

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

Mailed: July 13, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Elephant Learning, LLC

Serial No. 90556090
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Pamela N. Hirschman and Autumn R. Hartman of Sheridan Ross P.C.,
for Elephant Learning, LLC.

Sheena Kapoor Patel, Trademark Examining Attorney, Law Office 106,
Mary I. Sparrow, Managing Attorney.

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Before Cataldo, Greenbaum and English,
Administrative Trademark Judges.

Opinion by Greenbaum, Administrative Trademark Judge:

Elephant Learning, LLC (“Applicant”) seeks registration on the Principal Register of the mark ELEPHANT LEARNING MATH ACADEMY (standard characters, LEARNING and MATH ACADEMY disclaimed), for “Downloadable children’s educational mobile applications; Downloadable educational mobile applications featuring instruction in math,” in International Class 9.¹

¹ Application Serial No. 90556090 was filed on March 2, 2021, based upon Applicant’s claim of first use anywhere and first use in commerce since at least as early as June 9, 2017, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a).

The Trademark Examining Attorney has refused registration of the mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, when used on or in connection with the identified goods, so resembles the following two registered marks, owned by one Registrant, as to be likely to cause confusion, mistake or deception:

1. ELEPHANT GAMES (in standard characters, GAMES disclaimed) for

Computer game programs, electronic game programs, computer game programs downloadable via the Internet, downloadable electronic game programs, electronic game software for cellular telephones, in International Class 9,² and

2. ELEPHANT GAMES and Design (GAMES disclaimed), displayed as



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Video screens; electronic notice boards; video game cartridges; computer keyboards; mouse pads; computers; notebook computers; computer hardware, namely, monitors; recorded computer programs for entertainment, namely, game software; computer game programs for personal computers and for mobile devices for entertainment; computer programs, namely, downloadable game software for personal computers and for mobile devices for entertainment; downloadable electronic publications, namely, game guidelines and instructions for use; downloadable electronic publications, namely, brochures, articles, newsletters, magazines, trading cards and postcards in the field of entertainment; computer peripheral devices, in International Class 9.³

² Registration No. 5398907 issued on February 13, 2018.

³ Registration No. 6088002 issued on June 30, 2020 and includes the following description of the mark: "The mark consists of a stylized red arc over a stylized figure of a black elephant

When the refusal was made final, Applicant appealed. Applicant and the Examining Attorney filed briefs. We reverse the refusal to register.

I. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v. Capital 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) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination.”). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between 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.”).

and the words ‘ELEPHANT GAMES’ in black.” The colors red and black are claimed as a feature of the mark. The registration also covers goods in Class 28, which are not involved in this appeal.

A. Strength of the Cited Registered Marks

We begin by evaluating the strength of the cited registered marks and the scope of protection to which they are entitled. “A mark’s strength is measured both by its conceptual strength (distinctiveness) and its marketplace [or commercial] strength (secondary meaning).” *In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010). For likelihood of confusion purposes, “the strength of a mark is not a binary factor, but varies along a spectrum from very strong to very weak.” *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003).

Applicant contends that “ELEPHANT” is a weak term entitled to a narrow scope of protection or exclusivity of use because of approximately ten third-party, use-based registrations of ELEPHANT-formative marks for software goods and services:

- Reg. No. 4585969 for BUBBLES THE ELEPHANT for “on-line computer services, namely, providing software applications for enabling interactive access to educational materials for children and their families”;
- Reg. No. 5661493 for ELEPHANT TREASURES for “computer game software”;
- Reg. No. 4947579 for ASIAN ELEPHANT for “computer game software”;
- Reg. No. 5702981 for ELEPHANT EAR SOFTWARE for software for business purposes and database management;
- Reg. No. 4515266 for BULL ELEPHANT for computer software for games of chance;

- Reg. No. 5616819 for ELEPHANTSTOCK for providing a web site featuring temporary use of non-downloadable software related to artwork;
- Reg. No. 5162014 for GREAT ELEPHANT for computer software for games of chance (same owner as Reg. No. 4515266 for BULL ELEPHANT);
- Reg. No. 5032290 for ROYAL ELEPHANT for computer game software for gaming machines and games of chance;
- Reg. No. 6350229 for FILIPHANT and Design (of an elephant head) for database management software for use by financial advisers; and
- Reg. No. 4835327 for UNDERGROUND ELEPHANT for non-downloadable software related to business marketing services.

June 14, 2021 Response to Office Action, TSDR 15-74.⁴

Perhaps more importantly, the two cited registrations and the above third-party registrations coexist with Applicant's recent registrations for the marks ELEPHANT LEARNING (LEARNING disclaimed (Reg. No. 6178676)) and ELEPHANT AGE (Reg. No. 6047589), both for "Provision of online non-downloadable educational software for teaching children math," which is the online equivalent of the mobile

⁴ We do not include in this count third-party application Serial No. 4947589 for MAJESTIC ELEPHANT as it is not evidence of use; it is evidence only that the application was filed on a certain date. *In re Embiid*, 2021 USPQ2d 577, at*36 (TTAB 2021); *In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1089 (TTAB 2016). June 14, 2021 Response to Office Action, TSDR 48-51, 52-54, and 22-23, respectively. Applicant also submitted registrations for the marks TEMBO THE BADASS ELEPHANT and Design (Reg. No. 5043338) and ELEPHANTS, RHINOS & PEOPLE (Reg. No. 5516387). However, these two marks registered under Sections 66(a) and 44(e) of the Trademark Act, respectively. The registrations therefore have very little, if any, probative value. *Cf. In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993) (third-party registrations issued under Section 44(e), without any use in commerce basis, have very little persuasive value in suggesting that the identified goods or services are related).

applications identified in the instant application. June 14, 2021 Response to Office Action, TSDR 12-16. Notably, Applicant's registered ELEPHANT LEARNING mark is incorporated, in its entirety, in the involved mark ELEPHANT LEARNING MATH ACADEMY.⁵

There is no evidence that ELEPHANT has any meaning or significance as applied to software, including the computer game software identified in the cited registrations. Nor is there evidence of third-party use. However, there is evidence of third-party registrations of somewhat similar marks for various software, *cf. Juice Generation, Inc. v. GS Enters LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674-75 (Fed. Cir. 2015); *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1135-36 (Fed. Cir. 2015), *cert. denied*, 136 S. Ct. 982 (2016), all of which coexist with Applicant's recent registrations for ELEPHANT LEARNING and ELEPHANT AGE.

Due to the third-party registrations of ELEPHANT-formative marks for software, we accord the cited registered marks a somewhat narrower scope of protection than that to which marks with inherently distinctive terms normally are entitled. The presence of Applicant's registrations for ELEPHANT AGE, and more particularly, ELEPHANT LEARNING, on the Principal Register for services that are essentially equivalent to the purpose of mobile applications identified in the present application (i.e., to teach math to children), provide further support for this finding.

⁵ This is one reason for the separate disclaimer of LEARNING and MATH ACADEMY in the application.

B. Similarity or Dissimilarity of the Marks

We compare Applicant’s mark ELEPHANT LEARNING MATH ACADEMY (in standard characters), and the cited registered marks ELEPHANT GAMES (in



standard characters) and _____, “in their entirety as to appearance, sound, connotation and commercial impression.” *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1048 (Fed. Cir. 2018) (quoting *DuPont*, 177 USPQ at 567); *see also Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005). “The proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018). Further, the marks “must be considered ... in light of the fallibility of memory ...” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quotation omitted). We focus on the recollection of the average consumer – here, an ordinary purchaser of software – who normally retains a general rather than a specific impression of trademarks. *Id.* at 1085; *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971).

Because similarity is determined based on the marks in their entirety, our analysis is not predicated on dissecting the marks into their various components.

Stone Lion Cap. Partners, LP v. Lion Cap. LLP, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014). *See also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). On the other hand, “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 consideration of the marks in their entirety.” *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). For instance, as the Federal Circuit has observed, “[t]hat a particular feature is descriptive or generic with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of a mark” *Id.*, 224 USPQ at 751.

The Examining Attorney, citing *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 73 USPQ2d at 1692, and *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed Cir. 1992), argues that the dominant feature of each mark is the term “ELEPHANT” because this term appears first in each mark and it is most likely to be impressed in purchasers’ memories. Ex. Atty. Br., 6 TTABVUE 3. The Examining Attorney also contends that the other elements in each mark are less significant because the trailing terms GAMES and LEARNING and MATH ACADEMY have been disclaimed, *see In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997), and the design element in one of the cited registrations would not be verbalized. *See In re*

Viterra Inc., 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed Cir. 2012). Ex. Atty Br., 6 TTABVUE 3.

We agree that the marks are similar because they share the identical, leading literal term ELEPHANT. However, the evidence discussed above demonstrates that the common term ELEPHANT is somewhat weak due to the various third-party registrations for software. The different connotations of the trailing words GAMES and LEARNING MATH ACADEMY significantly contribute to the different commercial impressions of the marks, as GAMES describes the computer games identified in the cited registrations, and LEARNING MATH ACADEMY describes the purpose of Applicant's educational mobile applications, which children will use to learn math.

When considered in their entirety, and keeping in mind the relative weakness of the only common term shared by the marks, namely ELEPHANT, we find Applicant's mark and the cited registered marks to be more dissimilar than similar in appearance, sound and meaning, and overall, to convey dissimilar commercial impressions. Applicant's ownership of two registrations for ELEPHANT-inclusive marks covering essentially the same software as identified in the present application, including one for the mark ELEPHANT LEARNING, which the mark in Applicant's application incorporates, further supports this finding. Thus, this *DuPont* factor weighs in favor of a finding of no likelihood of confusion.

C. Similarity or Dissimilarity of the Goods and Channels of Trade

With regard to the goods, channels of trade and classes of consumers, we must make our determination under these *DuPont* factors based on the goods as they are identified in the application and cited registrations. *See Detroit Athletic Co.*, 128 USPQ2d at 1052; *Dixie Rests.*, 41 USPQ2d at 1534; *see also Stone Lion*, 110 USPQ2d at 1161; *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004-05 (Fed. Cir. 2002); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

To recap, the goods identified in the application comprise “downloadable children’s educational mobile applications; downloadable educational mobile applications featuring instruction in math,” while the goods identified in Reg. No. 5398907 include “computer game programs” and “electronic game software for cellular phones,” and the goods identified in Reg. No. 6088002 include “recorded computer programs for entertainment, namely, game software; computer game programs for personal computers and for mobile devices for entertainment; computer programs, namely, downloadable game software for personal computers and for mobile devices for entertainment.” The aforementioned computer game programs and software covered in the cited registrations are broadly identified, with no limitation as to the content of the computer game, and therefore must be presumed to encompass computer games of all types, including games that entertain while also imparting math skills to children. *See, e.g., In re Hughes Furniture Indus., Inc.*, 114 USPQ2d 1134, 1137 (TTAB 2015) (“Applicant’s broadly worded identification of ‘furniture’ necessarily

encompasses Registrant's narrowly identified 'residential and commercial furniture.'"); *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992). The goods therefore are legally identical in part.

The record, which includes printouts from Google Play and The App Store, amply supports this finding with multiple examples of educational math software applications that are in the form of games for children. The following are representative examples: My Math Academy, PBS KIDS Games, and various math educational applications by pescAPP's, all attached to the April 11, 2021 Office Action, TSDR 8-18; Monster Math, Moose Math by Duck Duck Moose, Prodigy: Kids Math Game, various math educational applications by RV AppStudios (e.g., Math Kids, Math Games), and various other applications such as Simple Math, MathLand, and Math games for kids, all attached to the July 15, 2021 Final Office Action, TSDR 2-29. Further, as the Examining Attorney points out, Applicant's specimen clearly states that the user can "choose games," and thus shows that Applicant's mobile applications are in the form of games that children can play to learn math skills.

Because the goods identified in the application and cited registrations include legally identical goods, we need not further consider their relatedness. *See SquirtCo v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 938-39 (Fed. Cir. 1983) (holding that a single good from among several may sustain a finding of likelihood of confusion); *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981) (likelihood of confusion must be found if there is likely to be

confusion with respect to any item that comes within the identification of goods or services in the application).

Moreover, given the in-part legal identity of the identified goods, and the lack of meaningful restrictions or limitations in the application or registrations as to their nature, channels of trade, or classes of customers, we must presume that the channels of trade and classes of purchasers for these goods are the same. *See In re Viterra*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion). The printouts from the Google Play Store and The App Store discussed above confirm this presumption.

Applicant points to Applicant's and Registrant's websites as evidence that the goods, and their channels of trade and classes of customers, actually differ. App. Br., 4 TTABVue 21-23 (referencing June 14 2021 Response to Office Action, TSDR 75-86). This argument is unconvincing. We remind Applicant that our determination under these *DuPont* factors is based on the descriptions of goods in the application and cited registrations, not on extrinsic evidence of actual use. *In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1749-50 (Fed. Cir. 2017). In other words, an applicant may not restrict the scope of the goods covered in its application or the cited registrations by argument or by extrinsic evidence. *Stone Lion*, 110 USPQ2d at 1162 ("It was proper, however, for the Board to focus on the application and registrations rather than on real-world conditions"); *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.”).

Finally, Applicant points to the coexistence of its recent registrations for the marks ELEPHANT LEARNING and ELEPHANT AGE for the “provision of online non-downloadable educational software for teaching children math” and the cited registered marks as evidence that it has “already been determined” that the goods are “unrelated.” App. Br., 4 TTABVUE 23-24. Contrary to Applicant's position, an Examining Attorney's approval of the applications underlying Applicant's other registrations is of little to no probative value. At a minimum, the application records of those registrations are not of record in this ex parte appeal. We therefore cannot tell whether the Examining Attorneys approved the applications for publication notwithstanding any relationship between the identified goods, akin to our decision herein. Moreover, previous decisions by examining attorneys are without evidentiary value and are not binding on the Board. *See In re Nett Designs Inc.*, 236 F.3d 1329, 57 USPQ2d 1564 (Fed. Cir. 2001) (determinations made by prior examining attorneys are not binding on the Board); *In re Davey Prods. Pty.*, 92 USPQ2d 1198, 1206 (TTAB 2009).

These *DuPont* factors favor a finding of likelihood of confusion.

II. Conclusion

The goods are legally identical in part, and move through the same channels of trade to the same classes of consumers. However, when viewed in their entirety, Applicant's mark ELEPHANT LEARNING MATH ACADEMY and the cited



registered marks ELEPHANT GAMES and are more dissimilar than similar, and the ELEPHANT component of the cited registered marks is somewhat weak. *Cf. Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quotation omitted) (where goods are identical, “the degree of similarity necessary to support a conclusion of likely confusion declines.”).

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