collectible vinyl figures. Odds vary from common to extremely rare (ratios = probability of getting each piece):

## A large collection of colorful, plush toys shaped like various food items, including a lemon, watermelon, pizza, donut, ice cream, and many others, all with large, expressive eyes and simple faces. The toys are arranged in a dense, overlapping group against a red background.

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Applicant argues that retailers such as Toys Я Us, the Disney Store, and Target, to which the Examining Attorney refers, “sell action figures and plush animals from a variety of manufacturers under license from a variety of brand owners. ... Thus the Examiner’s evidence only shows that consumers confronting the relevant goods in the marketplace have no reason to expect that they come from the same source because toy retailers routinely sell goods from a variety of manufacturers and brands.”

But this evidence of record demonstrates how toy figures and stuffed and plush toys may both be offered for sale by the same manufacturer under the same mark. Hence, consumers would readily perceive these types of toy goods as being related and offered by a single business. *See, e.g., Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (evidence that “a single company sells the goods and services of both parties, if presented, is relevant to the relatedness analysis”). *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1268-69 (TTAB 2009).

Additionally, the Examining Attorney submits approximately forty use-based third party registrations, each identifying the types of goods offered by Applicant and Registrant,<sup>21</sup> e.g.:

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<sup>21</sup> Dec. 24, 2016 Office Action, TSDR pp. 35-61 (eleven registrations; Feb. 16, 2017 Office Action, TSDR pp. 37-60; Sept. 5, 2017 Office Action (nine registrations), TSDR pp. 39-83 (twenty registrations).

Registration No.	Mark	Pertinent Goods
5165760	BOOGILY HEADS	Toy figures; collectable toy figures; plush toys; stuffed toys; stuffed and plush toys
5138791	GNOME IN YOUR HOME	Collectable toy figures; plush dolls; plush toys; stuffed toys; stuffed and plush toys
5266725	KAA	Collectable toy figures; plush toys; stuffed toys
4972623	IMAGINATION GENERATION	Collectable toy figures; plush toys; stuffed toys
4858041		Collectable toy figures; novelty toy items in the nature of stuffed dogs, plush toys, toys for domestic pets, stuffed toys; stuffed dolls and animals; stuffed toys
4833085	EVERYONE NEEDS A LIL' RESPECT	Collectable toy figures; stuffed and plush toys; toy figures
4989688		Collectable toy figures; action figure toys; plush toys; plush dolls; novelty toy items in the nature of plush toys
4207746	FRIENDLY ZOMBIES	Collectable toys, namely plush toys, collectable toy figures
4485495		Plush toys; puppets; toy figures; collectable toy figures
5008105	CROCONANA	Stuffed and plush toys, soft sculpture plush toys, toy action figures and accessories therefor, collectable toy figures

We find these registrations persuasive evidence that the identified goods are of a kind that may emanate from a single source under a single mark. *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1203 (TTAB 2009) (citing *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993) and *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988)); *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015); TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) §1207.01(d)(iii) (Oct. 2017).

For these reasons, the second *DuPont* factor, similarity of the goods, weighs in favor of finding a likelihood of confusion.

#### B. Channels of Trade and Classes of Customers

The third *DuPont* factor is the similarity or dissimilarity of established, likely-to-continue trade channels. *DuPont*, 177 USPQ at 567.

Applicant argues that “Applicant’s customers are in the market for Funko’s collectable toy figures. In contrast, Registrant’s customers are shopping for baby board books and the Boynton stuffed animals sold in conjunction with them.”<sup>22</sup> That argument, however, is predicated on its assumption, rejected above, that its goods could be differentiated from Registrant’s based on extrinsic evidence. “Likelihood of confusion must be resolved on the basis of the goods named in the registration and, in the absence of specific limitations in the registration, on the basis of all normal and usual channels of trade and methods of distribution.” *In re i.am.symbolic*, 123 USPQ2d at 1749 (internal punctuation omitted).

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<sup>22</sup> Applicant’s brief, p. 9, 9 TTABVUE 10.

Here, as we have seen, Applicant's toy figures and Registrant's stuffed and plush toys, as identified in the applications and the cited Registration, overlap in part or alternatively, are related. *See Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1268 (TTAB 2003) ("Given the in-part identical and in-part related nature of the parties' goods, and the lack of any restrictions in the identifications thereof as to trade channels and purchasers, these ... items could be offered and sold to the same classes of purchasers through the same channels of trade"). As the Examining Attorney has shown, and as Applicant effectively concedes, its products, like those of other toy manufacturers, are offered for sale through the same channels of trade, toy retail stores such as Buy Buy Baby, Toys Я Us, and the Disney Store, where they would be offered to the same classes of consumers—primarily children and their parents.<sup>23</sup>

We find, therefore, that Applicant's and Registrant's identified goods travel through the same channels of trade to the same classes of customers. Consequently, the third *DuPont* factor also weighs in favor of finding a likelihood of confusion.

### C. Similarity of the Marks

Under the first *DuPont* factor, we consider the similarity or dissimilarity of Applicant's and Registrant's marks. We shall consider Applicant's standard character mark, PINT SIZE HEROES, first, and then its stylized mark. Applicant's and Registrant's marks must be compared in their entirety, taking into account their appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at

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<sup>23</sup> Applicant's brief p. 8, 9 TTABVUE 9; Examining Attorney's brief, 11 TTABVUE 9, 11; Sept. 5, 2017 Office Action TSDR pp. 15-38.

567; *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1160-61 (Fed. Cir. 2014); *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.’ *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014); *accord Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”) (citation omitted).” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018).

Applicant does not dispute that the words PINT SIZE would be pronounced the same in its mark and the cited mark, and admits that they are “lexically similar.”<sup>24</sup> Applicant continues: “As used in Applicant’s mark, the term ‘PINT SIZE’ suggests the diminutive stature of figures. ... In contrast, as used in Registrant’s mark, the term ‘PINT SIZE’ suggests the babies and toddlers featured in the Registrant’s board books.”<sup>25</sup> Furthermore, Applicant argues, the Examining Attorney arbitrarily dissected the marks by focusing solely on their shared term, PINT SIZE. If the marks are viewed in their entirety, they “make starkly different commercial impressions because Funko’s [PINT SIZE HEROES] is ironic and [Pint Size Productions] is not,” Applicant contends. “PINT SIZE HEROES immediately communicates irony, especially when used in connection with collectable super-hero figures. In contrast

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<sup>24</sup> Applicant’s brief p. 5, 9 TTABVUE 6.

<sup>25</sup> Applicant’s reply brief, 12 TTABVUE 4.

PINT SIZE PRODUCTIONS is literal: the goods feature and are for babies and toddlers.”<sup>26</sup>

Despite this attempted distinction, we find that the marks are more similar than dissimilar, in important respects. “While we must consider a mark in its entirety, one feature may be recognized as being more significant than other elements. *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) (“[I]n articulating reasons for reaching a conclusion on the issue of confusion, 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 the ultimate conclusion rests on consideration of the marks in their entireties.”).” *In re Davia*, 110 USPQ2d at 1813.

It is evident that the first two words of Applicant’s standard character mark, PINT SIZE, are the same as those in the cited mark. The prominence of this wording is enhanced by its placement at the beginning of both marks: “It is also the first term in the mark, further establishing its prominence. *See Palm Bay v. Veuve Clicquot*, 73 USPQ2d at 1692 (“The presence of this strong distinctive term as the first word in both parties’ marks renders the marks similar, especially in light of the largely laudatory (and hence non-source identifying) significance of ROYALE.”); *Presto Prods. Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“[I]t is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered”).” *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1185 (TTAB 2018). PINT SIZE would be pronounced the same in both marks. And it

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<sup>26</sup> Applicant’s brief p. 5, 9 TTABVUE 6.

would convey the same general connotation. According to the dictionary, “pint-sized” means “very small.”<sup>27</sup> In either mark, PINT SIZE could refer to the small toys or the small children who enjoy them. Thus, the dominant portion of both marks, PINT SIZE, is similar in sound and meaning.

Moreover, both marks have the same structure, with the dominant component, PINT SIZE, followed by a single word—HEROES in Applicant’s case and PRODUCTIONS (disclaimed) in Registrant’s case. *See In re M. Serman & Co.*, 223 USPQ 52, 53 (TTAB 1984) (likely confusion between similarly structured marks CITY WOMAN and CITY GIRL). Applicant’s attempt to distinguish its mark’s “ironic” commercial impression is unavailing, for if the dominant portion of both marks is the same, then the marks may be confusingly similar notwithstanding peripheral differences. *See In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260-61 (Fed. Cir. 2010) (ML is likely to be perceived as a shortened version of registrant’s mark, ML MARK LEES); *Stone Lion Capital*, 110 USPQ2d at 1161 (STONE LION CAPITAL incorporated the entirety of the registered marks LION CAPITAL and LION). Indeed, given the related nature of the goods, PINT SIZE HEROES could easily be taken by consumers as another line of goods produced by PINT SIZE PRODUCTIONS. *See In re Collegian Sportswear, Inc.*, 224 USPQ 174, 176 (TTAB 1984). The marks are thus “sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between [Applicant and Registrant].” *Coach Servs., Inc. v. Triumph*

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<sup>27</sup> En.OxfordDictionaries.com 12/24/2016, Dec. 24, 2016 Office Action TSDR p. 9.

*Learning*, 101 USPQ2d at 1721 (citing *Leading Jewelers Guild, Inc. v. LJOW Holdings, LLC*, 82 USPQ2d 1901, 1905 (TTAB 2007)).

Applicant nonetheless argues that its stylized mark differs from the cited mark:



The marks differ, Applicant suggests, not only in appearance, but in emphasis and pronunciation:

The Examiner offers no analysis or argument that Funko's bold, action-hero style logo bears any resemblance to PSP's pastel pink, blue, and green logo with child-handwriting style font. Funko's brand is built on striking, pop-culture graphics, and PSP's is built on soft, warm, cuddly graphics.

...

Funko's stylization of its Mark makes the term HEROES the dominant term in the Mark, entirely distinguishing it from Registrant's Mark. The term "HEROES" is twice as large as the term PINT SIZE. And, the initial "H" precedes the term PINT SIZE, causing left-to-right readers (e.g., the vast majority of U.S. consumers) to see the term HEROES before the term PINT SIZE.<sup>28</sup>

...

Applicant's mark, in italicized all-caps, emphasizes "HEROES," which is twice as large as and, as designed, precedes the term "PINT SIZE." Applicant's mark emphasizes HEROES. In contrast, Registrant's mark is in all lower case and emphasizes the term "PINT SIZE."<sup>29</sup>

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<sup>28</sup> Applicant's brief pp. 6-7, 9-10, 9 TTABVUE 7-8, 10-11.

<sup>29</sup> Applicant's reply brief, 12 TTABVUE 3.

However, even though there is some difference in the marks' appearance, we agree with the Examining Attorney that the marks' verbal similarity outweighs their dissimilarity in design. "In the case of marks, such as Applicant's, consisting of words and a design, the words are normally accorded greater weight because they are likely to make a greater impression upon purchasers, to be remembered by them, and to be used by them to request the goods. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (citing *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir 1983)). The verbal portion of a word and design mark "likely will appear alone when used in text and will be spoken when requested by consumers." *Id.* at 1911; *see also In re Solid State Design Inc.*, 125 USPQ2d 1409, 1411 (TTAB 2018) (citing *L.C. Licensing, Inc. v. Berman*, 86 USPQ2d 1883, 1887 (TTAB 2007) ("[I]t is well settled that if a mark 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."))." *In re Aquitaine Wine*, 126 USPQ2d at 1184. In addition, color is not claimed as a feature of Applicant's mark, so it could appear in colors similar to those used in Registrant's mark.

Applicant's suggestion that HEROES would be read as preceding PINT SIZE in its stylized mark is belied by its application, which states "The mark consists of the stylized text 'PINT SIZE HEROES,'" and by its own brief, which states that "Funko seeks to register the 'PINT SIZE HEROES' logo...."<sup>30</sup> The marks thus retain the same literal structure, with the dominant term PINT SIZE placed prominently at the

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<sup>30</sup> Applicant's brief p. 1, 9 TTABVUE 2.

beginning of the mark. Although PINT SIZE is depicted in letters smaller than HEROES, the comparatively diminutive letters serve to reinforce the connotation and commercial impression that the toy figures are PINT SIZE—i.e., very small. As such, the term PINT SIZE is likely to make a greater impression upon purchasers, to be remembered by them, and to be used by them to request the goods. *See In re Vittera*, 101 USPQ2d at 1908.

On the whole, then, under the first *DuPont* factor, Applicant's standard character and stylized marks are more similar than dissimilar to the cited mark.

### III. Conclusion

Applicant argues that there is a *de minimis* likelihood of confusion with the cited mark, and that the Examining Attorney's findings were speculative.<sup>31</sup> But when we consider all of the arguments and evidence of record as they pertain to the relevant *DuPont* likelihood of confusion factors, we find that Applicant's identified goods are related to Registrant's goods, that they move through the same channels of trade to the same classes of customers, and that the marks are more similar than dissimilar.

**Decision:** The refusal to register Applicant's marks PINT SIZE HEROES and



is affirmed.

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<sup>31</sup> Applicant's brief pp. 10-11, 9 TTABVue 11-12.