

This Opinion is Not a
Precedent of the TTAB

Mailed: June 7, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Sunny Days Entertainment LLC

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Serial No. 88949521

Julian L. Bibb IV of Waller Lansden Dortch & Davis LLP for Sunny Days
Entertainment LLC.

Nelson B. Snyder III, Trademark Examining Attorney, Law Office 107,
J. Leslie Bishop, Managing Attorney.

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Before Bergsman, Shaw, and Dunn,
Administrative Trademark Judges.

Opinion by Dunn, Administrative Trademark Judge:

Sunny Days Entertainment LLC (Applicant) seeks registration on the Principal Register of the mark POP N PLAY (in standard characters) for “play tents,” in International Class 28.¹

¹ Application Serial No. 88949521 filed June 5, 2020, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant’s allegation of a bona fide intention to use the mark in commerce.

References to the application are to the downloadable .pdf version of documents available from the TSDR (Trademark Status and Document Retrieval) database. The TTABVUE citations refer to the Board’s electronic docket, with the first number referring to the docket entry and the second number, if applicable, referring to the page within the entry.

The Trademark Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, as applied to the goods identified in the application, so resembles the mark POP 'N PLAY (in standard characters) for "play yards" in International Class 20, registered on the Principal Register,² as to be likely to cause confusion, to cause mistake, or to deceive.

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed.³ We affirm the refusal to register.

I. LIKELIHOOD OF CONFUSION

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) (*DuPont*). See also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). We must consider each *DuPont* factor for which there is evidence and argument. See *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). In any likelihood of confusion analysis, two key considerations are the similarities between 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

² Registration No. 5568036 issued September 25, 2018.

³ The Examining Attorney's brief, due February 22, 2022, was filed February 23, 2022 with a motion to accept late-filed brief. Applicant does not object, and so we have considered the late brief.

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.”).

A. Similarity or Dissimilarity of the Marks

The first *DuPont* factor requires consideration of “[t]he similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.” *DuPont*, 177 USPQ at 567. Applicant seeks to register the term POP N PLAY in standard characters, which, except for an apostrophe, is identical to the registered mark POP ‘N PLAY. *See Pinocchio’s Pizza Inc. v. Sandra Inc.*, 11 USPQ2d 1227, 1228 (TTAB 1989) (“[T]he marks [PINOCCHIOS and PINOCCHIO’S] are virtually identical, the only difference being the insignificant inclusion of an apostrophe”). As a result, the marks look and sound the same.

As to connotation, both marks combine verbs which suggest that the goods are easy to set up, or “burst open” or “open with a pop” (POP) so the user can “engage in sport or recreation” (PLAY).⁴ The definition of “‘N’ states that it is a variant of AND and ‘N.⁵ Corroborating the suggestive connotation of POP N PLAY, or the variant POP ‘N PLAY, demonstrated by the dictionary definitions, Applicant provided an advertisement for its play tents which asserts:⁶

Easy assembly & fast storage: Pop-up design allows for hassle free assembly. Just slide in the sturdy poles and you're ready to go. No need for tools! When play time is over the tent folds flat for easy storage.

...

⁴ March 28, 2021 Office Action TSDR 6-26 (Merriam Webster online dictionary definitions).

⁵ *Id.* at 29-30.

⁶ March 2, 2021 Response TSDR 26.

Year round fun: The tent can be used as a place to play with toys, read or imagine you in a magical under sea adventure. This pop up play tent is the ultimate play space for any boy or girl to enjoy year round play.

Applicant also provided an advertisement for registrant's play yards which asserts:⁷

The Pop 'N Play® Portable Playard allows you to easily create a safe portable play area for your child. The ultra-lightweight and compact fold playard can be set up and taken down in seconds, making it perfect for use at home, a day at the park, or a weekend at the beach. The water resistant floor helps keep baby dry even on damp grass. Airy mesh sides provide added visibility, A travel bag with shoulder strap is included for on-the-go convenience.

We find that the term POP N PLAY and the variant POP 'N PLAY when used on play tents and play yards has the same suggestive connotation of goods which can be quickly assembled to enable children to play. Neither Applicant nor the Examining Attorney contend or present any evidence that POP N PLAY has a different connotation when applied to "play tents" that is absent when applied to "play yards," or vice versa, so we find that the connotation and overall commercial impression is identical when applied to the respective goods. *Cf. Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) ("Opposer's COACH mark, when applied to fashion accessories is clearly either arbitrary or suggestive of carriage or travel accommodations [e.g., stagecoach, train, motor coach, etc.] thereby engendering the commercial impression of a traveling bag [e.g., a coach or carriage bag]. On the other hand, applicant's COACH marks call to mind a tutor who prepares a student for an examination.").

⁷ *Id.* at 33.

We disagree with Applicant’s argument that the sixth *DuPont* factor, which assesses the commercial strength of the registered mark as shown by “the number and nature of similar marks in use on similar goods,” demonstrates that there is no likelihood of confusion here. *In re FCA US LLC*, 126 USPQ2d 1214 (TTAB 2018) (“Evidence of third-party use may reflect commercial weakness”). More specifically, we agree with the principle that evidence of extensive third-party use of a term, on the same or similar goods in the relevant marketplace, is probative of the term’s commercial weakness as a trademark. *See In re Medline Indus., Inc.*, 2020 USPQ2d 10237, *11 n.38 (TTAB 2020); *In re Morinaga Nyugyo Kabushiki Kaisha*, 120 USPQ2d 1738, 1745 (TTAB 2016); *In re Broadway Chicken Inc.*, 38 USPQ2d 1559, 1565-66 (TTAB 1996). However, based on the sparse evidence of third-party use of marks including the terms POP and PLAY in this record for similar goods, we find that the evidence fails to demonstrate that the cited registered mark is commercially weak.

Here, Applicant submitted four third party registrations for marks and goods which Applicant alleges to be similar to registrant’s mark and goods:⁸

⁸ *Id.* at 59-74. Because they are not sufficiently similar, we do not include the registrations for marks which includes only one of the two dominant terms in Applicant’s mark and the cited mark: POPSTROKE EAT, PLAY, DRINK (Registration No. 6019642), PORTA POP (Registration Nos. 6047062 and 5942559), POP IT UP (Registration No. 4990822, POP (Registration No. 6048760), POP! PORTABLE ON THE GO PRODUCTS (Registration Nos. 5897890 and 5583373), and PLAYINYARD (Registration No. 6215652). We also do not include cancelled Registration Nos. 4581458 and 4740527. A cancelled or expired registration is not evidence of any presently existing rights in the mark shown or that the registrant ever used the mark. *Action Temporary Servs. Inc. v. Labor Force Inc.*, 870 F.2d 1563, 10 USPQ2d 1307, 1309 (Fed. Cir. 1989); *Kemi Organics, LLC v. Gupta*, 126 USPQ2d 1601, 1606 (TTAB 2018).

Registration No. 6185919	POP N' PLAY	pet toys
Registration No. 5185295		Video and computer game programs Toy aircraft; Toy buildings and accessories therefor
Registration No. 3336102	POPULAR PLAYTHINGS	Toys, namely, construction sets, board games, parlor games, manipulative games, manipulative puzzles, multidimensional manipulative games and multidimensional manipulative puzzles, toy magnets; educational counting toys designed to teach children to count and do simple arithmetic consisting of numbers, play mat and storage tray; card games, action skill games, dice games, jigsaw puzzles; manipulative games, namely, magnetic play boards consisting of a background board made of metal and magnetic shapes for use with the board to create objects or scenes; toy vehicles, children's and infant's multiple activity toys, toy model and hobby craft kits involving science, toy building blocks, water squirting toys, drawing toys and toy figures
Registration No. 5869723	POP 'N GO PLAYPEN	Play yards; Play yards for pets; Playpens for babies

Four third party registrations is not the volume of evidence of extensive use which has been required to consider a mark commercially weak. *See Juice Generation, Inc. v. GS Enters. LLC*, 115 USPQ2d at 1673 n.1 (twenty-six examples of third-party use with restaurant services or food products). A handful of third-party uses generally is not considered sufficient to make a term weak in the eyes of the consuming public. *See In re i.am.symbolic, llc*, 127 USPQ2d 1627, 1636 (TTAB 2018) (“These five uses of WILLPOWER, while somewhat probative, are insufficient to ‘show that customers ... have been educated to distinguish between different ... marks on the basis of

minute distinctions.”) (citation omitted); *In re I-Coat Co.*, 126 USPQ2d 1730, 1733 (TTAB 2018) (“[U]nlike cases in which extensive evidence of third-party use and other evidence in the record was found to be ‘powerful on its face’ ... Applicant has presented, at most, three such uses, well short of the volume of evidence found convincing”).

We also note that absent evidence of actual use, third-party registrations have little probative value because they are not evidence that the marks are in use on a commercial scale or that the public has become familiar with them. *See Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462, 463 (CCPA 1973) (the purchasing public is not aware of registrations reposing in the U.S. Patent and Trademark Office); *Productos Lacteos Tocumbo S.A. de C.V. v. Paeteria La Michoacana Inc.*, 98 USPQ2d 1921, 1934 (TTAB 2011). *See also In re Hub Distrib., Inc.*, 218 USPQ 284, 285 (TTAB 1983) (“[T]hird party registrations in this Office, absent evidence of actual use of the marks subject of the third-party registrations, they are entitled to little weight on the question of likelihood of confusion.”).

In sum, we find the registered mark POP N PLAY for play yards is entitled to the customary scope of protection.

Because the marks POP N PLAY and POP ‘N PLAY are virtually identical in appearance, pronunciation, connotation and commercial impression, and the term has not been shown to warrant a narrow scope of protection, this *DuPont* factor favors finding a likelihood of confusion.

B. Similarity or Dissimilarity of the Goods, Trade Channels, and Conditions of Purchase

We now address the second, third, and fourth *DuPont* factors, assessing the similarity or dissimilarity of Applicant's and Registrant's goods, trade channels, and "the conditions under which and buyers to whom sales are made, i.e. 'impulse' vs. careful, sophisticated purchasing." *DuPont*, 177 USPQ at 567. Our determination must be based on the identification of goods in the subject application and cited registration because they define the scope of the benefit of registration. *Stone Lion Capital Partners v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014). The application and registration themselves may provide evidence of the relationship between the services. *Bose Corp. v. QSC Audio Prods. Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1310 (Fed. Cir. 2002) ("On the face of the registrations themselves, QSC's [amplifiers and power amplifiers] and the ACOUSTIC WAVE [loudspeaker systems and music systems consisting of a loudspeaker system and amplifier and at least one of a radio tuner, compact disc player and audio tape cassette player and loudspeaker systems] are related."); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1005 (Fed. Cir. 2002) (finding the Board erred in concluding that there was insufficient evidence of relatedness, because it "did not consider the important evidence already before it, namely the ITU application and [opposer's] registrations"). It is sufficient that the goods of the applicant and the registrant are related in some manner or that the conditions surrounding their marketing are such that they are likely to be encountered by the same persons under circumstances that, because of the marks used in connection

therewith, would lead to the mistaken belief that they originate from the same source. *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 14711, 1476 (Fed. Cir. 2000).

Here, we find an inherent relationship between Applicant’s “play tents” and the registered goods “play yards.” A “tent” is “a collapsible shelter of fabric (such as nylon or canvas) stretched and sustained by poles and used for camping outdoors or as a temporary building,” or “something that resembles a tent.”⁹ A “play yard” is another term for a “play pen,” a portable usually collapsible enclosure in which a baby or young child may play.¹⁰ Both are collapsible products for children’s play. *See Hewlett-Packard*, 62 USPQ2d at 1005 (“The ‘conversion from one media form to another media’ description in the ITU application is similar to HP’s registrations covering programs for information manipulation and apparatus for data acquisition and processing.”). Below are images of the respective goods:

Registrant’s Play Yard ¹¹	Applicant’s Play Tent ¹²
	

⁹ March 28, 2021 Office Action 35-41.

¹⁰ *Id.* at 31-34 (Merriam Webster online dictionary definition).

¹¹ September 27, 2021 Response TSDR 26.

¹² *Id.* at 33.

We agree with Applicant that the goods are not the same, and that the play yard is an enclosure while the play tent includes an entrance, and that there are structural differences and price differences. However, we do not agree that there are no overlapping uses. The definition of a play tent includes no age limits, and the definition of play yard refers to both babies and small children. A baby may crawl into a play tent as well as around a play yard, and a small child may take a nap in a play yard as well as run into a play tent.

In addition to the inherent relationship between play tents and play yards as collapsible structures for play by children, we consider the record evidence which shows that play tents and play yards are goods which may emanate from a single source. The Examining Attorney submitted twelve use-based third-party registrations (Nos. 3389609 ABBA PATIO, 4681634 MYPLAYSPACE, 4796580 DWINGULER, 5046794 TREEPOD, 5222022 LEBZE, 5546871 BBLUV, 5374490 SUGAR MOON TOYS, 5495589 INKERSCOOP, 5391640 APRFECTLIFE, 5380721 star design, 6040832 NATURE PIONEOR, and 5983565 KASINI) for goods including play tents and play yards in the nature of outdoor play structures or play pens for babies.¹³

“Third-party registrations which cover a number of differing goods and/or services, and which are based on use in commerce, although not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, may nevertheless have some probative value to the extent that they may serve

¹³ September 2, 2020 Office Action TSDR 7-39.

to suggest that such goods or services are of a type which may emanate from a single source.” *Ricardo Media, Inc. v. Inventive Software, LLC*, 2019 USPQ2d 311355, *2 (TTAB 2019) (quoting *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988), *aff’d*, 864 F.2d 149 (Fed. Cir. 1988) (unpub.).

In support of its argument that the differences between the goods preclude confusion, Applicant has submitted the November 16, 2017 request for reconsideration filed by the registrant during examination of the cited mark.¹⁴ Applicant contends that the statement by the registrant that its “play yards” differ from (and travel in different channels of commerce and appeal to different consumers than) the “play houses and toy accessories therefor; play tents; plush dolls; plush toys; pop up toys; stuffed toy animals; stuffed toys” in the cited mark POP-N-PLAY HAPPY CAMPERS (Registration No. 4543399) is “important information” which should be taken into account in this determination.¹⁵ We disagree.

Registrant is not a party to this ex parte appeal, so it is not clear why a legal conclusion that registrant unsuccessfully argued during examination is relevant. Moreover, legal conclusions such as the registrant’s statement that the differences between the goods preclude a likelihood of confusion are not admissions. *See Interstate Brands Corp. v. Celestial Seasonings, Inc.*, 576 F.2d 926, 198 USPQ 151,

¹⁴ March 2, 2021 Response TSDR 40-58.

¹⁵ 6 TTABVUE 20-21.

153 (CCPA 1978) (“[B]ecause ‘that confusion is unlikely to occur’ is a legal conclusion, it cannot be an ‘admission.’ Facts alone may be ‘admitted.’”).¹⁶

That a party earlier indicated a contrary opinion respecting the conclusion in a similar proceeding involving similar marks and goods is a fact, and that fact may be received in evidence as merely illuminative of shade and tone in the total picture confronting the decision maker. To that limited extent, a party’s earlier contrary opinion may be considered relevant and competent. Under no circumstances, may a party’s opinion, earlier or current, relieve the decision maker of the burden of reaching his own ultimate conclusion on the entire record.

Id. We have considered Registrant’s statements made during the prosecution of the application of the cited mark but they do not persuade us that the goods are unrelated or move in different channels of trade offered to different classes of consumers. In short, we have considered the request for reconsideration, but do not find it supports a conclusion that there is no likelihood of confusion here.

Turning to the channels of trade, the record includes excerpts from four online stores (buybuyBABY, Wayfair, Pottery Barn Kids, and Alvantor) showing the same retail entity may offer both play tents and play yards.¹⁷ One example is set forth below:

¹⁶ As additional context for registrant’s request for reconsideration, USPTO records show that on November the examining attorney rejected Registrant’s argument that the differences between the goods preclude a likelihood of confusion, and denied the request for reconsideration. On January 30, 2018, the registrant filed a petition to cancel the cited registration (Cancellation No. 92067833) which was granted on May 13, 2018 and resulted in entry of default judgment. On June 20, 2018, notice of publication for registrant’s application issued, so there was no co-existence of registrant’s mark and the cited mark on the register.

¹⁷ September 2, 2020 Office Action TSDR 40-41; March 28, 2021 Office Action 42-74.

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Showing 1 - 24 of 32 products Free 2 hour Pickup at Dulles Landing
Change or add stores

Type Of Savings Color Price Brand Product Type Gender All Filters Best Match

 \$39.99 Pacific Play Tents Cottage Twin Bed Tent ★★★★★ 3 Price Match Promise - Coupons cannot be applied Free Shipping on Orders Over \$39 Compare	 \$42.99 Pacific Play Tents Tree House Twin Bed Tent ★★★★★ 6 Price Match Promise - Coupons cannot be applied Free Shipping on Orders Over \$39 Compare	 \$39.99 Pacific Play Tents Rad Racer Twin Bed Tent ★★★★★ 5 Price Match Promise - Coupons cannot be applied Free Shipping on Orders Over \$39 Compare	 \$46.99 Pacific Play Tents H.Q. Camo Twin Bed Tent in Pink ★★★★★ 1 Price Match Promise - Coupons cannot be applied Free Shipping on Orders Over \$39 Compare
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Figure 1 BuyBuyBaby play tent¹⁸

¹⁸ September 2, 2020 Office Action TSDR 40-41 (image split).

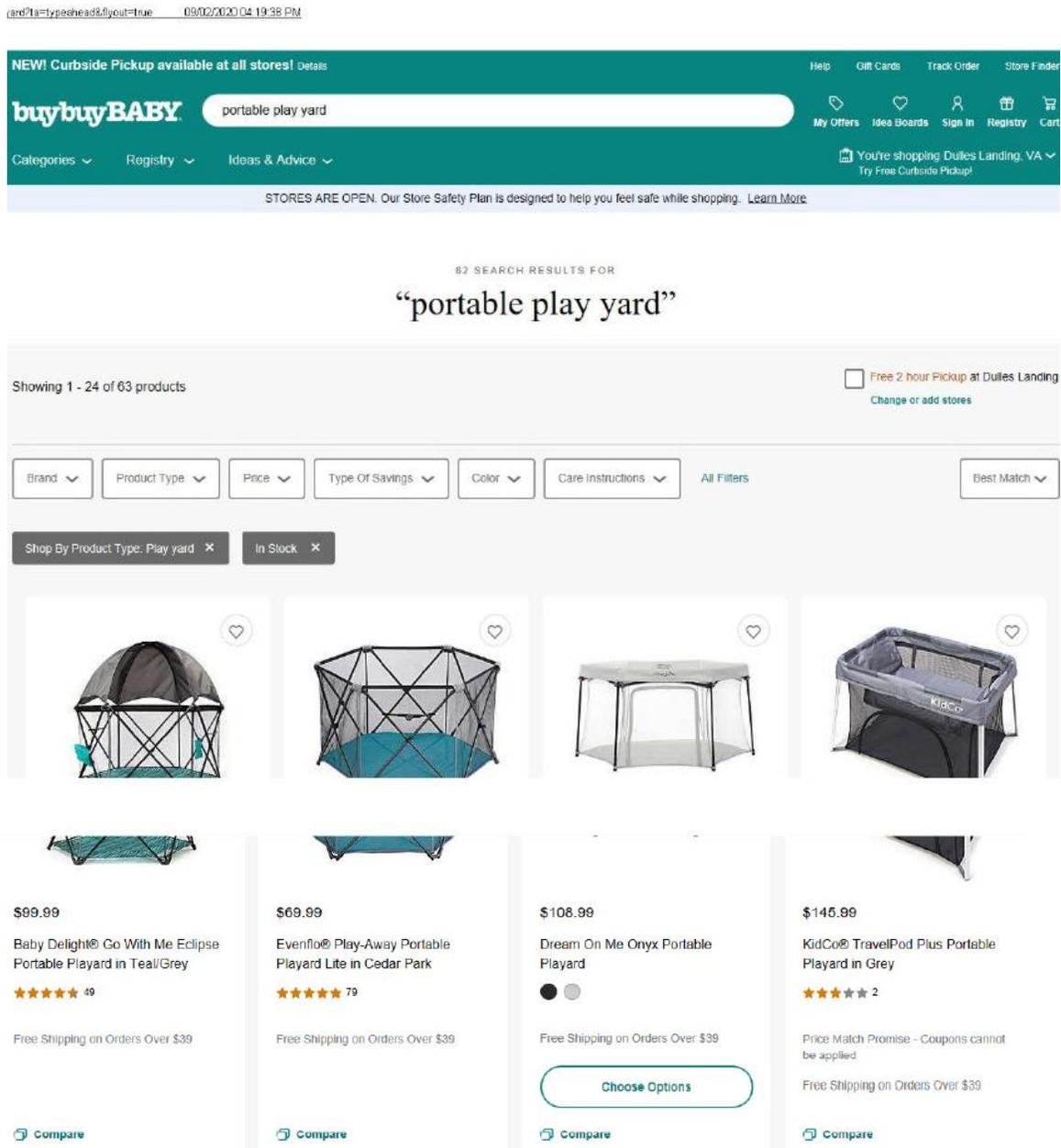


Figure 2 BuyBuyBaby play yard¹⁹

Finally, where, as in the application and cited registration, there are no restrictions on trade channels in the identification of goods, we must presume that the goods travel in all channels of trade appropriate for such goods. *Stone Lion*, 110

¹⁹ *Id.* at 44-45.

USPQ2d at 1161; *In re Ox Paperboard, LLC*, 2020 USPQ2d 10878, at *6 (TTAB 2020). That is, whether or not Applicant's play tents or the registered play yards actually come from the online retail stores shown in the examples of third-party use, for the purposes of this comparison the unrestricted identification of goods in the application and registration does not preclude Applicant's play tents or the registered play yards from travelling in those channels of commerce.

Finally, it is important to note that where virtually identical marks are involved, as is the case here, the degree of similarity between the goods that is required to support a finding of likelihood of confusion declines. *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993) (“[E]ven when the goods or services are not competitive or intrinsically related, the use of identical marks can lead to the assumption that there is a common source”). It is only necessary that there be a “viable relationship between the goods” to support a finding of likelihood of confusion. *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1636 (TTAB 2009); *In re Wilson*, 57 USPQ2d 1863, 1867 (TTAB 2001).

The evidence of record demonstrates that Applicant's play tents and the registered play yards are inherently related, are goods that may emanate from a single source, and travel in the same unrestricted channels of trade. More is not necessary. For these reasons, we find the relationship between the goods and their channels of trade also favor a finding of likelihood of confusion.

C. Balancing the Factors

In conclusion, we have considered all of the arguments and evidence of record, and all relevant *DuPont* factors. While we recognize there are differences between the goods, when used with the virtually identical marks POP N PLAY and POP 'N PLAY, we find that the relationship between play tents and play yards and the overlapping channels of trade make confusion likely.

Decision: The refusal to register Applicant's mark POP N PLAY is affirmed.