

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

Hearing:
July 18, 2007

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Mattel, Inc.

v.

Patricia Briden

Opposition No. 91160087
to application Serial No. 78223428
filed on March 10, 2003

Jill M. Pietrini of Manatt, Phelps & Phillips, LLP for
Mattel, Inc.

William G. Sykes for Patricia Briden.

Before Seeherman, Drost and Mermelstein, Administrative
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Mattel, Inc. has opposed, on the ground of likelihood of confusion, the application of Patricia G. Briden to register SOCK-UM as a trademark for a "game where a labeled mat is placed on the ground or floor, participants position themselves on the mat and volley a sock back and forth from

one half of the mat to the other half of the mat.”¹ Opposer has alleged that ROCK’EM SOCK’EM robots were created by a predecessor-in-interest in 1966; that opposer first used the mark ROCK’EM SOCK’EM robots in 1966, prior to the filing date of applicant’s application; that opposer owns Registration No. 1476968 for ROCK’EM SOCK’EM ROBOTS for mechanical toy figures and Application Serial No. 75735063 for ROCK’EM SOCK’EM for various goods, including games; and that opposer and its predecessors have promoted the trademarks ROCK’EM SOCK’EM ROBOTS and ROCK’EM SOCK’EM, and the marks and associated products have become famous. Applicant has denied the salient allegations of the notice of opposition in her answer.

The record includes the pleadings; the file of the opposed application; the testimony, with exhibits, of opposer’s witnesses Monica Danner, a paralegal at opposer’s law firm, and Sheila Hancock, opposer’s senior brand manager for ROCK’EM SOCK’EM products marketing. Opposer also submitted, under notice of reliance, applicant’s responses to opposer’s discovery requests;² printed publications, and

¹ Application Serial No. 78223428, filed March 10, 2003, based on a claimed bona fide intention to use the mark in commerce.

² Opposer’s submissions include certain documents produced by applicant in response to opposer’s request for production. Although documents produced in response to such a discovery request normally cannot be made of record by notice of reliance, see Trademark Rule 2.120(j)(3)(ii), applicant has admitted the authenticity of such documents, and that they are admissible in this proceeding. Accordingly, Exhibits 155-159 to the notice of reliance are of record.

registrations owned by opposer, as shown by the status and title copies thereof, for ROCK'EM SOCK'EM ROBOTS, with ROBOTS disclaimed, for mechanical toy figures³; and for computer game cartridges, CD-Roms, software, programs [sic], discs; video game cartridges; interactive video game programs; interactive multimedia computer game programs (Class 9); writing instruments (Class 16); pajamas; sweat pants; pants (Class 25); toy action figures and accessories therefor; collectible toy figures; action games; board games; parlor games; role-playing games and equipment therefor (Class 28); and on-line entertainment services in the nature of web sites featuring games, activities and projects for adults and children.⁴ The latter registration was not pleaded in the notice of opposition, but because opposer made it of record during its testimony period, and applicant has not objected thereto, we deem the pleadings to be amended pursuant to Fed. R. Civ. P. 15(b) to include it as part of opposer's claim of likelihood of confusion. Opposer also made of record its registration for ROCK'EM SOCK'EM for computer game cartridges, CD-Roms, software, programs, [sic] discs, video game cartridges, interactive

³ Registration No. 1476968, issued February 16, 1988; Section 8 & 15 affidavits accepted and acknowledged.

⁴ Registration No. 2838907, issued May 4, 2004. The registration originally included additional goods and services in each of the classes, but they were subsequently deleted by an amendment pursuant to Section 7 of the Trademark Act.

video game programs (Class 9); pens, writing instruments (Class 16); pajamas, pants (Class 25); toy action figures and accessories therefor, collectible toy figures, action games, board games, parlor games, role-playing games (Class 28); and on-line entertainment services in the nature of web sites featuring games, activities and projects for adults and children (Class 41).⁵ This registration issued from Application Serial No. 75735063, which was pleaded in the notice of opposition; it issued after the notice of opposition was filed, and we deem the pleadings to be amended to include this registration.

Applicant has submitted, under a notice of reliance, seven photographs. These photographs do not constitute printed publications or official records or any other document that can be submitted under a notice of reliance. See Trademark Rules 2.120(j), 2.122(e). However, opposer has treated Exhibits 1 through 5 as being of record, and we therefore deem them to have been stipulated into the record. Exhibits 6 and 7, to which opposer has objected, have not been considered.

⁵ Registration No. 2889396, issued September 28, 2004. The registration originally included additional goods and services in each of the classes, but they were subsequently deleted by an amendment pursuant to Section 7 of the Trademark Act.

The appeal has been fully briefed and, although both parties requested an oral hearing before the Board, only opposer appeared at it.

Before reaching the substantive issues in this proceeding, there are some preliminary matters that we must discuss. Opposer submitted, with its notice of reliance, printouts from certain Internet websites. Exhibits 4-6. Internet websites are not self-authenticating, and therefore cannot be treated as printed publications under Trademark Rule 2.122(e). *Raccioppi v. Apogee Inc.*, 47 USPQ2d 1368 (TTAB 1998). Consequently, these exhibits have not been considered. We also point out that newspaper and magazine articles, which were submitted under opposer's notice of reliance, and which are properly of record, cannot be used as proof of the statements made in the articles, as that would constitute hearsay. However, they are evidence that the public has been exposed to the articles, and may be evidence of the author's belief that the public will understand a reference to, for example, ROCK'EM SOCK'EM ROBOTS, and we have considered them for this purpose. For this reason, though, we have given no probative value to those articles appearing in foreign newspapers, since we have no information as to whether they had any circulation in the United States, nor can we say they reflect the

author's view of how consumers in the United States would understand a term.

We note that in its brief opposer has argued the ground of dilution. However, this ground was not pleaded in the notice of opposition. Nor can we find that this ground was actually tried, and therefore we cannot treat the pleadings to have been amended pursuant to Rule 15(b) of the Federal Rules of Civil Procedure. Because fame is a factor in the likelihood of confusion analysis, see *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973), the evidence regarding the fame of opposer's mark which was submitted at trial could have been viewed by applicant as relating to the ground of likelihood of confusion, rather than the ground of dilution. Accordingly, we have given opposer's arguments regarding the ground of dilution no consideration.

In addition, in its brief opposer has argued that it has "a family of marks including the terms "SOCK'EM," and that "part of the surname of Mattel's family of marks is SOCK'EM." p. 22. Opposer did not plead a family of marks in its notice of opposition, nor do find that this claim was tried. Accordingly, this claim has not been considered.

The record shows that the mark ROCK'EM SOCK'EM ROBOTS was first adopted at least as early as 1967 for a tabletop game in which two plastic robots controlled by thumb levers

fight each other in a boxing ring format. There is some discrepancy as to when the game, using this mark, was first introduced. In its notice of opposition opposer alleged a first use date of 1966 for the mark; a Wikipedia article submitted by opposer gives a date of 1967 (exhibit 54 to Danner deposition). Registration No. 1476968 for ROCK'EM SOCK'EM ROBOTS lists a first use date of 1987. Ms. Hancock stated at her deposition that this date was incorrect, and that the mark was first used in 1964. However, a claim of an earlier date of first use than that provided in an application or registration must be supported by clear and convincing evidence, and opposer provided no documentary evidence, only Ms. Hancock's statement that this 1987 date was incorrect. Since Ms. Hancock started working for opposer in approximately 2000 or 2001, she had no personal knowledge of the date of first use, and was relying on business records for her information. In these circumstances, we see no reason why she did not provide a copy of such records to support this earlier date. Therefore, we do not accept Ms. Hancock's testimony that the mark was used as of 1964. However, viewing the totality of the evidence, we find that the mark was in use at least as early as 1967.

The ROCK'EM SOCK'EM ROBOTS tabletop game was introduced by Louis Marx and Company. Through a series of transfers

opposer became the owner of the mark in 1997, when Mattel bought Tyco Industries, which had previously acquired the mark. The testimony indicates that the mark ROCK'EM SOCK'EM ROBOTS continued to be used for the tabletop game from the time of its introduction into the market until 1997, and that, in 1995 and 1996, Tyco also offered a smaller travel size version. After opposer acquired the assets, there was a four year hiatus, and then opposer reintroduced the ROCK'EM SOCK'EM ROBOTS table game in 2001, with a more retro look going back to the original product. At the same time opposer introduced a hand-held version and a line of action figures based on the robots in the game.

Since taking over the brand, opposer has also licensed the mark for items such as key chains, pens, an electronic Sony Playstation game, a travel version of the game, a bobbing head doll, and clothing such as pajamas. At the time Ms. Hancock's testimony was taken, September 29, 2005, opposer was selling only the table game and, through a licensee, key chains.

The games are sold nationally in mass channels, department stores, gift stores and on-line. Such stores include Wal-Mart, Toys 'R Us, J.C. Penney's, Kohl's and Hallmark; on-line retailers include eToys.com. Etoys.com also sells items through mail order. The suggested retail price is \$14.99, although some retailers may sell the game

for \$19.99, the next price point level. Opposer's sales information has been submitted under seal; we will discuss it, as far as possible, in our consideration of the factor of the fame of the mark. The target users of the game are boys ages 6-9, and the games are purchased by their mothers, although fathers and grandparents also buy them. In addition, there is a "collectible" market, involving both the original game made by Louis Marx and Company, action figures, and the licensed items that are no longer being sold.

With respect to advertising, in 2001, in conjunction with the introduction of its action figures, opposer did three versions of a television commercial which was run nationally. No further television commercials have been run; opposer considers them unnecessary because it claims that consumers do not have to be reminded about the brand on television. Opposer participates in co-op advertising with various retailers, who reference opposer's ROCK'EM SOCK'EM game in in-store and Sunday newspaper circulars. Opposer exhibits the game at six to eight trade shows a year; these include the two toy fairs that opposer itself puts on. Opposer also advertises the game in its catalogs; in addition, catalogs from 1988 through 1996 that were distributed by Tyco, opposer's predecessor-in-interest,

showed the game. See exhibits 20 through 34 to Hancock deposition.

The ROCK'EM SOCK'EM ROBOTS game and/or mark has also received mentions in magazine, newspaper and website articles. For example, opposer furnished the table game for the celebrity tent at the 2005 Nickelodeon Kids Choice awards, and a photograph, with caption, showing Jamie Foxx playing the game appeared in "People" magazine. Opposer also provided a special edition gold-plated ROCK'EM SOCK'EM ROBOTS game to be auctioned off at the Dream Halloween event to support Children Affected by AIDS.⁶ The original commercial for ROCK'EM SOCK'EM ROBOTS which was produced by Louis Marx and Company has been licensed to Comedy Central, and a few seconds of that commercial appeared on that network's Battlebots program, as part of a segment on the history of toy robots.

Opposer has received many requests for product placement of the game, for use as a prop on the set of television shows or movies. These programs include "Seinfeld," "That 70's Show" and "Roswell." In addition, the robots in the game were used as characters in the film "Charlie and the Chocolate Factory," and were animated characters in the film "Toy Story."

⁶ Opposer's witness did not indicate the date, but from the totality of the evidence it appears that it occurred some time between 2001 and 2004.

Applicant's evidence which is properly of record, through opposer's treating it of record, consists only of her game and its packaging and instructions. (Although applicant included argument in her notice of reliance, such argument is not evidence of the nature of the game or how the mark would be perceived.) Therefore, the information we have about applicant and her activities comes from the discovery that opposer has made of record. Essentially applicant intends to use her mark on a game that is directed to children. It is described as indicated in the identification of goods--a game where a labeled mat is placed on the ground or floor, participants position themselves on the mat and volley a sock back and forth from one half of the mat to the other half of the mat. Applicant has not made any sales nor has she identified potential channels of trade for the goods, except to say that she intends that the goods will be sold at retail throughout the United States. Her intention is to license the product to a toy company.

Opposer has demonstrated its standing by its registrations for ROCK'EM SOCK'EM ROBOTS and ROCK'EM SOCK'EM, as well as by the testimony showing its use of these marks. *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).

Because of opposer's registrations, priority is not in issue. King Candy Company v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

This brings us to the pleaded ground for opposition--likelihood of confusion. Our determination of this issue is based 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.*, supra. See also, *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003).

Opposer has asserted that its mark is famous, and therefore we turn first to a consideration of the factor of fame, because this factor plays a dominant role in cases featuring a famous or strong mark. *Kenner Parker Toys Inc. v. Rose Art Industries, Inc.*, 963 F.2d 350, 22 USPQ2d 1453 (Fed. Cir. 1992). We point out that we are concerned with the fame of the mark ROCK'EM SOCK'EM ROBOTS,⁷ not whether the actual game would be recognized because of its product configuration or trade dress. Thus, the fact that the table game has been used as a prop in the set designs of various television shows or motion pictures is not evidence that viewers have been exposed to the trademark. We do not have

⁷ Although in its brief opposer has characterized its marks as the ROCK'EM SOCK'EM marks, we have no evidence about use of ROCK'EM SOCK'EM per se that would demonstrate it is a famous mark.

either video or still shots of the game in these product placements from which we can ascertain that the viewer would be able to see the word mark on it. For the same reason, the fact that there have been movies with actors or animated characters that look like the robot figures, or there have been retail displays of such figures, is not evidence of fame of the word mark.

Normally we look to the volume of sales and advertising expenditures for the goods and services sold under the mark, and by the length of time those indicia of commercial awareness have been evident, in order to measure the fame of a mark. *Bose Corp. v. QSC Audio Products Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1309 (Fed. Cir. 2002). Here, the evidence shows that opposer's mark ROCK'EM SOCK'EM ROBOTS has been used for a considerable time--from at least 1967 until 1997, and again from 2001 to the date opposer presented its evidence in 2005. However, we have no information as to the extent of sales and advertising for virtually all of this period. We have sales figures only for the years 1995 through 1997, when the mark was owned by Tyco, and from 2001 through 2005, after opposer reintroduced the game. These figures are not sufficient for us to conclude that the mark is famous. We are hampered in our discussion of both the sales and advertising figures by the fact that they have been submitted under seal, and we do not

wish to divulge confidential information. Thus, we can say only that while there have been sales, and that since opposer has taken over the brand the sales have increased dramatically, they are not in the same range for other marks that have been found to be famous. Compare *Kenner Parker Toys Inc. v. Rose Art Industries Inc.*, supra at 22 USPQ2d 1453, 1455, in which the Court noted that, for another toy product, sales in a single year exceeded \$30 million, and PLAY-DOH toys comprised 60-70% of the modeling compound market. As for that company's advertising expenditures, the Court pointed out that the trademark owner spent over \$2 million that year in advertising and promotion for products with the PLAY-DOH mark. In this case, on the other hand, we have no information about advertising and promotion expenditures during the time opposer's predecessors owned the mark. Opposer's own expenditures between 2001 and 2005 were quite low, particularly when one considers that these figures include advertising for all of opposer's "classic" games. And these advertising expenditures were primarily for cooperative advertising done by retailers as in-store and Sunday newspaper circulars. Opposer ran nationally televised commercials only in 2001 to introduce its ROCK'EM SOCK'EM ROBOTS action figures, and because we have no information about how frequently the commercials were run we cannot gauge public exposure to them.

Opposer has made of record approximately 140 newspaper and magazine articles dated between 1991 and 2005 that were retrieved from a NEXIS database search. Some of these articles were retrieved from foreign publications or wire services, so we cannot determine what exposure consumers in the United States may have had to them. Others appear to be from trade magazines, and again we cannot determine whether the general public would have exposure to them. Still other exhibits are merely duplicate copies of a single article. However, even if we do not consider these articles, or give them limited probative value, there are still a substantial number of articles from U.S. newspapers that were made of record.

Although the search conducted by opposer retrieved a substantial number of articles which refer to ROCK'EM SOCK'EM ROBOTS, the mentions are merely passing references or asides, and are not likely to be particularly noticed or remarked on by readers of the articles. See, for example, Exhibit 65, an article in the April 1, 2004 "Los Angeles Times" about vintage t-shirts and those who buy them, and which includes a sentence, at the very end of the three-page article, referring to someone who wore vintage t-shirts in his 20s but later gave them all away: "he kept only one as a memento, a baby-soft, worn-out relic with an image of Rock'em, Sock'em Robots on the chest."

Some of the articles, although not specifically about opposer's game, mention ROCK'EM SOCK'EM ROBOTS as a game that people played in their youths. For example, Exhibit 98 is an article in the June 2, 2002 "Times-Picayune" (New Orleans) about Preservation Hall jazz hall, and the reminiscences of the manager of the hall about the musicians that played there. He is reported as saying that his earliest memories go back to Billie and DeeDee Pierce, and that at their house one Christmas they gave him and his brother "a boxing game, the Rock 'em Sock 'em Robots, two plastic figures that punched each other." Exhibit 109, a December 25 2001 article in the "New York Post" about various celebrities' Christmas memories, states that rap mogul Russell Simmons said that his brother, Run of Run DMC, gave him a Rock 'em Sock 'em Robot set, and they played with it every day for three years.

Other articles mention the ROCK'EM SOCK'EM ROBOTS as a game from the past. For example, Exhibit 10, an article in the June 24, 2005 "Seattle Times" about the Subaru B9 Tribeca SUV describes the B as standing for the boxer engine, "where facing cylinders seem to punch each other like the old Rock 'em Sock 'em Robots child's boxing toy." Exhibit 11, an article from the June 2, 2005 "San Gabriel Valley Tribune" (CA) about a classic toy store mentions "Rock em Sock em Robots that harken back to the 1960s."

These articles indicate that the ROCK'EM SOCK'EM ROBOTS game and mark have recognition for those who played the game in the past, but do not show that the mark is famous today. Simply put, people who have childhood memories of the game may remember the mark, and may buy the game for their own children as a result, but the evidence of how many of these adults played the game as a child is limited, since opposer has not made of record the sales figures for the game during those years. Current sales of ROCK'EM SOCK'EM ROBOTS products are presumably based on the nostalgia factor, with adults who knew the game now buying the products for the next generation. As we previously noted, Ms. Hancock stated that opposer has not done any television advertising for the game because the game is so well known that consumers do not have to be reminded about it on television. test., p. 67. The logical result of this, however, is that today's children do not themselves request the game because it has not been promoted to them. Nor can we conclude from the current sales figures that most parents are aware of the game.

As we have stated in previous decisions, in view of the extreme deference that is accorded to a famous mark in terms of the wide latitude of legal protection it receives, and the dominant role fame plays in the likelihood of confusion analysis, we think that it is the duty of a plaintiff

asserting that its mark is famous to clearly prove it. Blue Man Productions Inc. v. Tarmann, 75 USPQ2d 1811 (TTAB 2005). We find that opposer has failed to do so on this record.

However, while the evidence falls short of proving that ROCK'EM SOCK'EM ROBOTS is a famous mark as that concept has been interpreted under the case law on the issue of likelihood of confusion, the evidence is sufficient to show that ROCK'EM SOCK'EM ROBOTS is a strong mark. Although "sock" has a slang meaning of "to hit or strike forcefully, punch,"⁸ and "robots" is descriptive of the figures in the game, the entire phrase must be considered not only distinctive, but in view of the length of use and other evidence, a strong mark that is deserving of a broader scope of protection.⁹ In this connection, although we have found the sales figures not to reach the level that we normally expect for a mark to be considered famous, the sales are sufficient to demonstrate the strength of the mark.

⁸ The American Heritage Dictionary, 2d Coll. ed., © 1985. Opposer submitted this definition with its brief. The Board may take judicial notice of dictionary definitions. *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

⁹ During the oral hearing opposer's counsel was asked whether the phrase "rock'em sock'em" had a vernacular meaning. She responded that the use of this term derived from opposer's mark. There is nothing in the record to show such a derivation, but more importantly, we cannot conclude from the evidence in the record that "rock'em sock'em" has a vernacular meaning. For example, there is no dictionary evidence to show that this is a recognized term.

Moreover, the only evidence of third-party use consists of applicant's second amended answers to opposer's interrogatories, in which applicant lists certain third-party uses of "ROCK'EM or SOCK'EM or the phonetic equivalent of either, upon which Applicant intends to rely in this case." Interrogatory No. 31. Applicant listed, in response, ROCK'EM SOCK'EM HOCKEY, which she states to be a video about hockey; SOC 'EM (no indication of goods or services); SOCK'EM BOPPERS for "an inflatable toy in the nature of hand covers"; BLOCKEM-SOCKEM PADDLE BAT for a paddle ball game; SOCK'EM for clothing clips and stocking clips; and SOCKEM DOG for cafe and bar services.¹⁰

Applicant did not know the number of units sold or income generated for the goods and services, nor the geographic location of the sales or advertising. We cannot conclude from this information, or the lack of it, whether there has been actual use or, if so, significant exposure to such use, which would cause consumers to differentiate among various marks containing the element SOCK or variations thereof based on other portions of such marks.¹¹ Accordingly, we

¹⁰ We recognize the irony that it was opposer that submitted evidence potentially damaging to its case because it chose to make of record all of applicant's discovery responses.

¹¹ Opposer has also presented evidence that it has taken action against third-party users of various marks with the term SOCK in it, including those listed by applicant in her response to the interrogatory. This testimony and related exhibits were part of the testimony deposition that was submitted under seal, although it appears from some of the statements made by opposer's attorney during the deposition that not all of this portion of the

find that the factor of the strength of the mark ROCK'EM SOCK'EM ROBOTS favors opposer, although not to the extent that it would if the mark were a famous mark. In addition, the du Pont factor of third-party use favors opposer.

In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997). Therefore, we now turn to the du Pont factor of the similarity of the goods.

Two of the registrations opposer has made of record are for ROCK'EM SOCK'EM ROBOTS and ROCK'EM SOCK'EM, both for, inter alia, toy action figures, collectible toy figures, action games, board games, parlor games and role-playing games. Applicant's goods are identified as a "game where a labeled mat is placed on the ground or floor, participants

testimony was meant to be confidential. However, because it is not clear to us what parts are confidential and what parts are not, we will say only that opposer took prior action against some of the third parties that resulted in their ceasing use of the marks. Opposer has also written cease and desist letters to other third parties using marks which opposer considers to be infringing of its ROCK'EM SOCK'EM ROBOTS and ROCK'EM SOCK'EM marks. Some of the letters were written shortly before Ms. Hancock's testimony in September 2005, and we have no information about what was the result of those letters. However, we do not treat the statement in the letters--that opposer has learned that the party is using the particular mark--as evidence that the third-party use has resulted in significant exposure of the mark to the public.

position themselves on the mat and volley a sock back and forth from one half of the mat to the other half of the mat." Although applicant has identified her product with a great deal of detail, it would fall under the general terminology of an action game, and therefore is encompassed by the goods identified in opposer's registrations. Accordingly, applicant's goods must be deemed to be legally identical to opposer's goods. Moreover, because the goods are legally identical, they must be presumed to travel in the same channels of trade, and be sold to the same classes of consumers which, because they are action games, would include children as the users of the games, and the adults who would buy the games for them. These du Pont factors, thus, all favor opposer.

We next consider the marks, keeping in mind that when marks would appear on virtually identical goods or services, as they do here, the degree of similarity necessary to support a conclusion of likely confusion declines. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). Opposer's marks are ROCK'EM SOCK'EM ROBOTS and ROCK'EM SOCK'EM; applicant's mark is SOCK-UM. Obviously applicant's mark is identical in

pronunciation and connotation,¹² and virtually identical in appearance, to the SOCK'EM portion of opposer's mark.

As for the ROBOTS portion of opposer's mark, opposer points out that this disclaimed word is descriptive and therefore deserves less weight when the marks are compared in their entireties. We agree. Because ROBOTS describes the figures in opposer's game, it is obviously used when people refer to the figures or to the game. However, the question is whether people would view the absence of the word ROBOTS in an otherwise confusingly similar mark as indicating that those goods came from a separate source. We think, if the mark were used with a toy or game that did not involve robots, that consumers would assume that opposer had dropped the ROBOTS portion of its mark because it was not applicable to the toy or game at issue. Thus, if ROCK'EM SOCK'EM were used with a sock volleying game, the absence of the word ROBOTS would not be sufficient to differentiate the marks. Moreover, we point out that opposer owns a registration not only for the mark ROCK'EM SOCK'EM ROBOTS, but for ROCK'EM SOCK'EM as well.

Of course, we must also consider the effect of the term ROCK'EM in opposer's marks, and whether this element is

¹² We recognize that because applicant's game involves volleying a sock, the term "sock" in her mark has a double entendre; however, clearly one meaning of SOCK-UM connotes hitting or striking.

sufficient to differentiate opposer's marks from applicant's mark. Although ROCK'EM has a prominent position because it is the first word of the mark, it also has a suggestive connotation similar to SOCK'EM, as it suggests both the shaking motion of a "sock" and the effect of the striking motion of SOCK'EM, i.e., that one both rocks and socks one's opponent, and that one who is socked is rocked by the socking.¹³ Also, because ROCK'EM and SOCK'EM rhyme, the ROCK'EM portion of the mark would be viewed as intrinsically connected to SOCK'EM, and as reinforcing not just the meaning but also the sound and the appearance of SOCK'EM. Thus, although there are clear differences in the marks, they are outweighed by the similarities. Because of the reasons discussed above, consumers are likely to view SOCK-UM as a variation of the mark ROCK'EM SOCK'EM or ROCK'EM SOCK'EM ROBOTS when these marks are used on the same types of goods. Accordingly, although we acknowledge that this du Pont factor does not strongly favor opposer, it still does favor opposer to some extent.¹⁴

¹³ See the following definitions of "rock" taken from The American Heritage Dictionary of the English Language, 4th ed.

© 2000, of which we take judicial notice: "To cause to shake or sway violently"; "To sway violently, as from a blow or shock."

¹⁴ We note that in her three page trial brief applicant has said only that opposer has not submitted any evidence to show that confusion is likely, and that, with respect to the du Pont factor of the similarity of the marks, applicant has stated only that "in evaluating the similarities between marks, the emphasis must be on the recollection of the average purchaser who normally retains a general, rather than specific, impression of trademarks," brief, p. 2, a point that favors opposer's position.

The likelihood that consumers will confuse the marks is increased by the fact that, due to the nature of the products and their inexpensive price, the goods are a type that can be purchased on impulse and without a great deal of care. In this connection, we point out that the standard retail price for opposer's ROCK'EM SOCK'EM ROBOTS game is \$14.99. Applicant has not provided any information about the proposed retail price for her game, but in view of Ms. Hancock's testimony that \$14.99 is the price point in the industry for a skill and action game, we presume that applicant's game would sell at a similar price. Moreover, applicant's goods, as identified, must be presumed to include games in this price range. Accordingly, this du Pont factor favors opposer.

With respect to the related du Pont factors of evidence of actual confusion or length of time there has been use without instances of actual confusion, applicant has not begun selling the products under the mark, so not surprisingly, we have no evidence on either of these factors. We therefore treat them as neutral.

Opposer has argued that the number and different types of products and services for which its marks have been used also favor a finding of likelihood of confusion. This

Applicant has not presented any specific arguments as to why the differences in the marks are sufficient to prevent confusion.

du Pont factor generally comes into play to show that consumers are likely to believe that a plaintiff has expanded its line of goods, and therefore it has less relevance when the goods of the parties are legally identical, as they are here. However, we note that the mark ROCK'EM SOCK'EM ROBOTS has at various times been used for loungewear, pens, key chains, action figures, bobble figures and computer games, and that it and ROCK'EM SOCK'EM have been registered for a variety of goods and services. To the extent this factor is applicable, it favors opposer.

We also find that, since applicant's goods are a children's game that is intended to be sold to the general public, and is intended to be sold in retail stores in every state of the United States, amended response to interrogatory No. 4, the number of people that can potentially be confused is high, and this factor favors opposer.

Finally, opposer asserts that applicant adopted her mark with the intent to trade on opposer's goodwill in its ROCK'EM SOCK'EM marks. Opposer bases this argument on the fact that the packaging for applicant's prototype game uses similar colors to those in opposer's packaging, and that applicant uses a slogan, "It'll Knock Your Socks Off," which is similar to opposer's slogan, "Knock His Block Off." We are not persuaded by this argument. There is no evidence

that the primary colors used by the parties--red, yellow and blue--are so unique in the toy industry that we can say that applicant deliberately copied opposer's trade dress. In fact, while both parties' boxes contain these colors, yellow is the major color on opposer's box, and has a limited appearance on applicant's box, as the color of the shirt worn by one of the four children pictured thereon. Further, "knock the (or someone's) socks off" is a recognized slang phrase meaning "to overwhelm or amaze." See The American Heritage Dictionary of the English Language, 4th ed. © 2000. Given that applicant's game involves throwing socks, we see no ulterior motive in applicant's decision to use this slogan. Therefore, in reaching our decision on the issue of likelihood of confusion, we do not ascribe any bad intent to applicant in her adopting the mark.

We readily acknowledge that, because the marks are only somewhat similar, this is a close case. However, given the long use of opposer's mark and the respectable sales it has achieved, the fact that the goods are legally identical and are therefore presumed to be sold in the same channels of trade and to the same classes of purchasers, and the fact that the goods are inexpensive and are likely to be purchased on impulse and without a great deal of care or deliberation, we find that opposer has met its burden in demonstrating that applicant's use of SOCK-UM for her

identified children's game is likely to cause confusion. We add that, to the extent that there is any doubt on the issue of likelihood of confusion, we follow the well-established principle that such doubt must be resolved in favor of opposer as the registrant and prior user. *United Merchants & Manufacturers, Inc. v. R.A. Products, Inc.*, 404 F.2d 399, 159 USPQ 714 (CCPA 1968); *Interstate Brands Corp. v. McKee Foods Corp.*, 53 USPQ2d 1910 (TTAB 2000). However, we caution that, in reaching our determination that confusion is likely, we certainly do not mean to suggest that opposer is entitled to exclusive rights to the term SOCK'EM in all instances, only that opposer is entitled to judgment under the particular facts of this case.

Decision: The opposition is sustained.