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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Hasbro, Inc.

v.

Braintrust Games, Inc.

Opposition No. 91169603
to Application No. 78448790
filed July 9, 2004

Kim J. Landsman of Patterson Belknap Webb & Tyler LLP for
opposer.

Julie C. Jennings of Senniger Powers, LLP, for applicant.

**Before Walters, Drost, and Mermelstein, Administrative
Trademark Judges.**

Opinion by Mermelstein, Administrative Trademark Judge:

Applicant seeks registration of the mark NO FRIGGIN
CLUE (in standard characters) for

Computer telecommunication software for use in
accessing global computer networks for the purpose
of playing games; video game software; video game
cassettes; video game discs; video game machines
for use with televisions; computer software
featuring trivia and knowledge-based games

in International Class 9, and for

Entertainment services, namely, providing online
computer games; providing games that may be
downloaded from a global computer network; online
betting services,

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in International Class 41.¹

Opposer Hasbro, Inc. filed an opposition to registration. By its amended notice of opposition, opposer alleges priority and a likelihood of confusion with its previously used CLUE mark and the marks in five trademark registrations all comprising the term CLUE. Trademark Act § 2(d); 15 U.S.C. § 1052(d). Opposer also alleges that registration of applicant's mark would be "likely to dilute the distinctive quality of Opposer's famous mark," Trademark Act § 43(c); 15 U.S.C. § 1125(c), and that registration is "contrary to the provisions of [Trademark Act § 2(a);] 15 U.S.C. § 1052(a)."² Finally, opposer alleges that registration is barred by an allegedly fraudulent statement made during prosecution of the subject application.³

By its answer, applicant denied the salient allegations of the notice of opposition.

We sustain the opposition.

¹ Alleging a *bona fide* intent to use the mark in commerce pursuant to Trademark Act § 44(e); 15 U.S.C. § 1126(e) (based on Canadian Reg. No. TMA643,831), and claiming priority as of May 6, 2004, pursuant to Trademark Act § 44(d); 15 U.S.C. § 1126(d).

² Opposer did not discuss in its brief its allegations under Trademark Act § 2(a), and we accordingly consider this claim abandoned.

³ Specifically, opposer alleges that applicant fraudulently informed the USPTO that it had "a bona fide and effective commercial establishment in Canada, as applicant operates a business office and engages employees in Canada." Response to Office Action at 2 (Aug. 11, 2005).

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I. Record

Pursuant to Trademark Rule 2.122(b), the record in this case includes the pleadings and the file of applicant's subject application. In addition, the record includes the following items:

- Testimonial deposition of Matthew Collins, Vice-President of U.S. Marketing for opposer;
- Testimonial deposition of Rachel Hoagland, Senior Director of Digital Media and Gaming for opposer;
- Opposer's notice of reliance, filed July 23, 2008, including opposer's registrations, dictionary definitions, applicant's responses to interrogatories, and excerpts from the discovery depositions of Christopher Wright and Scott McKenna;
- Testimonial deposition of Christopher Wright, President of defendant;
- Testimonial deposition of Scott McKenna, Vice-President of defendant;
- Defendant's notice of reliance, filed September 23, 2008, including opposer's responses to interrogatories, documents produced by opposer, excerpts from the discovery deposition of Matthew Collins, applicant's Canadian Registration No. TMA643,831, seven third party applications and registrations incorporating the word CLUE, dictionary definitions, and excerpts from the discovery depositions of Christopher Wright and Scott McKenna introduced to provide context to the excerpts introduced by opposer.

Among other items submitted with opposer's notice of reliance were title and status copies, prepared by the USPTO, of the following trademark registrations:⁴

⁴ With respect to each listed registration, appropriate filings have been made under Trademark Act §§ 8, 9, and 15.

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Reg. No.	Mark	Goods/class	Reg. Date
0526059	CLUE	Equipment for use in playing board game. Int'l Class 28	Jun. 6, 1950
1644488 ⁵	CLUE THE CLASSIC DETECTIVE GAME and board design	Board games. Int'l Class 28	May 23, 1989
1915192	CLUE	Computer game software and video game software. Int'l Class 28	Aug. 29, 1995
2044400	CLUE	Interactive mystery storybooks. Int'l Class 16	Mar. 11, 1997

II. Analysis

A. Standing and Priority

Opposer made four of its pleaded registrations of record, establishing 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 Indus., 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 with respect to opposer's likelihood of confusion claims. *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

Opposer also submitted a title and status copy of pleaded Registration No. 2093295, of the mark CLUE for "entertainment services in the nature of live theater productions." However, this registration was cancelled and expired on June 6, 2009, pursuant to Trademark Act §§ 8 and 9, and we accordingly give it no further consideration.

⁵ Registered pursuant to Trademark Act § 2(f). Registrant has disclaimed the exclusive right to use "detective game" and "the overall shape of the game board apart from the mark as shown."

B. Likelihood of Confusion

Our determination under Trademark Act § 2(d) is based on an analysis of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. See *In re E.I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *Palm Bay Imp., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997). In considering the evidence of record on these factors, we keep in mind that “[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks.” *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); *In re Azteca Rest. Enters., Inc.*, 50 USPQ2d 1209 (TTAB 1999).

1. The Fame of the Prior Mark - Sales, Advertising, Length of Use

We begin our likelihood of confusion analysis with the fifth du Pont factor, which requires us to consider evidence of the fame of opposer’s CLUE marks. Fame, when established, is entitled to great weight in a likelihood of confusion analysis. See *Bose Corp. v. QSC Audio Products*

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Inc., 293 F.3d 1367, 63 USPQ2d 1303 (Fed. Cir. 2002); *Recot Inc. v. Becton*, 214 F.3d 1322, 54 F.2d 1894 (Fed. Cir. 2000); *Kenner Parker Toys, Inc. v. Rose Art Indus., Inc.*, 963 F.2d 350, 22 USPQ2d 1453 (Fed. Cir. 1992).

Fame of an opposer's mark or marks, if it exists, plays a "dominant role in the process of balancing the DuPont factors," *Recot*, 214 F.3d at 1327, 54 USPQ2d at 1456, and "[f]amous marks thus enjoy a wide latitude of legal protection." *Id.* This is true as famous marks are more likely to be remembered and associated in the public mind than a weaker mark, and are thus more attractive as targets for would-be copyists. *Id.* Indeed, "[a] strong mark ... casts a long shadow which competitors must avoid." *Kenner Parker Toys*, 963 F.2d at 353, 22 USPQ2d at 1456. A famous mark is one "with extensive public recognition and renown." *Id.*

Bose Corp., 63 USPQ2d at 1305.

Opposer makes a number of arguments bearing on the fame of its CLUE brand, including its history and length of use, the marketing of CLUE-branded products, and the success of the brand in the marketplace. See Opp. Br. at 2-10.

Opposer's "classic" CLUE product is a board game in which the players compete to solve the mystery of a murder committed by one of six suspects, in one of nine rooms, with one of six weapons. The game was invented in Britain in 1948 by Anthony Pratt, and was first licensed to be sold in the United States by opposer's predecessor in 1949. In the

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ensuing sixty years, opposer has sold a substantial number of units of its classic game.⁶ Collins Test. at 9.

In addition to the classic game, opposer and its predecessors have published or licensed a number of variations of the game aimed at specific audiences, such as the HARRY POTTER EDITION, the SCOOBY-DOO! WHERE ARE YOU? EDITION, THE HAUNTED MANSION EDITION, THE SIMPSONS EDITION, CLUE JR. THE CASE OF THE MISSING CHOCOLATE CAKE, and CLUE FX. *Id.* at 24-31. Opposer provided its sales figures for the years 2000-2005 for its various CLUE games, which were again quite substantial. Collins Test. 46, exh. 17. In addition to traditional board games, CLUE games have been published in a number of electronic formats for a variety of computer and electronic game platforms since as early as 1982. *Id.* at 9. A series of 18 mystery books based on the game concept was published by Scholastic Books, and both a motion picture and a Broadway musical based on the game have been produced under license from opposer or its predecessors. *Id.* at 9-10. Opposer has also licensed its CLUE mark for use on ancillary goods such as greeting cards, lottery tickets, key chains, clothing, casino games, and card games. Collins Test. at 38-39.

⁶ Opposer's sales and advertising figures were submitted under seal pursuant to a protective order, so we will refer to them only in general terms.

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Opposer has also invested considerable resources into promotion of its CLUE brand. Mr. Collins testified that that in the period 2000-2008, opposer spent substantial amounts on television advertising and other promotions. Collins Test. at 50-52. Opposer's efforts have resulted in recognition in national media such as the New York Times, and various other newspapers and magazines, particularly in recognition of the fiftieth anniversary of the game in 1999. Collins Test. at 54-57.⁷

In response to opposer's evidence of sales and advertising levels, applicant points out that "[o]pposer has not introduced any evidence to explain the significance of its sales and advertising figures, or any evidence to show how its sales and advertising figures measure up to its competitor's figures." App. Br. at 7. Applicant's point is valid. It is the burden of the party offering evidence of fame to provide a meaningful context for its figures, such as evidence of the market share for the goods sold under the mark. As the Federal Circuit has stated, "[r]aw numbers of product sales and advertising expenses may have sufficed in the past to prove fame of a mark, but raw numbers alone in today's world may be misleading.... Consequently, some

⁷ In support of its argument that its CLUE marks are famous, opposer also relies on certain other documents submitted under seal, and related testimony. See Collins Test. exh. 21-23. Applicant objects to consideration of this evidence for reasons

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context in which to place raw statistics is reasonable.”

Bose Corp. v. QSC Audio Prods., 293 F.3d 1367, 63 USPQ2d 1303, 1309 (Fed. Cir. 2002).

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, it is the duty of a plaintiff asserting that its marks are famous to clearly prove it. *Leading Jewelers Guild Inc. v. LJOW Holdings LLC*, 82 USPQ2d 1901, 1904 (TTAB 2007). We cannot say that opposer has met its burden on this record.⁸ Nonetheless, we would clearly be mistaken in dismissing out of hand opposer’s long use of its CLUE marks, its diversification of the brand on a variety of game-related and other products, and opposer’s very substantial sales and advertising figures (albeit without market context).

set out in its brief. App. Br. at 7. We sustain applicant’s objections; this material has not been considered.

⁸ Opposer points out that in two previous, non-precedential decisions (in 1999 and 2002), the Board found opposer’s CLUE mark to be famous. Reply Br. at 5. Fame is a factual matter which must be established on the record in each proceeding. Whether the record in opposer’s previous proceedings was sufficient to establish its fame eight and ten years ago is not relevant to whether the record in this proceeding is sufficient to establish fame now. “[I]t is well settled that a decision in a prior case is incompetent as proof of any fact recited therein as against one who was not a party thereto.” *Chicken Delight, Inc. v. Delight Wholesale Co.*, 193 USPQ 175, 177 (TTAB 1976), citing *Aloe Creme Labs., Inc. v. Bonne Bell, Inc.*, 168 USPQ 246 (TTAB, 1970). Moreover, the record in this case is likely different than that in the prior proceedings. We note in particular that we have sustained applicant’s objection in this case to significant evidence proffered by opposer on this issue. See supra note 7.

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We conclude that while we do not find opposer's mark to be famous on this record, it nonetheless is a well-known and strong mark, and enjoys considerable renown, a factor which significantly supports a finding of likelihood of confusion, and entitles the mark to an enhanced scope of protection.

2. The Similarity or Dissimilarity and Nature of the Goods or Services

The goods in the subject application are set out as follows:

Computer telecommunication software for use in accessing global computer networks for the purpose of playing games; video game software; video game cassettes; video game discs; video game machines for use with televisions; computer software featuring trivia and knowledge-based games

in International Class 9, and for

Entertainment services, namely, providing online computer games; providing games that may be downloaded from a global computer network; online betting services,

in International Class 41.

The goods in the cited registrations are "interactive mystery storybooks," in International Class 16 ('400 Registration); equipment for use in playing [a] board game ('059 Registration); board games ('488 Registration); and computer game software and video game software ('192 Registration), in International Class 28.

The subject application is based on applicant's stated intent to use the mark on the goods and services identified in the application. Nonetheless, it is apparent that

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applicant is currently using the mark in connection with an "online trivia game. Applicant's online trivia game is a real-time, interactive game that allows players to answer multiple-choice trivia questions in a number of subject categories. Players use their personal knowledge or guess at the correct answers." App. Br. at 3, citing Wright Test. at 17, 63. Applicant's game is available on applicant's website. Wright Test. at 12-14. Applicant argues that its trivia and knowledge-based games "are unrelated to opposer's board games and related goods." App. Br. at 19.

Contrary to applicant's contention, we find that applicant's goods are in part identical with and otherwise related to those identified in the cited registrations. Applicant's "video game software" and "computer software featuring trivia and knowledge-based games" are legally identical to the "computer game software and video game software" identified in the '192 Registration.

Despite the wording of the subject application and opposer's registrations, applicant argues that its games are trivia-related, and that opposer's CLUE games are not trivia games. App. Br. at 19-20. While factually correct, applicant's analysis misses the mark:

The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular

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channels of trade or the class of purchasers to which sales of the goods are directed.

Octocom Sys. Inc. v. Houston Computers Servs. Inc., 918 F2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) (citations omitted). Likewise, an applicant may not restrict the scope of the goods covered in the cited registration by argument or extrinsic evidence. *In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986). In other words, when we are considering a claim of likelihood of confusion as between an application and a cited registration, our analysis is limited to the goods or services as set out in the respective application and registrations.⁹ Evidence showing the more specific actual nature of the parties' goods or services will not be considered to limit the language of the application or registration.

In this case, while applicant's "computer software" is limited to that "featuring trivia and knowledge-based games," opposer's "computer game software" ('192 Registration) is not limited by subject matter. We must

⁹ Applicant's argument to the contrary, App. Br. at 20, relying on *du Pont* (requiring consideration of "the similarity or dissimilarity and nature of the goods or services as described in an application or registration *or in connection with which a prior mark is in use*" (emphasis added)), is erroneous. Consideration of the goods or services "in connection with which a prior mark is in use" only applies to the *opposer's* goods or services, and then only to the extent the opposer is relying on common-law rights, and not a registration. While opposer here has provided evidence of its actual use of the pleaded marks on a variety of goods, we find it unnecessary to consider such common-law rights because opposer's registrations are sufficient to resolve this matter.

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thus consider the cited registration to cover all computer game software, and not merely the specific kinds of software that opposer currently markets under its registered CLUE trademark. Applicant's "computer game software featuring trivia and knowledge-based games" is thus encompassed by opposer's more general "computer game software," and to that extent, they are legally identical. As noted, applicant's "video game software" is not limited by subject matter and by the same analysis is therefore identical to the "video game software" recited in the '192 Registration.

While we focus here primarily on the identical goods in the subject application and the '192 Registration, we also find that - at a minimum - applicant's "video game cassettes [and] video game disks" are related to the goods in opposer's '192 Registration because they could feature identical video games. Further, opposer's "equipment for use in playing [a] board game" ('059 Registration) and "board games" ('488 Registration) are both registered without limitation to a particular subject matter or a type of game. Such goods thus encompass "trivia and knowledge-based" board games, which are clearly related to applicant's similar computer- or electronic-based games. Finally, for the same reasons, we find that applicant's International Class 41 services "providing online computer games [and] providing games that may be downloaded from a global

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computer network" are closely related to opposer's computer game software, and to opposer's board games.

We thus conclude that applicant's goods are in part identical to and in part closely related to the goods set out in opposer's pleaded registrations, a factor which strongly supports a finding of a likelihood of confusion.

3. Similarity or Dissimilarity of Trade Channels.

Applicant argues that its channels of trade are distinct from those of opposer. App. Br. at 21-22. We disagree. As with our analysis of the parties' goods and services, we are not concerned here with the actual channels of trade of applicant and opposer; rather, we must consider the normal channels of trade for the goods and services identified in the subject application and the pleaded registrations.

As previously noted, the goods in the subject application are in part identical to those in opposer's pleaded '192 Registration. Because the goods are identical, we must assume that the purchasers and channels of trade for such goods are also identical. *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 clothing items could be offered and sold to the same classes of purchasers

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through the same channels of trade"); *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994) ("Because the goods are legally identical, they must be presumed to travel in the same channels of trade, and be sold to the same class of purchasers").

This factor further supports a finding of a likelihood of confusion.

4. The Similarity or Dissimilarity of the Marks

In a likelihood of confusion analysis, we compare the marks for similarities and dissimilarities in appearance, sound, connotation and commercial impression. *Palm Bay*, 73 USPQ2d at 1692. "[T]he 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 so that confusion as to the source of the goods offered under the respective marks is likely to result." *H.D. Lee Co. v. Maidenform Inc.*, 87 USPQ2d 1715, 1727 (TTAB 2008).

In this case, while analyzing the parties' marks, we keep in mind that when marks are used on identical goods, the marks do not have to be as similar, to support a conclusion that confusion among consumers is likely, as they would have to be if the goods were different. *See Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700-01 (Fed. Cir. 1992) ("When marks would

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appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines.").

As noted above, opposer has submitted evidence of its ownership of four registrations. The mark in the '059, '192, and '400 Registrations is CLUE, in "typed" characters, *i.e.* without regard to any particular stylization.¹⁰ The word "CLUE" thus comprises the entirety of three of opposer's pleaded registrations.

On the other hand, the mark in the subject application is NO FRIGGIN CLUE, likewise without regard to any particular stylization. Applicant argues that its mark is "a phrase from popular culture, and is thus distinct from [o]pposer's single word mark." App. Br. at 15. In particular, applicant contends that its mark

means emphatically "I don't know." The word "frigging" means "used for emphasis, esp. to express anger, annoyance, contempt, or surprise." The colloquial phrase "not to have a clue" is defined as, "to have no idea, not to know." Thus Applicant's mark NO FRIGGIN CLUE means "I don't know," with emphasis.

Id. (citations omitted). Applicant argues that NO FRIGGIN CLUE and CLUE "have opposite connotations, which must serve

¹⁰ While the mark in the '488 Registration prominently includes the term CLUE, we focus here on opposer's other three registrations, as they consist of the typed mark CLUE without any additional matter, and are thus most similar to applicant's mark.

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to distinguish them in the minds of consumers." App. Br. at 16.

In the context of the goods at issue here, the term CLUE bears the same connotation, *i.e.*, "that which points the way, or puts one on the track of a discovery; a key." App. Not. of Reliance, exh. M. With respect to games in general and both applicant's and opposer's games in particular, a "clue" is something which points the way to the correct answer. In the case of applicant's game, that would be the correct answer to the trivia question at hand. In the case of opposer's games, a "clue" is an aid to solving the mystery at hand. In other words, the term CLUE and its concept are central to both of the parties' goods. Here, while both parties' use of the term CLUE is somewhat suggestive, both marks use the term to suggest the same thing.

We agree with applicant that its mark is a phrase which should not be dissected, and we accordingly consider applicant's mark as a whole. Nonetheless, it is obvious that applicant's mark incorporates opposer's previously-registered and well-known CLUE mark in its entirety. Despite the fact that applicant's mark has an overall meaning that is somewhat different than opposer's, we think that this similarity would not be lost on consumers viewing the respective marks on identical goods (as we must construe

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them to be in this case), particularly in light of the renown of opposer's mark. While not an especially strong similarity, we thus find that applicant's mark and opposer's share some similarity in their appearance and sound. See *In re Mack*, 197 USPQ 755 (TTAB 1977) ("It is ... well settled that similarity in any one of the elements of sound, appearance or meaning is sufficient to indicate likelihood of confusion.").

While the marks are clearly not identical, we find that applicant's mark and opposer's mark are similar in appearance and sound to the extent that they both comprise the term CLUE. This factor lends some support to a finding of likelihood of confusion.

5. Third Party Use or Registration of CLUE Marks

Applicant points to the registration and use of CLUE-formative marks by third parties, claiming that this evidence indicates that applicant's mark "can, and does, co-exist with Opposer's mark without any likelihood of confusion." App. Br. at 24. Applicant admits that this argument is "perhaps not given much weight," *id.*, and we agree that it is entitled to very little weight indeed. In support of this point, applicant points to evidence submitted with its motion for summary judgment and several

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third party applications and registrations.¹¹ Applicant's summary judgment evidence is not part of the record at trial, see *Levi Strauss & Co. v. R. Josephs Sportswear Inc.*, 28 USPQ2d 1464, 1465 n.2 (TTAB 1993) (material submitted on summary judgment not part of trial record); Order (denying summary judgment) at 11, n.3 (May 6, 2008).

Applicant introduced evidence of the seven third-party registrations and applications including the term CLUE. App. Not. of Reliance Exh. E-K. Of these, two registrations have been cancelled and two applications abandoned, leaving three registrations, two of which are owned by a common entity. Applicant argues that there are no instances of confusion with respect to these marks. App. Br. at 23-24.

At the outset, we note that two of the three active registrations¹² are for services different than the goods and services at issue in this case, namely a television game show and "electronic bulletin boards and chat rooms for transmission of messages ... concerning game shows."

While the remaining registration¹³ is for computer and electronic game software and equipment in various formats, its existence provides little support for applicant's case.

¹¹ Applicant also relies on evidence submitted under seal in support of its argument. App. Not. of Reliance, exh. B. Opposer objects to consideration of this evidence. Opp. Br. at 30-31. We agree with opposer that this evidence is inadmissible.

¹² Reg. Nos. 2523363 and 2537222, both for the mark CLUED IN.

¹³ Reg. No. 2721726 of the mark BLUE'S CLUES.

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Third-party registrations are entitled to very little weight on the question of likelihood of confusion. Such registrations do not prove that the registered marks are in use or the extent of any such use in the marketplace. Even the registration of arguably confusing marks does not give applicant the right to register another confusing mark. *AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403; 177 USPQ 268, 269 (CCPA 1973); *Nat'l Aeronautics and Space Admin. v. Record Chem. Co. Inc.*, 185 USPQ 563, 567 (TTAB 1975).

While we recognize the existence of these registrations, we must conclude that they do not significantly help applicant's case.

6. Lack of Actual Confusion

Finally, applicant argues that it has been using its mark in connection with its online trivia game "since approximately July 2004," and that there have been no reported instances of actual confusion. App. Br. at 25. Applicant argues that "[t]his factor should weigh slightly against any likelihood of confusion." *Id.*

The issue before us is the *likelihood* of confusion, not actual confusion. *Herbko Int'l Inc. v. Kappa Books Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002) (actual confusion not required). While evidence of actual confusion is highly probative of this issue, its absence is not, unless it is accompanied by evidence demonstrating that in

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light of the parties' actual business activities, confusion, if likely, would have occurred. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1847 (Fed. Cir. 2000).

We agree with opposer that on this record, evidence of applicant's actual use of its mark is minimal. Reply Br. at 14. Applicant admitted that it has fewer than 1000 registered users for its downloadable trivia game. Wright Test. at 51-52. While applicant has engaged in some online advertising¹⁴ and promotion in conjunction with a different product, the impact of such activities on relevant consumers is uncertain, at best.

We are not able to conclude from this evidence that there has been a significant actual market interface between opposer's products and applicant's such that confusion - if likely - would have already occurred. Under the facts of this case, we conclude that the absence of instances of actual confusion is entitled to no weight in assessing whether confusion is likely. We thus find that this factor is neutral in our analysis.

C. Dilution and Fraud

In light of our finding on the issue of likelihood of

¹⁴ Applicant has placed advertisements with Google.com, but applicant was not able to explain "how it all works." Wright Test. at 50. We cannot tell from the record how often applicant's advertisement was displayed by Google or how many potential (U.S.) customers were exposed to it.

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confusion, we find it unnecessary to reach the issues of dilution and fraud.

III. Conclusion

We have carefully considered all of the evidence pertaining to the relevant *du Pont* factors, as well as all of the parties' arguments with respect thereto, including any evidence and arguments not specifically discussed in this opinion.

We have found that applicant's goods and services are partly identical and otherwise related to the goods set out in opposer's pleaded registrations, and that they share common channels of trade and prospective purchasers. We have also found the marks at issue to be somewhat, although not strongly, similar. We are further mindful of opposer's long use of its well-known mark and the substantial sales and advertising figures opposer has made of record. While such use does not rise to the level of fame (on this record), we nonetheless find it to be a substantial factor in opposer's favor.

On balance, we conclude that applicant's mark, used on or in connection with its identified goods and services, gives rise to a likelihood of confusion with opposer's previously-registered CLUE marks. This is admittedly a close case. Nonetheless, to the extent we have any doubt, we must resolve that doubt in favor of opposer, the prior

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registrant. See *Hard Rock Cafe Int'l (USA) Inc. v. Elsea*, 56 USPQ2d 1504, 1514 (TTAB 2000); *W.R. Grace & Co. v. Herbert J. Meyer Indus., Inc.*, 190 USPQ 308, 311 (TTAB 1976).

Decision: The opposition is SUSTAINED, and registration to applicant is refused.