

This Opinion is not a
Precedent of the TTAB

Mailed: April 22, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Favorit Czechoslovakia s.r.o.
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Serial No. 79133133
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John Alunit of Alunit IP,
for Favorit Czechoslovakia s.r.o.

Katherine Stoides, Trademark Examining Attorney, Law Office 101,
Ronald R. Sussman, Managing Attorney.

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Before Wellington, Shaw and Kuczma,
Administrative Trademark Judges.

Opinion by Shaw, Administrative Trademark Judge:

Favorit Czechoslovakia s.r.o. (“Applicant”) seeks registration on the Principal
Register of the stylized mark

for:

bicycles, namely road bikes, mountain bikes, cross bikes,
trekking bikes, racing bikes, sports bikes, freestyle bikes,

children's bikes, and construction bikes; bicycle parts, namely frames, wheels, forks, handlebars, mudguards, saddles, seat posts, chains, gears, pedals, and rims for bicycle wheels; luggage nets for vehicles; handlebar attachments, namely bicycle mirrors, brakes, and bells; bicycle cranks, tyres, casings for pneumatic tires, inner tubes for bicycles, tubeless tyres for bicycles; repair equipment for inner tubes, namely, tire repair patches, adhesive rubber patches for repairing inner tubes, baskets adapted for bicycles, water bottle holders for bicycles, stands for bicycles, bicycle racks for vehicles, in International Class 12;

clothing, namely, shirts, pants, skirts; footwear; headgear, namely, hats and caps; clothing for cycling and cyclo-tourism, namely cycling trousers and shorts, t-shirts, jerseys, jackets, hats and scarves, cycling gloves, cycling raincoats, cycling shoes; clothing for skiing, namely, ski jackets and ski trousers; men's, women's and children's clothing, namely, blouses, dresses, suits, trousers, skirts, jackets, shirts, vests, coats, overcoats, raincoats, turtlenecks, sweaters, pullovers; bathing suits; shorts, t-shirts, sweatpants, track suits, sweatshirts; windproof clothing, namely, wind coats, wind jackets; sports jackets; men's, women's and children's underwear, namely, night wear, pyjamas, dressing gowns, overalls, bodies, namely lingerie, men's briefs, pants, boxer shorts, petticoats, panties, bras, brassieres, bustiers, corsets, garters, undershirts, singlets, chemises, slips, cotton and elastic t-shirts, leggings, knit leggings, socks, hosiery, tights; denim clothing, namely, denim jackets, denim pants; leather wear clothing, namely, leather jackets, leather pants; ties, neckties, bow ties, scarves, shawls, gloves, mittens, hats, caps, headbands, berets, visors, swimming caps, men's, women's and children's footwear, namely, home footwear, sports footwear, tennis shoes, high boots, wellington boots, moccasins, low shoes, slippers, loafers, mules, carpet slippers, sandals, ski footwear, snowboarding footwear, waterproof clothing, namely, wet suits, in International Class 25; and

playing cards; stationary exercise bicycles; sports training apparatus, namely portable stationary cycles and spring hand grips for bicycles; toy scooters; manually-operated exercise equipment for physical fitness purposes; body

building apparatus, body training apparatus, sports training apparatus, namely pitching machines, in International Class 28.¹

The description of the mark states: “The mark consists of the wording ‘FAVORIT’ in stylized font.” Color is not claimed as a feature of the mark.

Registration as to International Classes 12 and 28 has been refused under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark, when used on the identified goods, so resembles the mark FAVORITES, in standard characters for “mail order catalogs featuring jewelry, hardware, sporting goods, toys and games, food and home furnishings, namely, furniture, appliances, housewares, home accessories, domestics, textile goods, electrical appliances, and electronics,” in International Class 16, as to be likely to cause confusion, mistake or deception.²

When the refusal was made final, Applicant appealed and requested reconsideration. The Examining Attorney denied the request for reconsideration, and the appeal was resumed. We reverse the refusal to register.

Analysis

Our determination of the issue of likelihood of confusion is based on an analysis of all the probative facts in evidence relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). *See also, In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between

¹ Application Serial No. 79133133, based on International Reg. No. 1168046, issued January 17, 2013.

² Registration No. 2661941, issued December 17, 2002; renewed.

the goods and the similarities between the marks. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”). The *du Pont* factors about which there is evidence or argument are the similarity of the marks, the similarity of the goods, and the number and nature of similar marks in use in connection with similar goods.

A. The similarity or dissimilarity of the marks in their entirety in terms of appearance, sound, connotation and commercial impression

First, we consider the similarity of the marks. In comparing the marks we must consider their appearance, sound, connotation and commercial impression. *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). The emphasis of our analysis must be on the recollection of the average purchaser who normally retains a general, rather than specific, impression of trademarks. Although we consider the mark as a whole, “in articulating reasons for reaching a conclusion on the issue of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark. . . .” *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

The Examining Attorney first argues that the marks are “essentially phonetic equivalents and thus sound similar.”³ We agree. In terms of sound, both marks

³ Examining Attorney’s Br. at 7.

consist primarily of the word “favorite” with Applicant’s mark dropping the letter “e” and the cited mark appearing in plural form. The slight change in spelling to drop the letter “e” does not affect the pronunciation of Applicant’s mark, nor does Applicant argue otherwise. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1912 (Fed. Cir. 2012) (finding XCEED and X-SEED pronounced similarly); *Kabushiki Kaisha Hattori Seiko v. Satellite Int’l Ltd.*, 29 USPQ2d 1317, 1318-19 (TTAB 1991) (holding phonetically identical marks SAKO and SEIKO confusingly similar despite different spellings). Similarly, the fact that Registrant’s mark is in plural form does not create a significant difference in pronunciation of the marks. It is well established that marks consisting of the singular and plural forms of the same term are essentially the same mark. *See Weider Publ’ns, LLC v. D&D Beauty Care Co.*, 109 USPQ2d 1347, 1355 (TTAB 2014) (citing *Wilson v. Delaunay*, 245 F.2d 877, 114 USPQ 339, 341 (CCPA 1957) (Marks “consisting of the singular and plural forms of the same term are essentially the same mark.”)).

In appearance, the cited mark is depicted in standard characters and, therefore, may appear in any typeface including one similar to Applicant’s. *See Citigroup Inc. v. Capital City Bank Group Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1258-59 (Fed. Cir. 2011) (“[T]he registrant is entitled to depictions of the standard character mark regardless of font style, size, or color.”). In connotation and commercial impression, both marks convey the same commercial impression of one or more “favorite” things.

In sum, when we consider the marks in their entireties, we find them to be similar in terms of appearance, sound, connotation and commercial impression. This *du Pont* factor weighs in favor of a finding of a likelihood of confusion.

B. Similar marks in use in the marketplace

As part of a *du Pont* analysis, we must consider “[t]he number and nature of similar marks in use on similar goods.” *Du Pont*, 177 USPQ at 567. Applicant contends that “FAVORITES is a terribly weak mark” because of third-party use of the term in the marketplace and argues that the cited mark is therefore entitled to a narrow scope of protection.⁴ Applicant made of record twenty third-party registrations and websites showing registration and use of the terms “favorite” or “favorites” in connection with sporting goods, toys, games, and retail stores selling toys or bicycles. The evidence includes:⁵

- Registration No. 3144691 for the mark **TOUR FAVORITES** for “toys, games and playthings, namely, toy vehicles and accessories therefor;”
- Registration No. 4471578 for the mark **FAIRYTALE FAVORITES** for “dolls, doll clothing and doll accessories”;
- Registration No. 4402285 for the mark **SUKI SHUFU** (stylized), which translates to “**favorite housewife**” for “sporting goods, namely, bottle insulators in the nature of insulating sleeve holders for bottles” and yoga mats and accessories;
- Registration No. 4306663 for the mark **FUN FAVORITES** for “dolls, doll clothing and doll accessories;”
- Registration No. 3080992 for the mark **AMERICA'S FAVORITE TACKLEBOXES** for “fishing tackle organizers, namely, fishing tackle containers;”

⁴ Applicant’s Br. at 6.

⁵ Applicant’s Response of February 7, 2014. (Emphasis added). We have not considered web site excerpts which appear to be from foreign countries.

- Registration No. 3084586 for the mark **FAN FAVORITES** for “toys, games and playthings, namely, toy vehicles and accessories therefor;”
- Registration No. 3904907 for the mark **MY FAVORITE PLAYHOUSE** for a “cardboard playhouse;”
- Registration No. 3775904 for the mark **MY FAVORITE COUPLE** for “toys, games and playthings, namely, dolls, doll clothing and doll accessories;”
- Registration No. 3807850 for the mark **FAVORITE CLASS** for “toys, games and playthings, namely, dolls, doll clothing and doll accessories;”
- Registration No. 3671930 for the mark **AMERICAN FAVORITES** for “toys, games and playthings, namely, dolls, doll clothing and doll accessories;”
- **Myfavoritetoys.com** – A printout from a web site offering toys trains; and
- **Allprobikes.com** – A printout from the web site of a Simi Valley bicycle shop which bills itself as “**Simi Valley’s Favorite Bike Shop.**”

The Federal Circuit has stated that “evidence of third-party use of similar marks on similar goods ‘can show that customers have been educated to distinguish between different marks on the basis of minute distinctions.’” *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015), quoting *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015). Such evidence is “powerful on its face, even where the specific extent and impact of the usage has not been established.” *Jack Wolfskin*, 116 USPQ2d at 1136 (internal quotes omitted).

We find the evidence of third-party use to be sufficient to show that the term **FAVORITE** is weak as a source indicator for sporting goods and toys. That is, the word “favorite” may be considered laudatory, and therefore conceptually weak, inasmuch as “favorite” is defined as “a person or a thing that is liked more than

others.”⁶ *See also, In re Wileswood, Inc.*, 201 USPQ 400 (TTAB 1978) (holding AMERICA’S FAVORITE POPCORN! consists of merely laudatory words for unpopped popcorn). Accordingly, we agree with Applicant that the cited mark is entitled to a “comparatively narrower range of protection.” *Juice Generation*, 115 USPQ2d at 1674. This *du Pont* factor weighs against a finding of a likelihood of confusion.

C. The similarity of the goods and channels of trade

We next consider the similarity of the respective goods and the channels of trade. It is not necessary that the goods be identical or competitive, or even that they move in the same channels of trade, to support a finding of likelihood of confusion. Rather, it is sufficient that the goods are related in some manner, or that the circumstances surrounding their marketing are such that they would or could be encountered by the same persons in situations that would give rise, because of the similarity of the marks, to a mistaken belief that they originate from the same source or that there is an association or connection between the sources of the goods. *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009).

Furthermore, it is the Examining Attorney’s burden to establish that the involved goods are related to support a finding of likelihood of confusion. *See, e.g., In re White*

⁶ [Http://www.merriam-webster.com/dictionary/favorite](http://www.merriam-webster.com/dictionary/favorite). The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imps. Co.*, 213 USPQ 594, 596 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or have regular fixed editions.

Rock Distilleries Inc., 92 USPQ2d 1282, 1285 (TTAB 2009) (finding the Office had failed to establish that wine and vodka infused with caffeine are related goods). Evidence of relatedness may include news articles and/or evidence from computer databases showing that the relevant goods are used together or used by the same purchasers; advertisements showing that the relevant goods are advertised together or sold by the same manufacturer or dealer; and/or copies of prior use-based third-party registrations of marks listing both goods of the type identified in the Applicant's application and the cited registration. *See, e.g., In re Davia*, 110 USPQ2d 1810, 1817 (TTAB 2014).

Applicant's identification of goods recites a long list of bicycles, bicycle parts, games, toys, and cycling-related sporting goods. The cited registration recites "mail order catalogs featuring jewelry, hardware, sporting goods, toys and games, food and home furnishings, namely, furniture, appliances, housewares, home accessories, domestics, textile goods, electrical appliances, and electronics."

The Examining Attorney argues that mail order catalogs and goods featured therein are of a kind that may emanate from a single source under a single mark.⁷ To support the refusal, the Examining Attorney introduced ten third-party registrations purporting to show the relatedness of Applicant's goods and the goods in the cited registration.⁸ However, none of the third-party registrations show use of the same mark on mail order catalogs and cycling-related sporting goods or on toys and games.

⁷ Examining Attorney's Br. at 7.

⁸ Examining Attorney's Office Action of January 21, 2015.

In three of the registrations, namely Registration Nos. 3147726, 3029205, and 3212783, the catalogs in class 16 have been deleted from the registration. In six of the registrations, namely Registration Nos. 3528600, 3592894, 2782042, 2964985, 32521432, and 4315904, the registration does not include any goods in Applicant's classes: 12 and 28. Only one registration, namely Registration No. 3029206, includes both catalogs and sporting goods, but the sporting goods are all related to the game of golf, not cycling. In sum, the third-party registrations fail to show any connection between Applicant's goods and the goods in the cited registration.

Regarding channels of trade, the Examining Attorney argues that Applicant's goods fall within the broad wording "sporting goods" or "toys and games" in the cited registration and "are therefore closely related and are presumed to travel in the same channels of trade."⁹ We disagree. Although some of the goods identified in Registrant's mail order catalogs encompass items in the application, we cannot assume that the channels of trade for Applicant's cycling-related goods, toys, and games are the same as Registrant's catalogs. The goods in the cited registration are mail order catalogs, and thus, Registrant's channels of trade do not include, for example, retail stores, the channel of trade in which the Applicant's goods are likely to be sold. Nor can we assume that Applicant's goods would be sold through Registrant's catalog. Thus, we find that the Examining Attorney has not shown the channels of trade to be the same for Applicant's goods and the goods in the cited registration.

⁹ Examining Attorney's Br. at 8.

D. Conclusion

Considering all of the arguments and evidence of record as they pertain to the relevant *du Pont* factors, we find that although sporting goods and toys and games are found in Registrant's catalogs and might therefore travel through some of the same channels of trade, this alone does not show that consumers would consider the goods to emanate from the same source. Moreover, we find the shared term in the marks, "favorite," is so weak that consumers will look to distinguishing features in the marks and there would be no likelihood of confusion.

Decision: The refusal to register Applicant's mark under Section 2(d) of the Lanham Act is reversed.