

**THIS OPINION IS NOT A
PRECEDENT OF THE
TTAB**

Hearing:
April 2, 2008

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PTH

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Time Warner Entertainment Company, L.P.
v.
Fleet Wholesale Supply Co., Inc.

Opposition No. 91155422

Michael A. Grow of Arent Fox LLC for Time Warner
Entertainment Company, L.P.

Ariana G. Voight of Michael Best & Friedrich LLP for Fleet
Wholesale Supply Co., Inc.

Before Hairston, Holtzman and Ritchie de Larena,
Administrative Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

Fleet Wholesale Supply Co., Inc. (applicant) has filed
an application to register the mark ROAD RUNNER (in standard
character form) for "batteries" in International Class 9.¹

Registration has been opposed by Time Warner
Entertainment Company, L.P. (opposer). In the notice of
opposition, opposer alleges that it "is the owner of all

¹ Serial No. 76383804, filed on March 18, 2002, based upon an
allegation of a bona fide intention to use the mark in commerce.

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rights, title and interest in and to a family of names and marks containing the term ROAD RUNNER, and a distinctive ROAD RUNNER cartoon character design, for a wide variety of goods and services including battery powered toys and games; a series of motion pictures; video and television films, audio/visual tapes, cassettes and/or compact discs, computer game programs, cartridges and cassettes for use in battery powered devices; telecommunications services, including the providing of Internet access, email, chat and online forum services, personal homepage hosting, providing multiple user access to a computer data base featuring news, weather, sports, educational and financial information, and entertainment services; and many other goods and services including clothing, sporting goods, books and printed materials;" that the ROAD RUNNER names and marks have been widely used and advertised for a period of many years; that as a result, the names and marks have become well known and famous; that "the Board recognized that [o]pposer's mark is well known and held it to be famous in a recent decision;" that opposer's ROAD RUNNER names and marks became well known and famous before applicant made any use of ROAD RUNNER; that applicant's mark, when applied to applicant's goods, so resembles opposer's ROAD RUNNER names and marks for opposer's goods and services, as to be likely to cause confusion; that applicant's mark so closely resembles

opposer's ROAD RUNNER names and marks that it is likely to cause deception and falsely suggest a connection with opposer in violation of Section 2(a) of the Trademark Act; and that applicant's mark will likely dilute the distinctive quality of opposer's ROAD RUNNER names and marks. In addition, opposer pleaded ownership of the following registrations for its ROAD RUNNER mark: Nos. 1288072; 1946471, 2135226; 2246924; 1915162; 2318165; and 2246925.²

Applicant, in its answer, has denied the salient allegations of the notice of opposition. As affirmative defenses, applicant asserted that "[o]pposer's claims are barred by laches, acquiescence, estoppel, and waiver" because applicant owns an incontestable registration for the

² These were the only registrations identified by number in the notice of opposition. At trial, opposer submitted by notice of reliance status and title copies of each of the pleaded registrations with the exception of Registration No. 2246925. In view thereof, we have given no consideration to this registration. In addition, at trial, opposer submitted by notice of reliance status and title copies of five unpleaded registrations. As discussed infra, applicant has objected to the unpleaded registrations. Also, we note that although opposer pleaded ownership of a family of names and marks containing the term ROAD RUNNER and the ROAD RUNNER cartoon character, it did not argue this family of marks claim in its brief. In view thereof, we have given no consideration to this claim.

same mark it seeks to register for related goods and opposer has failed to challenge such registration.³

Evidentiary Issues

Before turning to the merits of this case, there are several evidentiary issues we must discuss. We turn first to opposer's objections to portions of applicant's evidence.

Opposer has objected to the testimony (and Exhibits 2 and 3) of applicant's witness Thomas Wagner regarding alleged third-party use of "Roadrunner." Mr. Wagner, a

³ Applicant did not present any argument in its brief specifically directed to the affirmative defenses of laches, acquiescence, estoppel, and waiver. Indeed, applicant states that "the Board cannot consider a claim of laches as an affirmative defense in an opposition proceeding." (Brief at 45). Under the circumstances, we consider applicant to have waived these affirmative defenses.

We note that at trial applicant introduced a copy of its Registration No. 843203 for the mark ROAD RUNNER for "automotive tires." To the extent that applicant was attempting to assert a Morehouse defense, such defense is not well taken. The Morehouse defense, an equitable affirmative defense, is available in situations where the applicant already owns a registration for the same mark for substantially identical goods or services. See *Morehouse Mfg. Corp. v. J. Strickland & Co.*, 407 F.2d 881, 160 USPQ 715 (CCPA 1969). The Morehouse defense requires the goods to be "identical, substantially the same, or so related so as to represent in law a distinction without a difference." *Aquion Partners Limited Partnership v. Envirogard Products Limited*, 43 USPQ2d 1371, 1373 (TTAB 1997). Plainly, "batteries" are not substantially the same as "automotive tires."

Applicant also asserts as affirmative defenses that (1) it uses a stylized design in connection with its mark which further distinguishes said mark from opposer's mark, and (2) numerous third parties own and use ROAD RUNNER marks for a wide variety of goods and services and, therefore, opposer cannot claim that its mark is famous or well known for a broad range of goods and services. These, however, are not true affirmative defenses, but rather are assertions that relate to applicant's position that there is no likelihood of confusion and no likely dilution.

private investigator, was hired by applicant's attorney to conduct an investigation into third-party use of "Roadrunner." Mr. Wagner testified that he telephoned the companies listed in a search report to determine if they were currently using "Roadrunner." During his testimony, he recounted the statements of the persons with whom he spoke. In addition, Exhibits 2 and 3, which consist of summaries of the statements by the persons with whom Mr. Wagner spoke, were introduced. Opposer has objected to this testimony and exhibits on the grounds that it (1) constitutes hearsay and (2) is irrelevant because it pertains to alleged third-party uses of "Roadrunner" in connection with goods which are different from those involved herein.

We sustain opposer's objection to this testimony and supporting exhibits because they are hearsay. Applicant is offering the testimony and exhibits to show that third parties are using "Roadrunner" in their businesses and the extent of that use. However, statements made by others to Mr. Wagner are not admissible to prove the truth of such matters. In view thereof, this testimony and the exhibits have not been considered.

Further, opposer has objected to the testimony (and Exhibits 4 and 5) of Mr. Wagner regarding Internet searches he conducted for entities allegedly using "Roadrunner." Exhibits 4 and 5 are printouts of the Internet search

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results. Opposer has objected to this testimony and exhibits on the ground that it constitutes hearsay. We overrule opposer's objection to this testimony and evidence on the ground of hearsay because Mr. Wagner conducted the searches and, thus, the search results are properly authenticated. The printouts, however, are admissible only for what they show on their face and not for the truth of the matters therein.

Opposer has objected to Exhibit 3 of applicant's notice of reliance which consists of dictionary definitions and articles from printed publications concerning the road runner bird. Opposer argues that such evidence is irrelevant. Trademark Rule 2.122(d)(e) specifically provides that printed publications, such as books and periodicals, available to the general public, may be introduced by notice of reliance. Opposer's objection to this evidence on the ground of relevance goes to the weight of the evidence rather than its admissibility, and we will therefore consider the evidence for whatever probative value it may have.

Finally, opposer has objected to Exhibit 4 of applicant's notice of reliance which consists of printouts of third-party registrations for marks which include the word "Roadrunner/Road runner" from the USPTO's TESS database. Applicant proffered the third-party registrations

"to show that the terms 'roadrunner' and 'road runner' are suggestive of goods and services related to speed, the road or running." (Applicant's notice of reliance) Opposer objects to the third-party registrations on the ground that there is no evidence that the marks shown therein are in use. Opposer's objection is overruled. While third-party registrations are not evidence that the marks are in use or that the public is familiar with them, such registrations may be used in the same manner as dictionary definitions to show that a term has significance for goods in a particular field. See *Mead Johnson & Company v. Peter Eckes*, 195 USPQ 187 (TTAB 1977). We will therefore consider the third-party registrations for whatever probative value they may have.

We turn next to applicant's objections to portions of opposer's evidence.

Applicant has objected to the rebuttal testimony (with exhibits) of opposer's witness Jack Hitt as untimely. Opposer's rebuttal testimony period closed on October 4, 2006, and the Hitt testimony was taken on October 11, 2006. Although opposer requested an extension of its rebuttal testimony period, the Board, in an order issued November 15, 2006, denied such request. The Hitt testimony is clearly untimely, and we have given it no consideration.

Applicant has objected to the portions of the testimony (and Exhibits 1-5) of opposer's witness, David Hedrick which

pertains to a survey titled "The Appeal of Looney Tunes Characters." Applicant objects to this testimony and evidence on the ground that opposer has offered no evidence regarding the methodology used for the survey. Applicant's objection to the survey, essentially on the ground of lack of foundation, is overruled as it goes to the weight of the evidence rather than its admissibility, and we will therefore consider the survey for whatever probative value it may have.

Applicant also has objected to portions of the testimony (and Exhibits 6-18) of Mr. Hedrick which pertains to marketing studies regarding the recognition of the ROAD RUNNER mark for opposer's affiliate's Internet broadband service. Applicant objects to this testimony and evidence on the ground that it is irrelevant. Applicant's objection is overruled as it goes to the weight of the evidence rather than its admissibility, and we will therefore consider the marketing studies for whatever probative value they may have.

Applicant has objected to Exhibits 20-21 and 86 to the testimony of Mr. Hedrick on relevancy grounds. It is essentially applicant's position that these exhibits, which consist of licenses and promotional materials relating to all of opposer's Looney Tunes characters, are not relevant to the licensing and promotion of opposer's ROAD RUNNER mark

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and character, in particular. Again, we will consider this evidence for whatever probative value it may have.

As previously noted, applicant has objected to opposer's reliance on five unpleaded registrations, namely, Registration Nos. 2000037; 2847268; 2966847; 2157957; and 2923084. Because opposer did not plead ownership of these registrations in the notice of opposition, we find applicant's objection to such registrations to be well taken. We have not considered these registrations in reaching our decision herein.

Applicant has objected to the testimony of Mr. Hedrick concerning the licensed use of the ROAD RUNNER mark on automobiles, automotive accessories, watches, radios, flashlights, battery-operated toothbrushes and calculators on the ground that opposer did not plead use of the ROAD RUNNER mark on such goods. Similarly, applicant has objected to the exhibits attached to the declaration of opposer's witness Jodi Arlen which consist of printouts showing automotive equipment and accessories licensed by opposer using the Looney Tunes characters and marks on the ground that opposer did not plead use of the ROAD RUNNER mark on automotive equipment and accessories. Applicant's objection is overruled inasmuch as opposer alleged in the notice of opposition that it uses the ROAD RUNNER mark on "many [] goods and services... ."

Finally, applicant has objected to several statements in opposer's main brief. Such statements concern information at applicant's website, opposer's advertising and promotion figures, and royalties earned by opposer. Statements in a party's brief can be given no consideration unless they are supported by evidence properly introduced at trial. See TBMP §704.06(b) (2d ed. rev. 2004). Suffice it to say that to the extent that any statements in opposer's brief are not supported by evidence properly introduced at trial, we have given them no consideration.

The Record

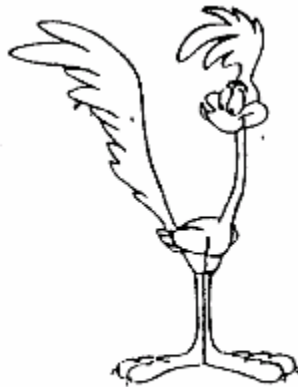
The record, therefore, includes the pleadings and the file of the involved application. Additionally, opposer submitted during its testimony-in-chief the deposition (with exhibits) of Dave Hedrick, senior vice-president for Warner Bros. Consumer Products, the licensing agent for opposer; and the declaration (with exhibits) of Jodi Arlen, a senior legal assistant with opposer's counsel (submitted pursuant to the parties' stipulation). Opposer submitted a notice of reliance on (a) applicant's interrogatory responses; (b) excerpts from the discovery deposition (with exhibits) of Stewart C. Mills, applicant's co-president; (c) copies of the final decisions/dispositions in eleven Board opposition proceedings where opposer or a predecessor in interest was

the plaintiff; and (d) status and title copies of the following pleaded registrations:

(1) Registration No. 2135226 issued February 10, 1998 (Section 8 & 15) for the mark ROAD RUNNER and WILE E. COYOTE for "video game cartridges; video and computer game programs, cartridges, and cassettes;"

(2) Registration No. 2246924 issued May 25, 1999 (Section 8 & 15) for the mark ROADRUNNER for "providing multiple-user access to a global computer information network for transfer and dissemination of a wide range of information;"

(3) Registration No. 2318165 issued February 15, 2000 (Section 8 & 15) for the mark shown below,



ROAD RUNNER

for "toys and sporting goods, games and playthings, namely, action figures and accessories therefor; plush toys; balloons; bathtub toys; ride-on toys; equipment sold as a unit for playing a board game and card game; a manipulative puzzle type game, a parlour game, a hand held unit for playing a parlour type video game; and action type target

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game; stand alone video output game machines; jigsaw and manipulative puzzles; paper face masks; doll costumes; costume masks; skateboards; ice skates; water squirting toys; balls, namely, playground balls, soccer balls, sportsballs, baseballs, basketballs; baseball gloves; swimming arm floats for recreational use; swim fins; Christmas tree ornaments;"

(4) Registration No. 1288072 issued July 31, 1984 (renewed) for the mark shown below,



for "candy;"

(5) Registration No. 1915162 issued August 29, 1995 (renewed) for the mark ROAD RUNNER for "toys; namely, plush dolls, and Halloween costumes and masks;" and

(6) Registration No. 1946472 issued January 9, 1996 (renewed) for the mark THE ROAD RUNNER & WILE E. COYOTE for a "series of motion picture, video and television films,

series of pre-recorded audio-video tapes cassettes and/or discs featuring animation and/or music."

Applicant submitted the testimony depositions (with exhibits) of Stewart C. Mills, its co-president; and Thomas Wagner, a private investigator. Additionally, applicant submitted a notice of reliance on (a) status and title copies of its Registration Nos. 843203 issued January 30, 1968 (renewed) for the mark ROAD RUNNER for "automotive tires"; and 2805515 issued January 13, 2004 for a mark consisting of a stylized bird design for "automotive tires," (b) dictionary definitions; (c) excerpts from printed publications; (d) the file of applicant's application Serial No. 74557378 for the mark THE ROAD RUNNER & WILE E COYOTE for "a series of motion pictures, video and television films; series of pre-recorded audio-video tapes, cassettes and/or discs featuring animation and/or music;" and (e) third-party registrations for marks consisting of "Roadrunner/Road runner" for various goods and services.

Opposer and applicant filed main briefs on the case; opposer filed a reply brief. We note that in an order issued September 28, 2007, the Board granted applicant's motion to strike opposer's reply brief as untimely. In view thereof, we have given no consideration to opposer's reply brief.

Both parties were represented by counsel at an oral hearing held by the Board.

Standing and Priority

Because opposer has properly made its pleaded registrations of record, we find that opposer has established its standing to oppose registration of applicant's mark. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982). Moreover, because opposer's pleaded registrations are of record, priority is not an issue in this case as to the marks and goods covered by said registrations. See *King Candy Co. v. King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

Likelihood of Confusion

Our likelihood of confusion determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the likelihood of confusion factors set forth in *In re E.I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). The relevant du Pont factors in this proceeding are discussed below.

The Fame of Opposer's Mark

This du Pont factor requires us to consider the fame of opposer's mark. Fame, if it exists, plays a "dominant role

in the process of balancing the *DuPont* factors.”⁴ *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1897 (Fed. Cir. 2000).

Opposer’s Road Runner cartoon character was created by the noted animator Chuck Jones, an employee of opposer’s predecessor-in-interest, Warner Bros. (Hedrick dep. at 57) The ROAD RUNNER mark was first used in 1949 in connection with the first of a series of animated cartoon shorts entitled “Fast and Furry-ous.” (Hedrick dep. at 58; Opposer’s Exhibit No. 29) The mark has been used continuously since then as part of the Looney Tunes family of cartoon characters, which include Wile E. Coyote, Bugs Bunny, Daffy Duck, Porky Pig, Tweety, and Sylvester. (Opposer’s Exhibit No. 29)

The first Road Runner cartoons were mainly shown as previews before a film shown in theaters. (Hedrick dep. at 60) In the 1960’s the cartoons began airing as a television series under the name “The Road Runner Show.” (Hedrick dep. at 60, Opposer’s Exhibit No. 32) In the 1990’s the cartoons were re-released as a series of videos and DVDs. (Hedrick dep. at 68, Exhibit Nos. 40-41)

⁴ We note the parties’ dispute regarding whether opposer may rely on the Board’s finding in *Time Warner Entertainment Co. v. Jones*, 65 USPQ2d 1650 (TTAB 2002) that opposer’s ROAD RUNNER mark is famous. Because the fame of a mark must be determined on the record in each case, the Board is not precluded from reaching a different finding on this issue if presented with a different record herein.

The Road Runner character had its own comic book series beginning in the 1950's, parts of which were reprinted in the 1970's. (Hedrick dep. at 61-61. Opposer's Exhibit Nos. 34-37)

Due to the popularity of the Road Runner cartoon character, there has been great demand for Road Runner merchandise. In 2005 opposer's Brand Assurance Group reviewed approximately 20,000 licensing submissions in connection with the Looney Tunes characters. (Hedrick dep. at 16-18) Opposer and its predecessors have licensed the Road Runner character for use on a wide variety of products, including apparel, accessories, automotive products, toys and games, die cast cars, postage stamps, toothbrushes, calculators, and novelty items. (Opposer's Exhibit No. 42) Approximately \$500 million worth of Looney Tunes licensed merchandise is sold at retail every year. (Hedrick dep. at 47)

Among the ROAD RUNNER licensed products are telephones, computers and electronic products, greeting cards, candy, watches, medicines, radios, sewing kits, cocoa mixes, pudding, beverages, decorations, string lights, stationery items, apparel, pet products, labels, automotive products, collectibles, sporting goods, and toys and games. (Opposer's Exhibit No. 86) The record contains substantial

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evidence of ROAD RUNNER character merchandise being advertised on eBay. (Arlen declaration, Exhibits 1-106) Specific examples of companies which have made nationwide use of ROAD RUNNER include Subway fast food restaurants which featured the Road Runner cartoon character as part of in-store promotion and giveaways for its kid's meal program. (Opposer's Exhibit No. 78) The U.S. Postal Service has made licensed use of the ROAD RUNNER character and word mark in connection with commemorative stamps, mailing labels, note cards, temporary tattoos, and other printed matter. (Opposer's Exhibit No. 52) Six Flags theme parks have made licensed use of the ROAD RUNNER character and marks in connection with various rides. (Hedrick dep. at 73, Opposer's Exhibit No. 48) In the 1960's the ROAD RUNNER marks were licensed for use on a Plymouth vehicle. (Hedrick dep. at 91-92) The ROAD RUNNER marks and character were used in connection with a nationally released motion picture entitled "Space Jam," starring basketball star Michael Jordan. (Hedrick dep. at 120) General Motors used the ROAD RUNNER marks in a series of commercials for the Pontiac Grand Prix car. (Hedrick dep. at 91) Time Warner Cable, an affiliated company of opposer's, uses the ROAD RUNNER name and character in connection with the provision of a broadband Internet service.

Opposer did not provide specific evidence of the dollar amounts expended on advertising its licensed ROAD RUNNER products. It appears that opposer's licensees conduct and pay for the advertising of licensed products, although opposer controls, owns, directs and approves all advertising done in connection with the Looney Tunes characters, including Road Runner. The record does reveal, however, that opposer's affiliate, Time Warner Cable, has expended significant sums advertising and promoting the ROAD RUNNER broadband Internet service.⁵

The evidence of record convinces us that opposer's ROAD RUNNER word and character marks have acquired significant fame for opposer's goods and services. In particular, the length of time in which the ROAD RUNNER mark has been in use, the large number of licensed products and services, the nationwide advertising exposure of the mark, along with the advertising expenditures of opposer's affiliate's broadband Internet service persuades us that the mark is famous under the fifth du Pont factor.⁶ See Bose Corp. v. QSC Audio

⁵ The information relating to these advertising expenditures has been designated confidential.

⁶ In reaching our finding that opposer's mark is famous under the fifth du Pont factor, we have accorded little probative weight to Exhibit Nos. 1-18 to the Hedrick deposition. Exhibit Nos. 1-5 consist of several documents entitled "The Appeal Of Looney Tunes Characters." Mr. Hedrick testified that opposer uses these documents to demonstrate the popularity of the Looney Tunes characters, including the Road Runner, to potential licensees. These documents, however, are of little probative value with respect to the strength of opposer's ROAD RUNNER mark because

Products Inc., 293 F.3d 1367, 63 USPQ2d 1303 (Fed. Cir. 2002). Our primary reviewing court and its predecessor have held that "there is no excuse for even approaching the well-known trademark of a competitor and that all doubt as to whether confusion, mistake, or deception is likely is to be resolved against the newcomer, especially where the established mark is one which is famous." *Nina Ricci S.A.R.L. v. E.T.F. Enterprises Inc.*, 889 F.2d 1070, 12 USPQ2d 1901, 1904 (Fed. Cir. 1989), quoting *Planter's Nut and Chocolate Co. v. Crown Nut Co., Inc.*, 305 F.2d 916, 134 USPQ 504, 511 (CCPA 1962) (internal quotations omitted). This factor, therefore, weighs heavily in opposer's favor.

The Similarity or Dissimilarity of the Marks

This du Pont factor requires us to determine the similarity or dissimilarity of the marks when viewed in their entirety in terms of appearance, sound, connotation,

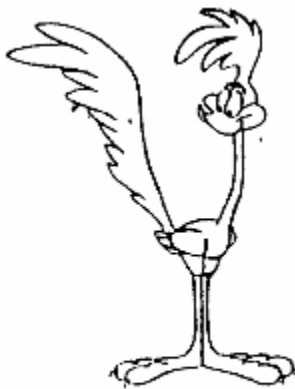
opposer offered insufficient information concerning the methodology used in these studies. Insofar as Exhibit Nos. 6-18 are concerned, they consist of several studies entitled "Road Runner Environmental Tracking Study." Mr. Hedrick testified that opposer commissioned these studies to measure, inter alia, public awareness of its affiliate's ROAD RUNNER broadband Internet service. The most recent studies indicate a fairly high degree of aided and unaided awareness of ROAD RUNNER broadband Internet service in the geographic markets where the service is offered. We note, however, that in each market where the study was conducted, approximately 40% of the interviews were conducted with persons who were currently Road Runner subscribers and approximately 60% were conducted with persons who were randomly selected. With the studies weighted in this manner, it is hardly surprising that awareness of the ROAD RUNNER broadband Internet service was fairly high.

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and overall commercial impression. The test is not whether 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 source of the goods and/or services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

In our opinion, the most pertinent of opposer's marks is its ROAD RUNNER and design mark for, in particular, "action figures and accessories therefor" and "a hand held unit for playing a parlour type video game" in Registration No. 2318165, shown below. Therefore in the remainder of our analysis, we will focus our discussion on this mark and goods.



ROAD RUNNER

We find that applicant's ROAD RUNNER mark is highly similar to opposer's ROAD RUNNER and design mark. These marks include the identical term, ROAD RUNNER, and the

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design element of opposer's mark is but a fanciful representation of a road runner, which is identical in concept to applicant's ROAD RUNNER mark. Viewing these marks as whole, we find that they are substantially similar in terms of appearance.

In terms of sound, the marks are identical, and in terms of connotation, we find that they connote the same thing, i.e., a road runner bird.

In terms of overall commercial impression, we find that each of the marks brings to mind a road runner bird. The appearance of the road runner design element in opposer's mark ROAD RUNNER and design mark merely reinforces the similarity between that mark and applicant's mark.

Applicant maintains that it uses its ROAD RUNNER mark in connection with a distinctive bird design that does not resemble opposer's ROAD RUNNER character. However, this is immaterial here because applicant seeks to register the mark ROAD RUNNER alone. See, e.g. *Sealy, Inc. v. Simmons Co.*, 265 F.2d 934, 121 USPQ 456, 459 (CCPA 1959); *Hat Corp. of America v. John B. Stetson Co.*, 223 F.2d 485, 106 USPQ 200, 203 (CCPA 1955); and *ITT Canteen Corp. v. Haven Homes Inc.*, 174 USPQ 539, 540 (1972). In other words, this cannot be considered in our likelihood of confusion analysis.

In sum, we find that the applicant's ROAD RUNNER mark is substantially similar to opposer's ROAD RUNNER and design mark, and that this du Pont factor heavily favors opposer.

The Number and Nature of Similar Marks in Use on Similar Goods

With its notice of reliance, applicant introduced evidence of thirty third-party registrations for marks that consist of or include the word "Roadrunner/Road runner;" and a dictionary entry from Webster's New Collegiate Dictionary (1979) which defines "road runner" as "a largely terrestrial bird [] of the cuckoo family that is a speedy runner" Applicant has also introduced with the Wagner testimony, reprints of numerous web pages that feature various marks which consist of or include the term "Roadrunner/Road runner."

Evidence of widespread third-party use can diminish the strength of a mark and thus the scope of protection to which a mark is entitled. However, as previously noted, third-party registrations are not evidence of use. The existence of these marks on the register is not evidence of what happens in the marketplace or that customers are familiar with them. *AMF Incorporated v. American Leisure Products, Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA) ["little weight is to be given such registrations in evaluating whether there is a likelihood of confusion."] Similarly,

the Internet web sites are of limited probative value. Cf. AMF Inc., 177 USPQ at 270 ["We think the listing of trademarks ... in various trade magazines should be treated in a similar manner as are third-party registrations. They give no indication as to actual sales, when the mark was adopted, customer familiarity with the marks, etc."] citing Gravel Cologne, Inc. v. Lawrence Palmer, Inc., 469 F.2d 1397, 176 USPQ 123 (CCPA 1972).

Although third-party registrations may be used in the same manner as dictionary definitions, to show that a term has significance for goods or services in a particular field, where, as here, such registrations are for non-related goods and services, they do not establish by themselves that opposer's ROAD RUNNER and design mark is weak for the goods and services in opposer's pleaded registrations. See Sheller-Globe Corporation v. Scott Paper Company, 204 USPQ 329 (TTAB 1979). Moreover, this is not a situation where the parties' marks have a portion in common which is suggestive and the remaining portions of the marks are enough to distinguish them as a whole from one another. In this case, the design element in opposer's ROAD RUNNER and design mark is the legal equivalent of the term ROAD RUNNER and, therefore, is insufficient to distinguish the parties' marks.

In short, applicant's evidence of third-party registrations and Internet web sites does not diminish the fame of opposer's ROAD RUNNER and design mark. This du Pont factor is neutral.

The Similarity or Dissimilarity of the Goods

We next consider the du Pont factor regarding the similarity or dissimilarity of the goods. As indicated, it is our opinion that the most pertinent of opposer's goods are "action figures and accessories therefor" and "hand held unit for playing a parlour type video game" in Registration No. 2318165.

It is readily apparent that opposer's goods are different in nature from applicant's goods, namely, batteries. However, it is a general rule that goods need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that goods are related in some manner or that some circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used thereon, to the mistaken belief that the goods originate from a common source. In re Martin's Famous Pastry Shoppe, Inc., 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984). Further, it is well settled that likelihood of confusion is determined on the basis of the goods as they

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are identified in the application and in the pleaded registration. *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002).

Opposer's goods are identified in its Registration No. 2318165 as "action figures and accessories therefor" and "hand held unit for playing a parlour type video game." Applicant's goods are identified in its involved application as "batteries." Inasmuch as opposer's identification of goods is not limited or restricted, it is presumed that the registration encompasses action figures, accessories therefor, and hand held video games of all types, including those which are battery operated. Similarly, because applicant's identification of goods is not limited or restricted, it is presumed that the application encompasses batteries of all types, including those for use in battery operated action figures, accessories therefor, and hand held video games. We believe that battery operated action figures, accessories therefor, and hand held video games, on the one hand, and batteries for use therein, on the other hand, are sufficiently related that, given the fame of opposer's mark and the substantial similarity in the marks, purchaser confusion is likely. It is undisputed that batteries are integral to the operation of battery operated action figures, accessories therefor and hand held video

games. Thus, these items of opposer and applicant are considered to be complementary goods.

For these reasons, we find that applicant's batteries are sufficiently related to opposer's action figures, accessories therefor, and hand held video games, under the second du Pont factor, that confusion is likely to result from the use of the parties' substantially similar marks thereupon. This is especially so in view of the fame of opposer's mark. This du Pont factor favors a finding of likelihood of confusion.

Trade Channels and Purchasers

Inasmuch as there are no limitations in the identifications of goods in the application and opposer's registration, we presume an overlap in trade channels, and that opposer's action figures, accessories therefor, and hand held video games and applicant's batteries would be offered to all normal and usual classes of purchasers for such goods. See *Hewlett-Packard Co. v. Packard Press Inc.*, supra; and *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990).

Applicant's argument as to the actual channels of trade of its goods, i.e., that its batteries will be sold only in its retail stores, cannot limit the broad identification of its goods in the application. In view of the foregoing, the du Pont factors of the relatedness of the channels of trade and

classes of purchasers weigh in favor of a finding of likelihood of confusion.

Conditions of Purchase

With respect to the du Pont factor of the conditions of purchase, there is no question but that the involved goods are general consumer items which are purchased without a great degree of care or sophisticated thought. This du Pont factor therefore weighs in opposer's favor in this case.

The Variety of Goods and Services on which Opposer's Mark is Used

The record shows that opposer has licensed its ROAD RUNNER marks for use on a wide variety of products, and opposer's affiliate uses the ROAD RUNNER marks in connection with a broadband Internet service. The fact that opposer's ROAD RUNNER marks are used on diverse goods makes it more likely that purchasers, when seeing a similar mark used in connection with batteries, will believe that these products are also being sponsored or licensed by opposer. Thus, this du Pont factor favors opposer.

Lack of Evidence of Actual Confusion

Applicant maintains that it has used the ROAD RUNNER mark on tires for approximately 40 years without any instances of actual confusion, and this suggests that confusion is not likely with respect to the ROAD RUNNER mark on batteries. However, the lack of evidence of actual

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confusion in this respect is not probative of no likely confusion with respect to use of the ROAD RUNNER mark on batteries, particularly batteries of the type used in battery operated action figures, accessories therefor, and hand held video games.⁷

Under the circumstances, this du Pont factor is not relevant in this case.

Conclusion

We conclude that applicant's ROAD RUNNER mark for batteries is likely to cause confusion in view of opposer's ROAD RUNNER and design mark for action figures and accessories therefor, and hand held unit for playing a parlour type video game.

Decision: The opposition is sustained on the ground of likelihood of confusion, and registration to applicant of its mark is refused.

In view of our decision on the issue of likelihood of confusion, we need not reach opposer's claims of dilution, deception and false suggestion of a connection.

⁷ As previously discussed, there is a legal presumption that applicant's goods include this type of batteries.