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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	87171233
Applicant	Funko, LLC
Applied for Mark	PINT SIZE HEROES
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UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

U.S. APPLICATION SERIAL NO. 87171233

MARK:



APPLICANT'S REPLY BRIEF

Applicant submits the following reply to address the issues raised by the Examiner on appeal.

- 1. The Examiner's request to strike "new evidence" should be denied because the "new evidence" is not identified, the facts at issue are not "new evidence," and even if the Board deems them otherwise, judicial notice of the facts is proper.**

The Examiner asks that the Board disregard "new evidence" submitted with Applicant's appeal brief. But, the Examiner has failed to identify the "new evidence," and this prejudices Applicant's ability to respond. Applicant therefore moves to strike the Examiner's request.

Although the subject of the Examiner's objection is unclear, if the Examiner is referring to Exhibit A to the Appeal brief, there is no reason to exclude it as it does not, in fact, introduce "new evidence." Exhibit A merely duplicates, for convenience, citations to a Google search and the parties' respective websites. Additionally, the websites were cited in the prior pleadings and are therefore, already of record. *See, e.g.,* Request for Reconsideration at 7. The Examiner's own submissions cite Applicant's website, so it cannot be the case that the website is "new evidence." *See, e.g.,* Examining Attorney's Appeal Brief at 9.

Moreover, contrary to the Examiner's argument, *In re Fiat Grp. Mktg. & Corp. Commc'ns S.p.A.*, 109 USPQ2d 1593, 1596 (TTAB 2014) does not support the Examiner's request. *Fiat* acknowledged the fundamental evidentiary principle that a court should take judicial notice of facts that cannot be reasonably doubted. Accordingly, *Fiat* took judicial notice of dictionary definitions. *Id.*; *see also* ER 201 (providing for judicial notice of a fact that is not subject to reasonable dispute because it can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned).

As in *Fiat*, the Examiner, the Board, or anyone else can access the cited Google searches and the parties' respective websites to confirm what is merely provided for convenience on Exhibit A. Courts take judicial notice of factual information on the internet. *See, e.g., O'Toole v. Northrop Grumman Corp.*, 499 F.3d 1218, 1225 (10th Cir. 2007)(finding that the district court abused its

discretion by failing to take judicial notice as required by Rule 201(d) of the earnings history provided by a party on the internet)(citing *City of Monroe Employees Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 655 n. 1 (6th Cir.2005) (taking judicial notice of a term defined on the website of the National Association of Securities Dealers, Inc.); *Schaffer v. Clinton*, 240 F.3d 878, 885 n. 8 (10th Cir.2001) (taking judicial notice of information found in a political reference almanac and citing to the almanac’s website); and *Grimes v. Navigant Consulting, Inc.*, 185 F.Supp.2d 906, 913 (N.D.Ill.2002) (taking judicial notice of published stock prices found on the world wide web)). As in each of the foregoing cases, a Google search and the parties’ websites are information that can be accurately and readily determined from the internet, and ER 201 therefore applies.

To the extent the Board considers a Google search or the parties’ websites “new evidence,” Applicant requests that the Board either (a) take judicial notice of these facts, or (b) remand the matter so the Examiner may consider the “new evidence.”

2. The refusal to register places undue emphasis on a single term in the marks to the exclusion of the differing terms and distinct designs.

The Examiner is candid that the refusal to register is based not on the marks in the application and the registration, but on an abstraction:

“Because the marks share the common PINT SIZE wording, they are confusingly similar in appearance and, as a result of the shared wording, the connotation and commercial impression evoked by the marks is also similar. Both marks give rise to the commercial impression of something that is small in size.”

Appeal Brief at 6.

But the application and the registration paint a different picture. Indeed, the isolated terms “PINT SIZE” and “PINT SIZE” in Arial font, as considered by the Examiner, are similar in “appearance,” but those are not the marks at issue. The marks at issue are highly visually distinct and place emphasis on different words in the marks:



and



Applicant’s mark, in italicized all-caps, emphasizes “HEROES,” which is twice as large as and, as designed, precedes the term “PINT SIZE.” Applicant’s mark emphasizes HEROES. In contrast, Registrant’s mark is in all lower case and emphasizes the term “PINT SIZE.” As set forth in the application and the registration, the marks are fundamentally distinct in appearance.

Even if we isolate the term “PINT SIZE” in each of the marks and strip them of their respective designs, the commercial impressions of the marks are distinct. As used in Applicant’s mark, the term “PINT SIZE” suggests the diminutive stature of figures. *See* Request for Reconsideration at 2. In contrast, as used in Registrant’s mark, the term “PINT SIZE” suggests the babies and toddlers featured in the Registrant’s board books. *See* Request for Reconsideration at 5. To remove all doubt, the design of Registrant’s mark emphasizes that “PINT SIZE” refers to kids: the small “i” inside a large “I” depicts a ‘kid’ stick-figure head and body inside an ‘adult’ stick-figure head and body. Thus, even the isolated term “PINT SIZE” in each of the marks makes a different commercial impression.

3. The Examiner ignores dictionary definitions of common terms when concluding that Applicant’s and Registrant’s marks do not make distinct commercial impressions.

The Examiner improperly rejected Applicant’s argument that the commercial impression of “PINT SIZE HEROES” is different from “PINT SIZE PRODUCTIONS” because the former creates an ironic juxtaposition, whereas the latter does not. In rejecting this argument, the Examiner improperly isolates the term “HEROES” and argues that there is no ironic juxtaposition because Applicant’s figures depict heroes.¹ The Examiner’s position is untenable because it considers only one term, not the terms in juxtaposition (a *sin qua non* of irony). And more to the point, the Examiner’s analysis does not even consider the definition(s) of irony, which explain the effect of (i.e., the impression made by) this linguistic device.

Irony has been a successful linguistic and literary device since the ancient Greeks. *See* <https://literarydevices.net/irony/>. In other words, it has proven itself effective at reaching an audience—people recognize it when they see, and it engages the listener. It has been the subject of much philosophizing (*see, e.g.*, Richard Rorty, Ernst Behler, Soren Kierkegaard, Alanis Morissette), but one need look no further than the dictionary to describe it. *See* <https://www.merriam-webster.com/dictionary/irony>. The common thread in each definition of irony is incongruity, be it in the literal and conveyed meaning of words, in the gap between intentions and outcomes, or between what the actor and the audience know.

Whether the Examiner agrees that Applicant’s mark exemplifies irony, is not the point. The fact remains that the term “PINT SIZE” is incongruous with the term “HEROES” in a way that “PINT SIZE” is not when used with “PRODUCTIONS.” A conventional hero is admirable, great, and commonly depicted as larger than life, often with the bulging muscles to match. Even Michelangelo’s David, a hero known for defeating his much larger foe, is depicted in this manner, looming large with a subtly but nonetheless disproportionately large sling arm:

¹ In fact, many of Applicant’s Pint Size Heroes are not terribly heroic (e.g., the characters from *A Nightmare Before Christmas*, *Snow White and the Seven Dwarfs*, and *Despicable Me*).



Heroes do not, of course, need to be depicted as larger than life. But that is the convention. It is the common understanding; what is expected. Certainly, small heroes exist, but it cannot be said that they establish the norm. Accordingly, the term “PINT SIZE” creates an incongruous, or at least a less than expected, impression when combined with the term “HEROES.” This cannot be said of the combination of terms in Registrant’s mark, and the Examiner should have considered this in assessing how consumers perceive Applicant’s mark.

4. The refusal to register Applicant’s mark improperly extends patent-like exclusionary rights to Registrant’s mark.

The Examiner cites *Recot, Inc. v. Becton*, 214 F.3d 1322, 1329, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000) for the proposition that even goods that are different in kind may be related in the minds of

consumers. But the Examiner stretches *Becton* too far, ignoring the fact that the court in *Becton* made this exception to the rule because the mark at issue, FRITO-LAY, was famous: “The Board erred when it limited the weight accorded to the fame of the FRITO-LAY mark.” *Id.* at 1327. And indeed, consumers might think that FIDO-LAY dog treats might be a new offering from the famous purveyor of snack-foods.

That is not, however, the case here. Registrant’s mark is not famous, so there is no reason to think that it is associated in the minds of consumers with any and all types of toys. Just as the Registration states on its face, Registrant’s mark covers board books and stuffed animals, which are not the same as Applicant’s vinyl collectable figures. Under the circumstances, the Examiner’s application of *Becton* is inapt, allowing the exception to swallow the rule that different products in different registration categories are different.

The Examiner’s overbroad reading of *Becton* extends the scope of Registrant’s marks not just beyond Registrant’s registration but also beyond what the law allows. A trademark does not function as a patent on all associated goods; if it did, any good sold in a department store could provide the basis for rights extending to a wide range of “related goods” that consumers confront in the same department store—case in point, the Examiner’s citation to Toys-R-Us and The Disney Store. Goods bear no rights in and of themselves that spill over to all other goods in a general category such as toys; the associated rights are derived from the marketing and sale of particular goods in a particular trade or industry:

“A trademark is not one in gross like a patent right but is a right of user in connection with a trade or business to designate the product to which the mark is applied in that trade or business. It is the use of the mark in a going trade or business to distinguish the product of the user from that of others and not the choice of it which creates what becomes the subject of property in the mark.”

Standard Brands v. Smidler, 151 F.2d 34, 36 (2d Cir. 1945).

Accordingly, Registrant’s registration for board books and stuffed animals does not give it a monopoly on all toys sold in connection with term PINT SIZE. *Du Pont* mandates a case-by-case analysis, and here, Registrant does not enjoy the sort of fame that (under *Becton*) expands rights beyond the goods identified in the registration (as does “Frito-Lay” for snack foods).

5. Applicant requests oral argument.

For the reasons stated above and in the preceding pleadings, Applicant respectfully requests that the Board reverse the refusal to register Applicant’s mark. Pursuant to 37 CFR 2.129, Applicant requests oral argument via teleconference.