

**This Opinion is Not a
Precedent of the TTAB**

Mailed: October 19, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re ChuChu TV Studios, aka ChuChu TV
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Serial No. 87005177
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Michael J. Hoisington, Esq. of Higgs Fletcher & Mack LLP,
for ChuChu TV Studios aka ChuChu TV

David Gearhart, Trademark Examining Attorney, Law Office 112,
Renee Servance, Managing Attorney.

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Before Mermelstein, Wolfson and Gorowitz,
Administrative Trademark Judges.

Opinion by Gorowitz, Administrative Trademark Judge:

ChuChu TV Studios (“Applicant”) seeks registration on the Principal Register of
the mark ABBY and a design of a hippopotamus, which is set forth below



for

Bottoms; Caps; Children's and infant's apparel, namely, jumpers, overall sleepwear, pajamas, rompers and one-piece garments; Children's and infants' cloth bibs; Dresses; Footwear; Gloves; Hats; Jackets; Pajamas; Pants; Scarves; Shirts; Shorts; Skirts; Sleepwear; Socks; Sweaters; Sweatshirts; Swimwear; T-shirts; Tank tops; Underwear in International Class 25; and

Plush toys in International Class 28.¹

¹ Application Serial No. 87005177 was filed on April 16, 2016, based upon Applicant's allegation of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act.

The mark comprises the word ABBY under a fanciful depiction of a hippopotamus.

There is no claim to color.

The Trademark Examining Attorney has refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark so resembles the registered mark ABBY (in standard characters) for "toys, namely, dolls, fashion dolls, electronic dolls, animated dolls, doll clothing and doll accessories" in International Class 28² as to be likely to cause confusion, mistake or deception.³

After the Trademark Examining Attorney made the refusal final, Applicant appealed and filed a request for reconsideration. When the request for reconsideration was denied, the appeal was resumed. We reverse the refusal with respect to Applicant's Class 25 goods and affirm the refusal with respect to Applicant's Class 28 goods.

I. Evidentiary Issue.

Before proceeding to the merits of the refusal, we address an evidentiary matter. The Examining Attorney objected to Applicant's submission as evidence of Exhibits A-E with its appeal brief. Applicant did not file a reply brief or otherwise respond to the Examining Attorney's objection. These documents were not previously introduced. "The record in the application should be complete prior to the filing of an appeal." Trademark Rule 2.142(d); 37 CFR § 2.142(d). Absent a request for remand

² Registration No. 4533796, owned by Peter Sui Lun Fong, issued on May 20, 2014.

³ Registration No. 4097770 for the mark ABBY in standard characters for athletic apparel was also cited as a bar to registration. That registration was cancelled on September 21, 2018 for failure to file a Section 8 declaration of use. Thus, the refusal based on this citation is moot and for that reason, *reversed*.

granted upon a showing good cause, evidence submitted after the filing of an appeal is untimely and will not ordinarily be considered. *Id.* Therefore we grant the Examining Attorney's request and have not considered the documents marked Exhibits A-E. *See In re Fiat Grp. Mktg. & Corp. Commc'ns S.p.A.*, 1593 USPQ2d 1596 (TTAB 2014).

II. Likelihood of Confusion.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). *See also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). *See also In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

A. Similarity of the goods and channels of trade.

We start our analysis with the second and third *du Pont* factors, similarity or dissimilarity of the goods, and channels of trade. When assessing goods and channels of trade,

[i]t is well settled that the issue of likelihood of confusion between applied-for and registered marks must be determined on the basis of the goods as they are identified in the involved application and cited registration, rather than on what any evidence may show as to the actual nature of the goods, their channels of trade and/or classes of purchasers.

In re Total Quality Grp. Inc., 51 USPQ2d 1474, 1476 (TTAB 1999). *See also Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161-1162 (Fed. Cir. 2014). Applicant's goods are identified as:

Bottoms; Caps; Children's and infant's apparel, namely, jumpers, overall sleepwear, pajamas, rompers and one-piece garments; Children's and infants' cloth bibs; Dresses; Footwear; Gloves; Hats; Jackets; Pajamas; Pants; Scarves; Shirts; Shorts; Skirts; Sleepwear; Socks; Sweaters; Sweatshirts; Swimwear; T-shirts; Tank tops; Underwear in International Class 25; and

Plush toys in International Class 28.

The goods in the cited registration are identified as "dolls, fashion dolls, electronic dolls, animated dolls, doll clothing & doll accessories."

The Examining Attorney bears the burden of establishing the relationship between the goods. In this case, the Examining Attorney did not provide any evidence establishing the relationship between Applicant's Class 25 clothing items and the goods in the cited registration. Accordingly, the refusal with respect to Applicant's Class 25 goods is reversed.

We need to determine whether Applicant's "plush toys" are related to "dolls, fashion dolls, electronic dolls, animated dolls, doll clothing & doll accessories." A "plush toy" is defined as "a children's toy, typically a toy animal, made of soft fabric

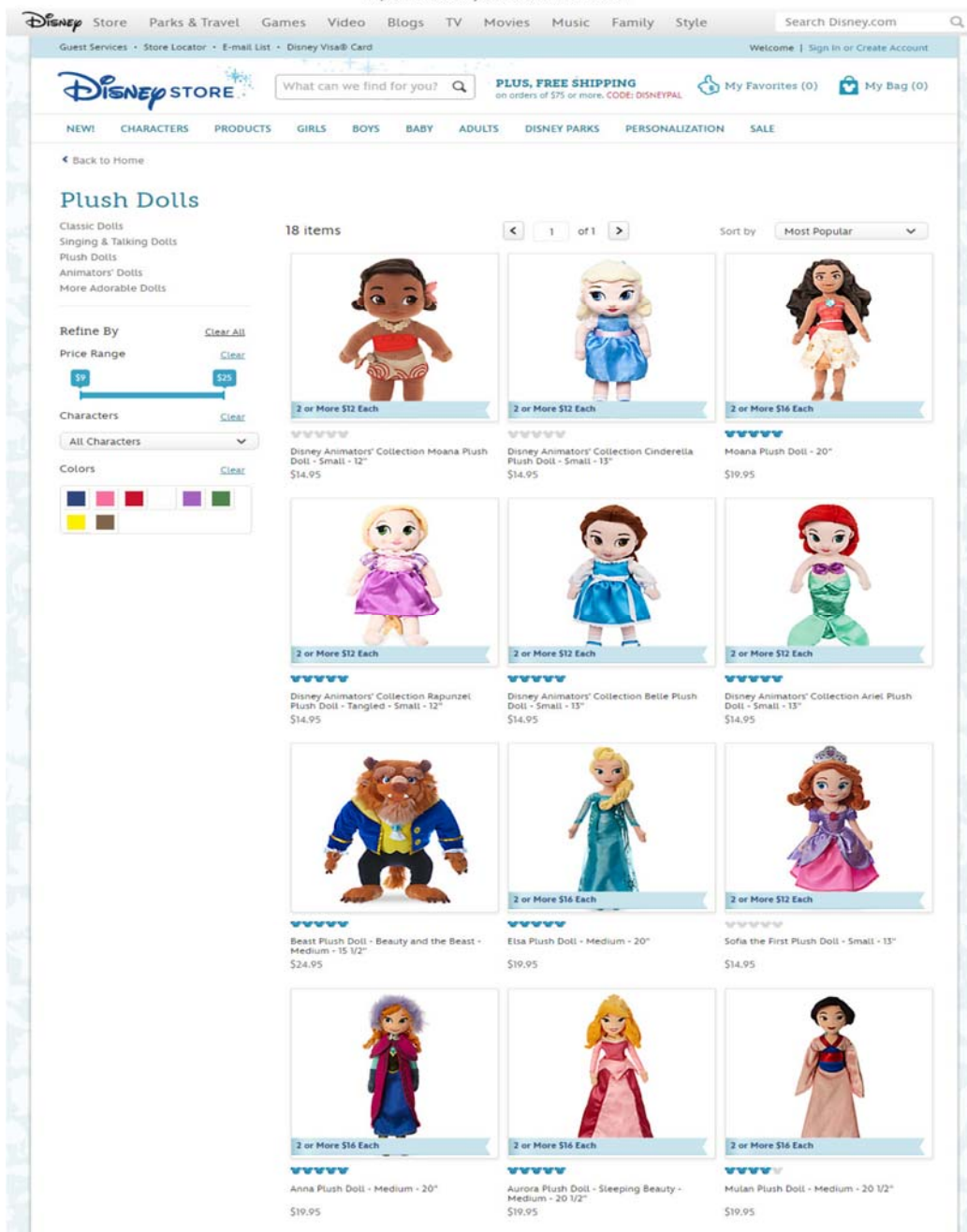
and stuffed with cotton or a similar filling.”⁴ A “doll” is defined as “a small model of a human figure, typically one of a baby or girl, used as a child’s toy.”⁵

The Examining Attorney has submitted a number of webpages establishing that dolls and plush toys are sold on the websites of toy manufacturers, i.e. Melissa and Doug, www.melissaanddoug.com, February 9, 2017 Office Action, TSDR pp. 10-11; Gund, www.gund.com, *id.* at 12-14; and Cabbage Patch Kids, www.cabbagepatchkids.com, *id.* at 17-21. While a plush toy is typically a toy animal, it may also be a small model of a human figure, which is a doll. Evidence introduced by the Examining Attorney establishes that the term “plush” can also be used in connection with “doll” to describe a plush toy, which is in the shape of a human figure. *id.*, at 15, which is a page from the Disney Store website located at www.disneystore.com, partially reproduced below. The website indicates that in addition to “plush dolls,” the Disney Store sells dolls, which are identified as: “Classic Dolls,” “Singing & Talking Dolls,” and “Animators’ Dolls” and other “adorable dolls.” *Id.*

The following are examples of the plush dolls sold on the Disney Store website:

⁴ We take judicial notice of the definition of “plush toy” from the North American English version of the OXFORD DICTIONARY. Plush Toy, OXFORD DICTIONARY (US) (2018), en.oxforddictionaries.com, accessed on May 3, 2018. The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff’d*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016).

⁵ OXFORD DICTIONARY (US), doll (first sense), accessed on May 3, 2018.



Accordingly, we find that under the second *du Pont* factor, Applicant’s “plush toys” are legally identical in part to the “dolls” identified in cited Registration No. 4533796.

To the extent the goods are legally identical, they are presumed to travel in the same channels of trade, and to be sold to the same class of purchasers. *See, Stone*

Lion Capital Partners, at 110 USPQ2d 1159; *In re Smith & Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994). As such, the second and third *du Pont* factors favor a finding of likelihood of confusion in Class 28.

B. Similarity of the marks.

We next determine the similarity or dissimilarity of the marks in their entireties, keeping in mind that “where, as here, the goods at issue are [in-part] identical, ‘the degree of similarity necessary to support a conclusion of likelihood of confusion declines.’” *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (quoting *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992)).

The marks at issue in this case are: Applicant’s mark ABBY and hippopotamus design, and the cited mark ABBY in standard characters. In comparing the marks we must consider the appearance, sound, connotation and commercial impression of the marks at issue. *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 the elements may be sufficient to support a finding of likelihood of confusion).

It is a well-established principle that, in articulating reasons for reaching a conclusion on the issue of likelihood 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, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir.

1985). Applicant's mark consists of the word ABBY in block letters under the design of a hippopotamus.

"In the case of a composite mark containing both words and a design, the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed." *In re Viterra Inc.*, 101 USPQ2d at 1908 (citing *CBS Inc. v. Morrow*, 708 F.2d. 1579, 128 USPQ 198 (Fed. Cir. 1983)) (internal quotation marks omitted). The only word in the marks at issue is ABBY and thus, the literal portions of the marks are identical. Based on similar facts in *In re Jakob Demmer KG*, 219 USPQ 1199 (TTAB 1983), the Board found that the marks GOLDEN HARVEST within a leaf design,



and GOLDEN HARVEST in a stylized format,



were similar and that confusion was likely; and in *In re Mack*, 197 USPQ 755 (TTAB 1977) where the Board found that the similarity of the literal portions of the marks



and



, rendered the marks similar and that confusion was

likely.

potential purchaser to identify the hippo by that name. The word ABBY in Applicant's mark is thus considerably different than the words REDNECK RACEGIRL in *Covalinski*.

There were several cases discussed in the *Covalinski* case in which the marks at issue were distinguished from cited marks in part because of design elements. The same differences present in the *Covalinski* case, as discussed above, also distinguish Applicant's mark from the marks discussed in the other cases, for example,

1. *Parfums de Coeur Ltd. v. Lazarus*, 83 USPQ2d 1012 (TTAB 2007) – the applicant's mark was BODYMAN and the design of a torso wearing cape bearing the initials "BM," as set forth below



BODYMAN

for entertainment services in the nature of an animated television series; and the cited marks were BOD and BODMAN for fragrance products.

In the *Parfums de Coeur* case both the literal portions of the marks were different and the goods and services were not related.

In the current case, the literal portions of the marks are identical and the goods are in-part identical.

2. *Steve's Ice Cream v. Steve's Famous Hot Dogs*, 3 USPQ2d 1477, 1478-79 (TTAB 1987) – the applicant's mark was STEVE'S in block letters for ice cream and the opposer's mark was STEVE'S and a design consisting of two fanciful hot dogs with human features, walking together, which is set forth below



for hot dog restaurants.

In the *Steve's Ice Cream* case, the Board found that the literal word in the mark "STEVE'S," along with derivatives, i.e. STEVE, STEVEN and STEPHEN were weak in the restaurant and food store field and therefore, both the differences in the marks and the differences between the applicant's services and opposer's goods avoided a likelihood of confusion.

In the current case, there is no evidence that the identical literal portions of the marks are weak. Further, the goods are in-part identical.

Thus, although the depiction of a fanciful hippopotamus is larger than the word ABBY, given that the literal portions of both Applicant's mark and the cited mark is the identical word "ABBY" and since the goods are in-part identical, we find that the marks are similar and the first *du Pont* factor favors a finding of likelihood of confusion.

C. Additional argument propounded by Applicant.

Applicant argues that the term ABBY is a common given name and is diluted. To support its arguments, Applicant relied on Exhibits A-E, which were attached to Applicant's brief. As discussed above, these documents were not timely submitted and thus have not been considered. Based on the record, Applicant's arguments are unsupported. While we acknowledge that ABBY is a given name, there is no evidence that it is weak as a trademark for the goods at issue.

III. Conclusion.

Having considered all of the relevant evidence and *du Pont* factors, we find that the goods are in-part identical, they presumptively travel in the same channels of trade and the marks are similar. Accordingly, we find a likelihood of confusion between Applicant's mark ABBY and design for plush toys in International Class 28 and cited Registration No. 4533796 for the mark ABBY in standard characters for "dolls, fashion dolls, electronic dolls, animated dolls, doll clothing & doll accessories."

Decision: The refusal to register Applicant's mark ABBY and design is reversed with respect to Applicant's goods in International Class 25 and is affirmed with respect to Applicant's goods in International Class 28. The International Class 25 goods will be deleted from the application, and the application will be published for opposition in International Class 28.