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Subject: U.S. TRADEMARK APPLICATION NO. 86248063 - FUNOVATIONS - N/A - EXAMINER BRIEF

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UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

U.S. APPLICATION SERIAL NO. 86248063

MARK: FUNOVATIONS



CORRESPONDENT ADDRESS:

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GENERAL TRADEMARK INFORMATION:

<http://www.uspto.gov/trademarks/index.jsp>

TTAB INFORMATION:

<http://www.uspto.gov/trademarks/process/appeal/index.jsp>

APPLICANT: Fourstar Group Inc.

CORRESPONDENT'S REFERENCE/DOCKET NO:

N/A

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EXAMINING ATTORNEY'S APPEAL BRIEF

Applicant has appealed the examining attorney's final refusal to register the trademark FUNOVATIONS in International Class 28 for "Mechanical toys; Wind-up toys" on the ground that the

applied-for mark is likely to be confused with the mark in U.S. Registration No. 3698713 pursuant to Trademark Act Section 2(d), 15 U.S.C. Section 1052(d).

FACTS

On April 10, 2014, applicant FOURSTAR GROUP INC. filed U.S. Application Serial No. 86248063 to register the mark FUNOVATIONS in standard characters for “Mechanical toys; Wind-up toys” in International Class 28. On July 23, 2014, the examining attorney refused registration on the grounds that the applied-for mark was likely to be confused with the mark in U.S. Registration No. 3698713 pursuant to Trademark Act Section 2(d).¹ U.S. Registration No. 3698713 is the design mark FUNOVATION for, in relevant part, “Action skill games” in International Class 28.² The registration is owned by FUNOVATION, INC.

In the August 4, 2014, response to the Office action, applicant requested suspension of the application “until it can be determined if the required Section 8 Affidavit is timely filed” by registrant. *See 8/04/2014 Response*. On August 20, 2014, the examining attorney denied applicant’s request for suspension. U.S. Registration No. 3698713 registered on October 20, 2009 meaning that the earliest date that registrant could have filed a Section 8 affidavit was October 20, 2014, which is the fifth anniversary of the filing date. TMEP §1604.04. Registrant has until April 20, 2016 to file the Section 8 affidavit. *Id.* An application may only be suspended pending cancellation or expiration of a cited registration when the cited registration is in the six-month grace period following the sixth year after the date of registration. TMEP §716.02(e). For U.S. Registration No. 3698713, the six month grace period is October 20, 2015 until April 20, 2016. As the cited registration was not in the grace period at the time of

¹ The examining attorney also advised applicant that applicant’s claim of ownership of U.S. Registration No. 2749772 will not be printed on any registration which may issue from the application because Office records show that the claimed registration is cancelled. *See* 37 C.F.R. §2.36; TMEP §812.

² In total, U.S. Registration No. 3698713 identifies “Action skill games” in International Class 28 and “Entertainment services in the nature of an amusement park attraction, namely, a themed area” in International Class 41.

the final action - and at the time of this brief it is still not in the grace period - the examining attorney may not suspend the current application pending cancellation or expiration of U.S. Registration No. 3698713. The examining attorney denied applicant's request to suspend and made the Section 2(d) refusal final.

On December 16, 2014, applicant requested reconsideration of the Section 2(d) refusal. On December 31, 2014, the examining attorney considered applicant's request for reconsideration, but ultimately maintained the final Section 2(d) refusal. On February 5, 2015, applicant again requested reconsideration of the Section 2(d) refusal. On February 10, 2015, the examining attorney considered applicant's second request for reconsideration, but ultimately maintained the final Section 2(d) refusal. This appeal now follows.

PRELIMINARY MATTER

On pages 20-24 of applicant's appeal brief, applicant apparently attempted to include a print-out of registrant's website. On pages 25-31 of applicant's appeal brief, applicant apparently attempted to attach search results from GOOGLE®. This evidence was an attempt to establish the type of action skill games for which registrant is using the registered mark. However, what appears on pages 20-31 of applicant's appeal brief are largely blank pages with a scattering of pictures, a few lines of text, and a few URLs. The attachments on pages 20-31 of the appeal brief do not establish anything, let alone what applicant intended it to establish. Regardless, applicant did not submit the attachments on pages 20-31 of the appeal brief prior to the appeal. The record in an application should be complete prior to the filing of an appeal. 37 C.F.R. §2.142(d); TBMP §§1203.02(e), 1207.01; TMEP §710.01(c). Because applicant's new evidence was untimely submitted during an appeal, the trademark examining attorney objects to this evidence and requests that the Board disregard it. *See In re Fiat Grp. Mktg. & Corp. Commc'ns*

S.p.A., 109 USPQ2d 1593, 1596 (TTAB 2014); *In re Pedersen*, 109 USPQ2d 1185, 1188 (TTAB 2013); TBMP §§1203.02(e), 1207.01; TMEP §710.01(c). Notwithstanding the insufficiency of the evidence, and in the event that the Board overrules the objection and considers the evidence, the evidence is irrelevant because, as discussed in detail below, the determination of the scope of applicant's and registrant's goods are determined by the description of the goods stated in the application and registration at issue, not on extrinsic evidence of actual use. *See Octocom Sys. Inc. v. Hous. Computers Servs. Inc.*, 918 F.2d 937, 942, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

ISSUES ON APPEAL

1. Whether the applied-for mark FUNOVATIONS is similar to the registered mark FUNOVATION.
2. Whether applicant's and registrant's goods are closely related.

ARGUMENT

THE MARKS ARE CONFUSINGLY SIMILAR AS THE MARKS HAVE SIMILAR WORDING AND CONVEY A SIMILAR COMMERCIAL IMPRESSION AND THE GOODS ARE CLOSELY RELATED SUCH THAT CONSUMERS ARE LIKELY TO BE CONFUSED OR MISTAKEN OR DECEIVED AS TO THE SOURCES OF THE GOODS UNDER SECTION 2(d) OF THE TRADEMARK ACT

Trademark Act Section 2(d) bars registration of an applied-for mark that so resembles a registered mark that it is likely a potential consumer would be confused, mistaken, or deceived as to the source of the goods of the applicant and registrant. *See* 15 U.S.C. §1052(d). A determination of likelihood of confusion under Section 2(d) is made on a case-by case basis and the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973) aid in this determination. *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 1349, 98 USPQ2d 1253, 1256 (Fed. Cir. 2011)

(citing *On-Line Careline, Inc. v. Am. Online, Inc.*, 229 F.3d 1080, 1085, 56 USPQ2d 1471, 1474 (Fed. Cir. 2000)). Not all the *du Pont* factors, however, are necessarily relevant or of equal weight, and any one of the factors may control in a given case, depending upon the evidence of record. *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d at 1355, 98 USPQ2d at 1260; *In re Majestic Distilling Co.*, 315 F.3d 1311, 1315, 65 USPQ2d 1201, 1204 (Fed. Cir. 2003); see *In re E. I. du Pont de Nemours & Co.*, 476 F.2d at 1361-62, 177 USPQ at 567.

The overriding concern is not only to prevent buyer confusion as to the source of the goods, but to protect the registrant from adverse commercial impact due to use of a similar mark by a newcomer. See *In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993). Therefore, any doubt regarding a likelihood of confusion determination is resolved in favor of the registrant. TMEP §1207.01(d)(i); see *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1265, 62 USPQ2d 1001, 1003 (Fed. Cir. 2002); *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 464-65, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988).

In any likelihood of confusion determination, two key considerations are similarity of the marks and similarity or relatedness of the goods. *Syndicat Des Proprietaires Viticulteurs De Chateaufneuf-Du-Pape v. Pasquier DesVignes*, 107 USPQ2d 1930, 1938 (TTAB 2013) (citing *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103, 192 USPQ 24, 29 (C.C.P.A. 1976)); *In re Iolo Techs., LLC*, 95 USPQ2d 1498, 1499 (TTAB 2010); see TMEP §1207.01. That is, the marks are compared in their entireties for similarities in appearance, sound, connotation, and commercial impression. *In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (quoting *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973)); TMEP §1207.01(b)-(b)(v). Additionally, the goods are compared to determine whether they are similar or commercially related or travel in the same trade channels. See *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369-71, 101 USPQ2d 1713,

1722-23 (Fed. Cir. 2012); *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1165, 64 USPQ2d 1375, 1381 (Fed. Cir. 2002); TMEP §1207.01, (a)(vi).

I. THE MARKS ARE CONFUSINGLY SIMILAR

The applied-for mark FUNOVATIONS is similar to the registered mark FUNOVATION because the wording of the marks is essentially the same. In the applied-for mark, the word FUNOVATION appears in the plural form of FUNOVATIONS while in the registered mark it appears in the singular form.

Trademarks consisting of the singular and plural forms of the same term are essentially the same mark.

See Wilson v. Delaunay, 245 F.2d 877, 878, 114 USPQ 339, 341 (C.C.P.A. 1957) (finding no material difference between the singular and plural forms of ZOMBIE such that the marks were considered the same mark); *In re Pix of Am., Inc.*, 225 USPQ 691, 692 (TTAB 1985) (noting that the pluralization of NEWPORT is “almost totally insignificant” in terms of likelihood of confusion among purchasers). As a result, the different use of the plural and singular form of FUNOVATION is not significant when comparing the marks for likelihood of confusion.

The term FUNOVATION has no meaning in English and because it is an invented word it is a strong trademark entitled to a broad scope of protection. *See evidence from Collins American Dictionary attached to Office action dated 7/23/2014 at 15.* The invented word FUNOVATION appears to be a combination of the words “fun” and “innovation.” The use of the singular and plural form of FUNOVATION gives both marks the commercial impression that the toys and games are innovations in having fun. As the marks have a similar commercial impression, the use of the same invented word is likely to cause confusion between the marks.

The registered mark has a small design of arcs around the FUN portion of the word FUNOVATION. The word portions of the marks are nearly identical in appearance, sound, connotation, and commercial

impression; therefore, the addition of a design element does not obviate the similarity of the marks in this case. See *In re Shell Oil Co.*, 992 F.2d 1204, 1206, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993); TMEP §1207.01(c)(ii). The applied-for mark is in standard characters and thus could be presented in any stylization including stylization similar to the registered mark. As the wording of the marks is essentially the same, the design in the registered mark does not obviate the likelihood of confusion.

Applicant argues that the difference in pluralization and additional visual elements of the registered mark set the marks apart from one another. When comparing marks, the test is not whether the marks can be distinguished in a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. *Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 1053, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012); *In re Davia*, 110 USPQ2d 1810, 1813 (TTAB 2014); TMEP §1207.01(b). The proper focus is on the recollection of the average purchaser, who retains a general rather than specific impression of trademarks. *United Global Media Grp., Inc. v. Tseng*, 112 USPQ2d 1039, 1049, (TTAB 2014); *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012); TMEP §1207.01(b). As discussed above, despite the elements in the registered mark that do not appear in the applied-for mark, the marks have a similar commercial impression because of the use of the singular and plural versions of the word FUNOVATION. The use of the singular and plural form of FUNOVATION gives both marks the commercial impression that the toys and games are innovations in having fun. The overall recollection of the average purchaser would be the dominant element FUNOVATION and not the pluralization of that word or minor design elements. As discussed above, the different use of the plural and singular form of FUNOVATION is not significant when comparing the marks for likelihood of confusion. As a result, despite the differences, a likelihood of confusion exists because of the use of the singular and plural form of FUNOVATION.

Applicant has submitted a printout of third-party registration U.S. Registration No. 4170950 for the mark FUNNOVATION for playground equipment in International Class 28 to support the argument that the wording of U.S. Registration No. 3698713 is weak, diluted, or so widely used that it should not be afforded a broad scope of protection. *See February 5, 2015 Response at 2.* The weakness or dilution of a particular mark is generally determined in the context of the number and nature of similar marks *in use in the marketplace* in connection with *similar goods*. *See Nat'l Cable Television Ass'n, Inc. v. Am. Cinema Editors, Inc.*, 937 F.2d 1572, 1579-80, 19 USPQ2d 1424, 1430 (Fed. Cir. 1991); *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973).

Evidence of weakness or dilution consisting solely of a third-party registration such as U.S. Registration No. 4170950 is generally entitled to little weight in determining the strength of a mark, because such registrations do not establish that the registered marks identified therein are in *actual use* in the marketplace or that consumers are accustomed to seeing them. *See AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 1406, 177 USPQ 268, 269 (C.C.P.A. 1973); *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1204 (TTAB 2009); *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1639 (TTAB 2009); *Richardson-Vicks Inc. v. Franklin Mint Corp.*, 216 USPQ 989, 992 (TTAB 1982). Furthermore, the goods listed in U.S. Registration No. 4170950 are different from those identified by U.S. Registration No. 3698713 and thus does not show that the relevant wording is commonly used in connection with the goods at issue. Specifically, U.S. Registration No. 4170950 identifies playground structures including climbing towers and jungle gyms which are large physical structures and not related to the games identified by U.S. Registration No. 3698713. Additionally, the spelling of U.S. Registration No. 4170950 differs from the spelling of U.S. Registration No. 3698713. For these reasons, U.S. Registration No. 4170950 does not establish that the wording of U.S. Registration No. 3698713 is weak, diluted, or so widely used that it should not be afforded a broad scope of protection.

Thus, when looking at the various toy and game goods identified in the marks, a consumer would be confused as to the source of the goods because of the use of the single or plural version of the word FUNOVATION. Therefore, the marks are confusingly similar.

II. THE GOODS ARE CLOSELY RELATED

The goods of the parties need not be identical or even competitive to find a likelihood of confusion. *See On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 1086, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d 1322, 1329, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000) (“[E]ven if the goods in question are different from, and thus not related to, one another in kind, the same goods can be related in the mind of the consuming public as to the origin of the goods.”); TMEP §1207.01(a)(i). The respective goods need only be “related in some manner and/or if the circumstances surrounding their marketing [be] 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)); TMEP §1207.01(a)(i).

Applicant’s wind-up and mechanical toys are related to the registrant’s action skill games because they are toys and games targeted at the same consumer by the same manufacturers. For example, Toysmith manufactures a wind-up diver toy, a mechanical robot claw toy, and a puzzle skill game. *See evidence attached to Office action dated 7/23/2014 at 11-14.* Hasbro manufactures a wind-up BEYBLADE® metal fusion wind and shoot launcher, a mechanical mouse trap toy game, and a JENGA® action skill game. *See evidence attached to Office action dated 7/23/2014 at 5-7.* Mattel manufactures a BARBIE® wind-up toy, a POLLY POCKET® mechanical toy playset, and a “Bounce-Off” action skill game. *See evidence attached to Office action dated 7/23/2014 at 8-10.* Lego manufactures a “Wild Wind-Up”

toy, a mechanical truck toy, and a “Minotaurus” action skill game. *See evidence attached to Office action dated 8/20/2014 at 2-13.* Disney manufactures a “Finding Nemo” wind-up toy, a PIXAR® mechanical toy, and a “Beat the Parents” action skill game. *See evidence attached to Office action dated 8/20/2014 at 14-25.* Schylling manufactures a wind-up “Gone Fishing” game that is a wind-up toy, mechanical toy, and action skill game all in one. *See evidence attached to Office action dated 8/20/2014 at 26.* Cupcakes and Cartwheels manufactures a “Vehicle On Board” game that includes a wind-up vehicle and action skill game. *See evidence attached to Office action dated 8/20/2014 at 27-29.* Alex Brands manufactures a SLINKY® mechanical toy and a wind-up action skill game named “Booby Trap.” *See evidence attached to Office action dated 8/20/2014 at 30-31.* This evidence establishes that the same entity commonly manufactures the relevant goods and markets the goods under the same mark and that the relevant goods are sold through the same trade channels and used by the same classes of consumers in the same fields of use. Therefore, applicant’s and registrant’s goods are considered related for likelihood of confusion purposes. *See, e.g., In re Davey Prods. Pty Ltd., 92 USPQ2d 1198, 1202-04 (TTAB 2009); In re Toshiba Med. Sys. Corp., 91 USPQ2d 1266, 1268-69, 1271-72 (TTAB 2009).*

Evidence obtained from the Internet may be used to support a determination under Trademark Act Section 2(d) that goods are related. *See, e.g., In re G.B.I. Tile & Stone, Inc., 92 USPQ2d 1366, 1371 (TTAB 2009); In re Paper Doll Promotions, Inc., 84 USPQ2d 1660, 1668 (TTAB 2007).*

The evidence of record also includes evidence from the USPTO’s X-Search database consisting of a number of third-party marks registered for use in connection with the same or similar goods as those of both applicant and registrant in this case. This evidence shows that the goods listed therein, namely action skill games, mechanical toys, and wind-up toys, are of a kind that may emanate from a single source under a single mark. *See In re Davey Prods. Pty Ltd., 92 USPQ2d 1198, 1203 (TTAB 2009); In re Albert Trostel & Sons Co., 29 USPQ2d 1783, 1785-86 (TTAB 1993); In re Mucky Duck Mustard Co., 6*

USPQ2d 1467, 1470 n.6 (TTAB 1988); TMEP §1207.01(d)(iii). As the representative sample below demonstrates, purchasers are accustomed to encountering these goods offered under a single trademark. Specifically:

<u>Reg. No.</u>	<u>Mark</u>	<u>Relevant Goods</u>	<u>Location</u>
3875236	HASBRO	action skill games; mechanical toys; wind-up toys	7/23/2014 Office Action at 16-18.
3592302	BYDICO!	action skill games; mechanical toys; wind-up toys	7/23/2014 Office Action at 19-21.
4091370	MIGHTY MORPHIN POWER RANGERS	action skill games; mechanical toys; wind-up toys	7/23/2014 Office Action at 22-24.
3636910	TINKER BELL	action skill games; mechanical toys; wind-up toys	7/23/2014 Office Action at 28-30.
3085720	FUTURE PRINCESS	action skill games; mechanical toys; wind-up toys	8/20/2014 Office Action at 32-34.
3568971	DEKKO TOYS	action skill games; mechanical toys; wind-up toys	8/20/2014 Office Action at 35-38.

3724296	SMALL WORLD	action skill games; mechanical toys; wind-up toys	8/20/2014 Office Action at 42-44.
3901903	BRAVO KIDZ	games, namely, plastic action skill games and manipulative games; mechanical and electrical children's multiple activity toys with or without electronic light or sounds; wind-up toys and parts thereof	8/20/2014 Office Action at 45-47.
2998285	TUTTI CUTI	action skill games; mechanical action toys; wind-up toys	8/20/2014 Office Action at 51-53.
3926939	BOZ	action skill games; mechanical toys; wind-up toys	8/20/2014 Office Action at 56-58.

Ultimately, all of these registrations have probative value to the extent that they serve to suggest that the goods listed therein are of a kind that may emanate from a single source. *See In re Infinity Broad. Corp.*, 60 USPQ2d 1214, 1217-1218 (TTAB 2001).

As discussed above, the literal elements of the marks are virtually identical. Where the marks of the respective parties are virtually identical, the relationship between the relevant goods need not be as close to support a finding of likelihood of confusion. *See In re Shell Oil Co.*, 992 F.2d 1204, 1207, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993); *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1202 (TTAB 2009); *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1636 (TTAB 2009); TMEP §1207.01(a). As the literal elements of the marks are virtually identical, the relationship between the relevant goods need not be as close to support a finding of likelihood of confusion.

Applicant argues that the goods are dissimilar because applicant identifies different goods than registrant. This argument is not convincing because, while the goods of the parties are not identical, they are closely related. As discussed previously, the goods of the parties need not be identical or directly competitive to find a likelihood of confusion. *See Safety-Kleen Corp. v. Dresser Indus., Inc.*, 518 F.2d 1399, 1404, 186 USPQ 476, 480 (C.C.P.A. 1975); TMEP §1207.01(a)(i). Rather, it is sufficient to show that because of the conditions surrounding their marketing, or because they are otherwise related in some manner, the goods would be encountered by the same consumers under circumstances such that offering the goods under confusingly similar marks would lead to the mistaken belief that they come from, or are in some way associated with, the same source. *In re Iolo Techs., LLC*, 95 USPQ2d 1498, 1499 (TTAB 2010); *see In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 1566-68, 223 USPQ 1289, 1290 (Fed. Cir. 1984); TMEP §1207.01(a)(i). In this case, the evidence of record amply demonstrates that the goods are related goods because they commonly emanate from the same manufacturer, are marketed under the same marks, and are offered to the same groups of consumers in the same trading channels.

Applicant argues that registrant's action skill games are only laser mazes offered in amusement parks or traveling trailers while applicant is selling novelty toys. In applicant's brief on appeal, applicant references evidence in the record and attaches evidence from the record related to registrant's use of the applied-for mark. *See 12/16/2014 response at 2-6, 2/5/2015 response at 6-9, and applicant's appeal brief at 14-19.*³ However, none of this evidence is relevant as applicant impermissibly reads limitations and restrictions into the scope of the registration and application that are not present therein. When analyzing an applicant's and registrant's goods for similarity and relatedness, that determination is

³ As discussed in the preliminary matter above, applicant also attempted to include new evidence from registrant's website and GOOGLE®. The examining attorney has objected to this untimely submitted evidence, but in the event that the Board overrules the objection and considers the evidence, the evidence is irrelevant as the determination of the scope of applicant's and registrant's goods are determined by the description of the goods stated in the application and registration at issue, not on extrinsic evidence of actual use. *See Octocom Sys. Inc. v. Hous. Computers Servs. Inc.*, 918 F.2d 937, 942, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

based on the description of the goods stated in the application and registration at issue, not on extrinsic evidence of actual use. *See Octocom Sys. Inc. v. Hous. Computers Servs. Inc.*, 918 F.2d 937, 942, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *see also Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 1267, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002). Neither the application nor the registration limits the goods to certain uses. The registration does not limit the games to only laser games in amusement parks and the identification in the registration is broad enough to include any action skill games including those related to registrant's toys. Applicant and registrant's identifications are broad enough to target similar consumers for their goods which would create a likelihood of confusion between the goods.

Applicant also argues the applied-for goods and the registered goods are used only by knowledgeable consumers. Neither the application nor the registration limits the goods to certain sophisticated users and the identifications are broad enough to cover individuals who are not knowledgeable in the field. Even if registrant's or applicant's goods are used by knowledgeable consumers, the fact that purchasers are sophisticated or knowledgeable in a particular field does not necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or immune from source confusion. TMEP §1207.01(d)(vii); *see, e.g., Imagineering Inc. v. Van Klassens Inc.*, 53 F.3d 1260, 1265, 34 USPQ2d 1526, 1530 (Fed. Cir. 1995); *Top Tobacco LP v. N. Atl. Operating Co.*, 101 USPQ2d 1163, 1170 (TTAB 2011). The knowledge of the consumers does not obviate a likelihood of confusion. Furthermore, there is nothing inherent in the nature of toy goods that would lead to the conclusion that purchasers have complex knowledge or experience about toys.

Applicant argues that the goods are priced disparately. As discussed above, applicant and registrant identify toys and games. The identifications do not specify the buyer of the goods or a price for the goods meaning that they could include professionals and the public at any price. When the relevant

consumer includes both professionals and the general public, the standard of care for purchasing the goods is that of the least sophisticated potential purchaser. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d. 1317, 1325, 110 USPQ2d 1157, 1163 (Fed. Cir. 2014); *Alfacell Corp. v. Anticancer, Inc.*, 71 USPQ2d 1301, 1306 (TTAB 2004). As neither the application nor registration specifies the buyer of the goods or the price, the standard of care for purchasing the goods is that of the least sophisticated potential purchaser. Moreover, the goods are broad enough to include low-price toys and games. “Generally, casual purchasers of low-cost, every-day consumer items exercise less care in their purchasing decisions and are more likely to be confused as to the source of the goods.” *In re Davia*, 110 USPQ2d 1810, 1818 (TTAB 2014) (citing *Specialty Brands, Inc. v. Coffee Bean Distribs., Inc.*, 748 F.2d 669, 672, 223 USPQ 1281, 1282 (Fed. Cir. 1984)). Applicant and registrant’s identifications are broad enough to target similar consumers for their goods which would create a likelihood of confusion between the goods.

Finally, applicant alleges that there has been no evidence of actual confusion between the marks during years of concurrent use. This argument is also unavailing. The test under Trademark Act Section 2(d) is whether there is a likelihood of confusion. It is not necessary to show actual confusion to establish a likelihood of confusion. *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1165, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002) (citing *Giant Food, Inc. v. Nation’s Foodservice, Inc.*, 710 F.2d 1565, 1571, 218 USPQ 390, 396 (Fed. Cir. 1983)); TMEP §1207.01(d)(ii). The Trademark Trial and Appeal Board stated as follows:

[A]pplicant’s assertion that it is unaware of any actual confusion occurring as a result of the contemporaneous use of the marks of applicant and registrant is of little probative value in an ex parte proceeding such as this where we have no evidence pertaining to the nature and extent of the use by applicant and registrant (and thus cannot ascertain whether there has been ample opportunity for confusion to arise, if it were going to); and the registrant has no chance to be heard from (at least in the absence of a consent agreement, which applicant has not submitted in this case).

In re Kangaroos U.S.A., 223 USPQ 1025, 1026-27 (TTAB 1984). Actual confusion between the applied-for mark and the registered marks is unnecessary for a likelihood of confusion to exist.

Thus, when confronted by applicant's and registrant's goods, consumers would likely be confused as to the source of the goods because they are similar toys and games. Therefore, the goods are closely related. Since the marks are similar and the goods are related, there is a likelihood of confusion as to the source of applicant's goods.

CONCLUSION

Therefore, because the marks include the similar wording FUNOVATION and convey a similar commercial impression and the goods of applicant and registrant are similar toys and games purchasers are likely to be confused or mistaken or deceived as to the sources of the games. For the foregoing reasons, the refusal to register on the basis of Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d) should be affirmed.

Respectfully submitted,

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