

This Opinion is not a
Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re YG Entertainment Inc.

Serial No. 79975600

April L. Besl and Michael G. Frey of Dinsmore & Shohl LLP for YG Entertainment Inc.

Erin Z. Dyer, Trademark Examining Attorney, Law Office 103,
Stacy Wahlberg, Managing Attorney.

Before Zervas, Cataldo and Greenbaum,
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Applicant, YG Entertainment Inc., filed an application to register on the Principal

Register the mark **BABYMONSTERS** (in stylized form), identifying the following goods:

Toy animals; stuffed toys; stuffed dolls; dolls; dolls' clothes; accessories for dolls; action figure toys; toy sticks with glow-in-the-dark features; jigsaw puzzles; plush dolls; plastic character toys; toy figures; novelty toys, namely, sticks with luminous features for fans and for entertainment, novelty items,

in International Class 28.¹

The Trademark Examining Attorney refused registration of Applicant's mark as to the goods identified as "Toy animals; stuffed toys; stuffed dolls; dolls; dolls' clothes; accessories for dolls; plush dolls; plastic character toys; toy figures"² under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground of likelihood of confusion with the cited registered mark BABY MONSTERS, (in standard characters, "BABY" disclaimed), identifying, inter alia, the following goods:

Furniture; seats; high chairs for babies; beds, transportable beds, travel beds, children's beds, divans, wooden beds; cradles, bouncing cradles; cribs for babies; bassinets; moses baskets; changing tables; chests of drawers; lockers; dressers; dressing tables; standing desks; playpens; cupboards; storage and organization systems comprising shelves, footrests, steps, portable child seats, baby changing platforms, baby bouncer seats, travel beds with integrated changing top, dressers with integrated changing top; children's multi-functional furniture unit comprising a bassinet that may be converted into a crib, a bed or two chairs or a sofa; children's multi-functional furniture unit comprising a changing table for a baby that may be converted into a play table, a desk or an audio-visual stand or a bookshelf desk; children's multi-functional furniture unit comprising a bassinet that may be converted into a changing table or a play table; children's multi-functional furniture unit comprising a crib that may be converted into a sofa and/or children's bed and/or a changing table stand and/or a bassinet stand; fitted furniture coverings; bed rails; rails for chairs; straps specially adapted for beds

¹ Application Serial No. 79975600 is the child of parent application Serial No. 79280308, filed on January 10, 2020 under Section 66(a) of the Trademark Act, 15 U.S.C. § 1141h(a), seeking an extension of protection of International Reg. No. 1518394, issued on January 10, 2020. The application includes the following color statement: "Color is not claimed as a feature of the mark." Parent application Serial No. 79280308 identifies goods and services in Classes 9, 28 and 41 that are not subject to the refusal of registration.

² In her brief, the Examining Attorney "submits that the Section 2(d) refusal was withdrawn as to the following goods: 'action figure toys; toy sticks with glow-in-the-dark features; jigsaw puzzles; novelty toys, namely, sticks with luminous features for fans and entertainment, novelty items,' in International Class 028." 9 TTABVue 6; Examining Attorney's brief.

and chairs to secure them to walls and floors; back rests for chairs, not for medical use; cushion inserts for chairs, not for medical use; seat and back cushions for chairs; back supports for child chairs, not for medical use; wall storage shelves made of wood for hanging up portable child seats; mattresses and spring mattresses; pillows; cushions; bumper cushions; bed bases; wooden beds; bed rails; cushions for changing diapers on children; diaper changing mats; baby changing platforms; portable baby bath seats for use in bath tubs; fitted covers for high chairs; booster seats and fitted covers therefor; pillows used for cradling, supporting, propping and feeding babies not for medical or therapeutic purposes; furniture parts, namely, crib rail, fitted crib rail covers, crib bumpers, mats for playpens; storage and organization systems comprising, cupboards, baskets and clothes rods, sold as a unit; furniture parts, namely, floor legs for seats, chair leg extenders, chair leg adapters, trays for highchairs, table trays, protective mats for tables; crib bumpers,

in International Class 20.³

After the Trademark Examining Attorney made the refusal final, Applicant appealed to this Board.⁴ We affirm the refusal to register.

I. Evidentiary Matters

Applicant appended a significant amount of evidence to its brief.⁵ Applicant argues:

³ Registration No. 6004480 issued on the Principal Register on March 10, 2020. The cited registration also identifies goods in Class 12.

⁴ All citations to documents contained in the Trademark Status & Document Retrieval (TSDR) database are to the downloadable .pdf versions of the documents in the USPTO TSDR Case Viewer. *See, e.g., In re Peace Love World Live, LLC*, 127 USPQ2d 1400, 1402 n.4 (TTAB 2018). References to the briefs on appeal refer to the Board's TTABVUE docket system. Before the TTABVUE designation is the docket entry number; and after this designation are the page references, if applicable. *See, e.g., New Era Cap Co., Inc. v. Pro Era, LLC*, 2020 USPQ2d 10596, *2 n.1 (TTAB 2020).

⁵ 7 TTABVUE 25-363; Applicant's brief.

Applicant recognizes that these printouts have not previously been made of record, and therefore may appear to be untimely submitted for consideration. However, Applicant notes that the Examining Attorney did not submit complete printouts from the websites referenced in connection with the Office Actions issued in this matter, and therefore Applicant is merely supplementing those incomplete printouts with additional relevant information from the sites. Applicant proposes that the submission of these additional printouts from the websites is analogous to the submission of an entire article when the Examining Attorney has only submitted an excerpt thereof, a practice which is recognized as permissible. *See Trademark Trial and Appeal Board Manual of Procedure* § 1207.01; *cf. In re Bed & Breakfast Registry*, 229 USPQ 818, 820 (Fed. Cir. 1986) (stating that, if only a portion of an article is submitted, that portion is not thereby insulated from the context from whence it came).⁶

We disagree. Applicant submitted with its brief screenshots from four websites: skiphop.com; potterybarnkids.com; munchkin.com; and glucksteinhome.com. The Examining Attorney submitted evidence from skiphop.com with her February 17, 2021 non-final Office Action.⁷ Applicant did not submit any evidence with its April 17, 2021 Response to the non-final Office Action. The Examining Attorney submitted evidence from potterybarnkids.com with her October 26, 2021 final Office Action.⁸ Applicant did not submit evidence from skiphop.com or potterybarnkids.com with its April 22, 2022 Request for Reconsideration.⁹ The Examining Attorney submitted evidence from munchkin.com and glucksteinhome.com with her June 2, 2022 denial

⁶ 7 TTABVUE 15 n.1.

⁷ At 49-72.

⁸ At 59-77.

⁹ Applicant did submit webpage evidence from other websites with its Request for Reconsideration.

of Applicant's Request for Reconsideration.¹⁰ Applicant could have submitted evidence from skiphop.com and potterybarnkids.com with its responses to the Examining Attorney's Office Actions but did not. Applicant further could have submitted the evidence attached to its brief from all four websites with a written request to the Board to suspend the appeal and remand the application for further examination. *See* Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d). *See also* TBMP § 1207.02 and authorities cited therein. However, Applicant made no such request.

We find the facts of this case are analogous to those in *In re Psygnosis Ltd.*, 51 USPQ2d 1594, 1597-98 (TTAB 1999) (if, after appeal, an applicant attempts to submit a full printout of articles from the NEXIS database which were revealed in an examining attorney's search, but which were not introduced by the examining attorney, such articles are considered to be additional evidence and therefore untimely). The evidence Applicant submitted with its brief does not consist of entire articles supplementing excerpts submitted by the Examining Attorney, but rather new, additional evidence that Applicant could have introduced during prosecution or with a request for remand.

Trademark Rule 2.142(d) reads as follows:

The record in the application should be complete prior to the filing of an appeal. Evidence should not be filed with the Board after the filing of a notice of appeal. If the appellant or the examining attorney desires to introduce additional evidence after an appeal is filed, the appellant or the examining attorney should submit a request to the

¹⁰ At 7-50.

Board to suspend the appeal and to remand the application for further examination.

The evidence attached to Applicant's appeal brief was not introduced into the record during prosecution and is not timely. *See, e.g., In re James S. Fallon*, 2020 USPQ2d 11249, at *2 (TTAB 2020) (applicant's submission of a patent drawing with its appeal brief was untimely and therefore not considered); *see also* Trademark Trial and Appeal Board Manual of Procedure (TBMP) § 1207.01 and authorities cited therein. Accordingly, we give no further consideration to this evidence.

II. Likelihood of Confusion

We base our determination of likelihood of confusion under Trademark Act Section 2(d) on an analysis of all of the probative facts in evidence that are relevant to the factors enunciated in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) ("*DuPont*"), *cited in B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015); *see also In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1161-62 (Fed. Cir. 2019).

We have considered each *DuPont* factor for which there is evidence and argument. *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). *See also Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1800 (Fed. Cir. 2018) (quoting *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010) ("Not all of the *DuPont* factors are relevant to every case, and only factors of significance to the particular mark need be considered.")); *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1242 (TTAB 2015) ("While we have

considered each factor for which we have evidence, we focus our analysis on those factors we find to be relevant.”).

Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v. Cap. City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“the various evidentiary factors may play more or less weighty roles in any particular determination”).

Two key considerations are the similarities between the marks and the relatedness of the goods. *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.”); *In re FabFitFun, Inc.*, 127 USPQ2d 1670, 1672 (TTAB 2018).

A. The Marks

Under the first *DuPont* factor, we determine the similarity or dissimilarity of the marks in their entirety, taking into account their appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567; *Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014); *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (quoting *In re Davia*, 110 USPQ2d 1810, 1812

(TTAB 2014)); *accord Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”).

Applicant’s **BABYMONSTERS** mark is essentially identical to the registered BABY MONSTERS mark in appearance. The presence or absence of a space between the two words is an inconsequential difference that even if consumers noticed or remembered would not serve to distinguish these marks. *In re Iolo Technologies, LLC*, 95 USPQ2d 1498, 1499 (TTAB 2010) (finding ACTIVECARE and ACTIVE CARE are similar); *Giersch v. Scripps Networks Inc.*, 90 USPQ2d 1020, 1025 (TTAB 2009) (petitioner’s mark DESIGNED2SELL is phonetically identical to respondent’s mark DESIGNED TO SELL and “the spaces that respondent places between the words do not create a distinct commercial impression from petitioner’s presentation of his mark as one word.”); *Seaguard Corp. v. Seaward Int’l, Inc.*, 223 USPQ2d 48, 51 (TTAB 1984) (SEA GUARD and SEAGUARD are “essentially identical”); *In re Best Western Family Steak House, Inc.*, 222 USPQ 827, 827 (TTAB 1984) (“there can be little doubt that the marks [BEEFMASTER for restaurant services and BEEF MASTER for frankfurters and bologna] are practically identical and indeed applicant has not argued otherwise.”); *Stock Pot, Inc. v. Stockpot Rest., Inc.*, 220 USPQ 52, 54 (TTAB 1983), *aff’d* 737 F.2d 1576, 222 USPQ 665 (Fed. Cir. 1984) (“There is no question that the marks of the parties [STOCKPOT AND STOCK POT] are confusingly similar. The word marks are phonetically identical and visually

almost identical.”). The marks **BABYMONSTERS** and BABY MONSTERS also are identical in sound.

With regard to connotation, Applicant argues:

The goods offered under the cited registration include car seats, carriages, cribs, high chairs, changing tables, and other furniture. These are all goods that are used to care for small children. Thus, BABY MONSTERS, as set forth in the cited registration, has an obvious connotation in connection with these goods, namely, that the goods are used for babies that are lightheartedly referred to as or equated with “monsters.” The term BABY has also been disclaimed in the registration, which further cements the idea that the mark itself refers to children.

Applicant’s goods, however, include a variety of toys, including toy animals; stuffed toys; stuffed dolls; dolls; dolls’ clothes; accessories for dolls; plush dolls; plastic character toys; toy figures. A mark such as BABYMONSTERS would not be viewed as referring to the children who may play with these toys, but instead would more likely refer to the toys themselves. ... However, when considered with the fact that Applicant’s mark refers to an all-girl K-Pop group named BABYMONSTERS, it is logical to presume that the toys themselves would be modeled after the members of the group, and therefore that the connotation of the mark as used with these goods would be that of the musical group.¹¹

However, nothing in Applicant’s mark or identification of goods indicates that the **BABYMONSTERS** mark refers to an all-girl K-Pop musical group. In our determination of the similarity or dissimilarity of the marks, we must compare them as they appear in the drawing of the application and in the registration. We do not consider the manner in which Applicant or the registrant actually use their marks in the marketplace. *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1186 (TTAB

¹¹ 7 TTABVUE 12.

2018) (citing *In re i.am.symbolic, llc*, 866 F.3d 1315, 1324, 123 USPQ2d 1744, 1749 (Fed. Cir. 2017)). Nor is there any evidence that consumers will perceive **BABYMONSTERS** in the manner argued by Applicant. With its April 22, 2022 Request for Reconsideration, Applicant submitted evidence that it is recruiting, training and selecting members for a new musical group under the applied-for mark.¹² However, all of the record evidence indicates that at the time of briefing, the band remains in pre-debut status and has not yet performed.¹³ “[W]e must look to the likely consumer perception of the mark in connection with the identified goods, rather than applicant’s intended connotation.” *UMG Recordings, Inc. v. Mattel, Inc.*, 100 USPQ2d 1868, 1886 (TTAB 2011). On this record, despite Applicant’s apparent intentions, both marks connote babies that literally or figuratively are monsters in appearance, attitude or behavior. There is insufficient evidence that consumers will ascribe a meaning to Applicant’s **BABYMONSTERS** mark different from that of the registered mark BABY MONSTERS.

The marks consist of identical terms displayed in the same order. The only difference between the marks is an inconsequential space between the terms comprising the registered mark. Further, Applicant’s mark is presented with minimal stylization that does not create a separate commercial impression from BABY MONSTERS, which is registered in standard characters and may be presented

¹² At 22-69.

¹³ *Id.*

in any manner, including a font identical to that of Applicant's mark. Marks presented in standard characters are not limited to any particular depiction. The rights associated with a mark in standard characters reside in the wording and not in any particular display. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909-11 (Fed. Cir. 2012); *see also In re Cox Enterprises Inc.*, 82 USPQ2d 1040, 1044 (TTAB 2007).

We find the marks are nearly identical in appearance, identical in sound and meaning, and overall convey essentially identical commercial impressions. The first *DuPont* factor weighs heavily in favor of finding a likelihood of confusion.

B. The Goods and Channels of Trade

The second *DuPont* factor concerns the "similarity or dissimilarity and nature of the goods or services as described in an application or registration," *Stone Lion*, 110 USPQ2d at 1159; *Hewlett-Packard*, 281 F.3d 1261, 62 USPQ2d 1001, 1003 (Fed. Cir. 2002); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). "This factor considers whether 'the consuming public may perceive [the respective goods or services of the parties] as related enough to cause confusion about the source or origin of the goods and services.'" *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1086 (Fed. Cir. 2014) (quoting *Hewlett-Packard*, 62 USPQ2d at 1004).

In support of the refusal of registration, the Examining Attorney introduced into the record¹⁴ printouts from the following websites showing use of the same marks and trade names to identify the source of Applicant's toys and the baby products identified in the cited registration:

- Fisher-Price/Mattel;
- Infantino;
- Skip + Hop;
- Chicco;
- Aden + Anais;
- ErgoBaby;
- MacLaren;
- Pottery Barn Kids;
- Munchkin;
- Gluckstein/The Bay and
- Olliella.

This evidence establishes that these third parties offer toys of the type listed in Applicant's involved application, and the child and baby furniture and related items identified in the cited registration, under the same house marks or trademarks.

¹⁴ February 17, 2021 non-final Office Action at 11-72; October 6, 2021, 2021 final Office Action at 9-77; June 2, 2022 Denial of Request for Reconsideration at 7-60.

The Examining Attorney also introduced into the record¹⁵ copies of approximately twelve use-based, third-party registrations for marks identifying, inter alia, both children's furniture and toys. The following examples are illustrative:

Reg. No. 6058052 for the mark SUNVENO and design, identifying baby changing mats, cradles cots for babies, dolls, plush toys, stuffed toys; and

Reg. No. 5275134 for the mark MORE TIME TO SLEEP and design identifying baby furniture, namely, cribs and changing tables, stuffed animals baby multiple activity toys.

Although use-based, third-party registrations alone are not evidence that the marks shown therein are in use or that the public is familiar with them, they nonetheless have some probative value to the extent they serve to suggest that the goods are of a kind that emanate from a single source. *See In re Infinity Broad. Corp.*, 60 USPQ2d 1214, 1217-18 (TTAB 2001); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988). In this case, the totality of the website and third-party registration evidence demonstrates that consumers would readily expect that child and infant furniture and toys would emanate from a common source.

Applicant argues: "These goods are not the same. Nor do toys encompass car seats or baby furniture. Indeed, not even the categories of car seats or baby furniture include toys."¹⁶ Applicant's arguments regarding the differences between the goods

¹⁵ February 17, 2021 non-final Office Action at 73-8; October 6, 2021, 2021 final Office Action at 78-116.

¹⁶ 7 TTABVUE 13.

are inapposite. It is not necessary for us to find that the goods have the same functions, address the same consumer needs, or are even competitive to find a likelihood of confusion. *See, e.g., On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 1086, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000). They need only be “related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that [the goods and/or services] emanate from the same source.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)); *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009).

Applicant further argues: “it is also illogical to presume that consumers will necessarily see a connection between car seats and toys, for example, simply because a small handful of companies offer both of those products among a broad product line under their respective marks.”¹⁷ The question, however, is not whether some, or even many, companies provide both baby furniture and toys. Rather, the question is whether there are companies that engage in both activities, and the evidence submitted by the Examining Attorney is sufficient to show that this is not an aberration done by only one or two companies. As the Board said in connection with a similar argument based on third-party registrations, i.e., that there were many

¹⁷ 7 TTABVUE 15.

third-party registrations for the goods of the applicant that did not include the goods identified in the cited registration, and vice versa:

There is no requirement for goods to be found related that all or even a majority of the sources of one product must also be sources of the other product. Therefore, evidence showing only that the source of one product may not be the source of another product does not aid applicant in its attempt to rebut the evidence of the examining attorney.

In re G.B.I. Tile and Stone Inc., 92 USPQ2d 1366, 1370 (TTAB 2009).

The Examining Attorney's evidence demonstrates that consumers are accustomed to encountering Applicant's toys and the baby furniture and related goods identified in the cited registration emanating from the same sources under the same house marks and trademarks.

With regard to the third *DuPont* factor, the similarity of the trade channels in which the goods are encountered, we must base our likelihood of confusion determination on the goods as they are identified in the application and registration at issue. *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981); *In re William Hodges & Co., Inc.*, 190 USPQ 47, 48 (TTAB 1976). *See also Octocom*, 16 USPQ2d at 1787 ("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 channels of trade or the class of purchasers to which the sales of goods are directed.").

Neither Applicant's goods nor the goods identified in the cited registration are limited to any particular trade channel. We cannot consider asserted marketplace

realities not reflected in the identifications. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000). In the absence of trade channel limitations in the identifications of goods in the involved application and cited registration, we must presume that these goods are offered in all customary trade channels therefor. *See Citigroup v. Cap. City Bank Grp.*, 98 USPQ2d at 1261; *In re Jump Designs LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006). Evidence of record demonstrates that both Applicant's goods and the Registrant's goods may be encountered by the same classes of consumers under the same marks in at least one common trade channel, i.e., websites of businesses providing both toys, baby furniture and related products.

We find that the *DuPont* factors of the relatedness of the goods, channels of trade and classes of consumers weigh in favor of likelihood of confusion.

C. Conditions of Purchase

Under the fourth *DuPont* factor, we consider “[t]he conditions under which and buyers to whom sales are made, i.e., ‘impulse’ vs. careful, sophisticated purchasing.” *DuPont*, 177 USPQ at 567. Applicant argues

Purchasers of baby furniture, carriages and related items such as those offered under the cited mark are not impulse purchases. Instead, because these consumers are generally concerned with the safety, security, health and comfort of their babies, they are discerning purchasers who are likely to exercise a heightened degree of care in evaluating the goods before they purchase them. In this way, the products are somewhat akin to medical goods and services, in that the nature of the goods results in a more discriminating consumer base.¹⁸

¹⁸ 7 TTABVUE 19.

The toys, baby furniture and related items identified in the involved application and cited registration must be presumed to include both expensive and inexpensive varieties, available in any common channels of trade. There is nothing in the nature of these identified goods, without any limitation as to their type, price point or intended consumers, to suggest their purchasers are particularly sophisticated or careful. *See In re I-Coat Co.*, 126 USPQ2d 1730, 1739 (TTAB 2018). In fact, the standard of care is that of the least sophisticated potential purchaser. *Stone Lion*, 110 USPQ2d at 1163, *cited in In re FCA US LLC*, 126 USPQ2d 1214, 1222 (TTAB 2018) (“Board precedent requires our decision to be based on the least sophisticated potential purchasers.”).

Similarly, in the absence of restrictions in the application or registration, we presume the toys and baby products travel in all channels of trade normal for those unrestricted goods and that they are available to all classes of consumers for those products. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (quoting *Hewlett-Packard*, 62 USPQ2d at 1005). *See also In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986) (evidence that relevant goods are expensive wines sold to discriminating purchasers must be disregarded given the absence of any such restrictions in the application or registration).

Even if we accept, in considering the fourth *DuPont* factor, Applicant’s assertion that its goods may be the subject of sophisticated purchases, even careful purchasers are likely to be confused by essentially identical marks. As stated by our primary

reviewing court, “[t]hat the relevant class of buyers may exercise care does not necessarily impose on that class the responsibility of distinguishing between similar trademarks for similar goods. ‘Human memories even of discriminating purchasers ... are not infallible.’” *In re Research and Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) quoting *Carlisle Chem. Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970). Therefore, the fact that the purchasers may exercise care before purchasing these goods does not mean there can be no likelihood of confusion.

In the present case, the nearly identical nature of the marks and the relatedness of the goods as identified outweigh any sophisticated purchasing decision. *See HRL Associates, Inc. v. Weiss Associates, Inc.*, 12 USPQ2d 1819 (TTAB 1989), *aff’d*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990) (similarities of goods and marks outweigh sophisticated purchasers, careful purchasing decision, and expensive goods).

The fourth *DuPont* factor is neutral.

D. Conclusion

When we consider the record and the relevant likelihood of confusion factors, and all of Applicant’s arguments relating thereto, we conclude that consumers familiar with Registrant’s goods offered under its mark would be likely to believe, upon encountering Applicant’s mark, that the goods in the cited registration and Applicant’s goods originate with or are associated with or sponsored by the same entity.

Serial No. 79975600

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