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

Proceeding	91218509
Party	Defendant Styles, Robert Lee
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Application Serial No. 86/157,616
Filed: January 4, 2014
For Mark: UnBully Me!
Published in the Official Gazette: May 27, 2014

ROBERT LEE STYLES,
Applicant

Opposition No.
ANSWER: NOTICE OF OPPOSITION

Opposer,

Take -Two Interactive Software. Inc.
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Commissioner for Trademarks
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ANSWER TO: NOTICE OF OPPOSITION filed September 24, 2014

(APPLICANT) Robert Styles, This is responsive to Notice Of Opposition filed September 24, 2014. Applicant respectfully requests that the Opposition be dismissed and application be permitted to register. Applicant believes that, the “BULLY” mark, by Rockstar Games, subsidiary of Take-Two Interactive Software, would not be injured by registration of “UnBully Me!” mark, serial no. 86157616, and “UTURN BULLY” mark, serial no. 86232124, prior Reg. No. 4472443.

In addition to opposing UnBully Me!, Take-Two Interactive Software, Inc., has also filed and received an Extension Of Time to oppose, on October 8th, 2014 for Applicant's “UTURN BULLY” mark, serial no. 86232124.

Class: 028 for “Action figure toys; Articles of clothing for toys; Bobble head dolls; Bobblehead dolls; Costume masks; Dolls and accessories therefor; Face masks; Plastic character toys; Plush dolls; Plush toys; Squeeze toys; Stress relief exercise toys; Stuffed

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and plush toys; Toy action figures and accessories therefor; Toy and novelty face masks; Toy figures.

Respectfully request for the consideration of combining and addressing both marks for registration within this opposition ruling.

BACKGROUND

Applicant Robert Lee Styles seeks registration of UnBully Me! serial no. 86157616 for Class: 028 “action figure toys; board games; card games; children educational toys for developing cognitive skills; decorative toy mobiles and plush toys for children made of felt; dolls and doll accessories, namely, clothing for dolls, doll rooms, doll beds, doll houses, toy fabrics and linens for dolls and strollers for dolls; educational card games; electronic interactive board games for use with external monitor; electronic novelty toys, namely, toys that electronically record, play back, and distort or manipulate voices and sounds; equipment sold as a unit for playing board games; equipment sold as a unit for playing card games; game equipment set sold as a unit comprised primarily of a playing board and playing cards and also including rules of play, dry erase boards and erasers, markers, a timer and t-shirts; gaming paper, namely, paper printed with regular grid and hexagon patterns for use in playing war games, role playing games and miniature games; hand held units for playing electronic games; infant development toys; infant toys; memory games; parlour games; playing card game accessories, namely, playing card cases, playing card holders, mats for use in connection with playing card games, playing card shuffling devices and dice; playing cards and card games; plush toys; positionable printed toy figures for use in games; role playing games; squeezable squeaking toys; squeeze toys; stuffed and plush toys,” in International Class 028.

Take-Two Interactive Software (Opposer) alleges that Opposer’s BULLY mark is prior and superior to the rights of Applicant’s (Robert Styles) “UnBully Me!” mark. That the goods covered by “UnBully Me!” mark are closely related and so resemble, as to be likely cause confusion, mistakes, and deceive public, who are likely to believe that Applicant’s goods have their origin with Opposer, and/or that such goods are approved, endorsed or sponsored by Opposer in some way. Thus alleging the applied for mark is likely to be confused with the Opposer’s “BULLY” marks listed below:

BULLY Reg. No. 3,413,563 for “computer game programs and software and computer game cartridges”, Class 9, BULLY Reg. No. 3,589,232 for “printed matter, namely, books, pamphlets, magazines, periodical publications featuring games interactive software and videogames, posters, and pictures”, Class 16, BULLY Reg. No. 3,670,955 for “entertainment services in the nature of animated motion picture films; entertainment services in the nature of computer games provided and played through a global computer

network”, Class 41, BULLY Reg. No. 4,289,379 for “clothing, namely, shirts, t-shirts”, Class 25.

APPLICANT’S ARGUMENT IN SUPPORT OF REGISTRATION

Applicant respectfully disagrees with the Opposer’s Allegations for the reasons discussed below.

APPLICANT (ROBERT STYLES) already own five (5) registered marks, valid, enforceable, and all representing and relating to anti-bullying education and programing, in International Classes: 14, 16, 28. Two (2) registered marks containing the word “bully”, and three (3) registered marks containing the words “bullying”.

1. A WORLD WITHOUT BULLYING

US Serial Number: 85588909

Application Filing Date: Apr. 04, 2012

Reg. No. 4355156 Reg. Date: Jun 18, 2013

Class: 014 for “Ankle bracelets; Bracelets; Charity bracelets; Charms for collar jewelry and bracelet; Jewelry, namely, bracelets, wristbands and necklaces that also provides notification to the wearer of a pending medical related task; Nylon ankle bracelets; Nylon bracelets; Plastic bracelets in the nature of jewelry; Rubber or silicon wristbands in the nature of a bracelet; Slapband bracelets”

2. A WORLD FREE OF BULLYING

US Serial Number 85600824

Application Filing Date: Apr. 18, 2012

Reg. No. 4343919 Reg. Date: May 28, 2013

Class: 014 for “Bracelets made of silicon, rubber; Charity bracelets; Rubber or silicon wristbands in the nature of a bracelet; Slap bracelets; Slapband bracelets”

3. O% BULLY

US Serial Number: 85648164

Application Filing Date: Sept 9, 2012

Reg. No. 4502340 Reg. Date: Jun 18, 2014

Class: 016 for “Posters; Posters made of paper; Printed award certificates; Printed certificates; Printed educational materials in the field of Bullying and Meanness; Printed informational folders in the field of Bullying and Meanness; Printed instructional, educational, and teaching materials in the field of Bullying and Meanness; Printed mail

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response cards relating to Bullying and Meanness; Printed material, namely, surveys and assessments in the field of educator training and performance; Printed materials, namely, curricula in the field of Bullying and Meanness; Printed matter, namely, paper signs, books, manuals, curriculum, newsletters, informational cards and brochures in the field of Bullying and Meanness; Printed pamphlets, brochures, manuals, books, booklets, leaflets, flyers, informational sheets and newsletters, adhesive backed stickers, and kits comprising one or more of the foregoing materials in the field of Bullying and Meanness.”

4. *A WORLD WITHOUT BULLYING*

US Serial Number: 85684791

Application Filing Date: Jul. 23, 2012

Reg. No. 4308647 Reg. Date: Mar. 26, 2013

Class: 016 for “Application include: Children's interactive educational books; Educational and learning publications, namely, booklets and flash cards on a variety of educational disciplines in pre-school through eighth grade; Educational kits sold as a unit in the field of Bullying consisting primarily of educational books and also including DVDs and t-shirts; Educational kits sold as a unit in the field of Bullying consisting primarily of educational books, flash cards and worksheets, and also including an educational DVD; Educational publications, namely, educational learning cards, flash cards, activity cards, workbooks, textbooks, activity books, story books, puzzle books, printed puzzles, teacher guides, manuals, posters and educational booklets in the field of Bullying, meanness; Educational publications, namely, training manuals in the field of Bullying; Educational publications, namely, workbooks in the field of Bullying; Manuals in the field of Bullying; Packaged kits comprising printed instructional, educational, and teaching materials for educational activities in the field of Bullying; Posters; Posters made of paper; Printed educational materials in the field of Bullying; Printed instructional, educational, and teaching materials in the field of Bullying; Printed material, namely, surveys and assessments in the field of educator training and performance; Printed matter, namely, paper signs, books, manuals, curriculum, newsletters, informational cards and brochures in the field of Bullying; Printed pamphlets, brochures, manuals, books, booklets, leaflets, flyers, informational sheets and newsletters, adhesive backed stickers, and kits comprising one or more of the foregoing materials in the field of Bullying; Printed survey answer sheets; Publications, namely, brochures, booklets, and teaching materials in the field material, namely, surveys and assessments in the field of educator training and performance; Printed matter, namely, paper signs, books, manuals, curriculum, newsletters, informational cards and brochures in the field of Bullying; Printed pamphlets, brochures, manuals, books, booklets, leaflets, flyers, informational sheets and newsletters, adhesive backed stickers, and kits comprising one or more of the foregoing materials in the field of Bullying; Printed survey answer sheets; Publications, namely, brochures, booklets, and teaching materials in the field”

5. *UTURN BULLY*

US Serial Number: 85850101

Application Filing Date: Feb. 14, 2013

Reg. No. 4472443 Reg. Date: Jan. 21, 2014

Class: 028 for “Application include: Board games; card games; educational card games; electronic games for the teaching of children; playing card game accessories, namely, playing card cases, playing card holders, mats for use in connection with playing card games, playing card shuffling devices and dice; role playing games; trivia game played with cards and game components”

The Standard for Determining Likelihood of Confusion

A determination of likelihood of confusion between two marks is determined on a case by case basis. In re Dixie Restaurants Inc., 41 USPQ2d 1531, 1533 (Fed. Cir. 1997). The examining attorney is to apply each of the applicable thirteen factors set out in In re E.I. DuPont DeNemours & Co., 476 F.2d 1357, 1361, 177 USPQ 563, 567 (CCPA 1973). The relevant DuPont factors as they relate to likelihood of confusion in this case are reviewed below.

The dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression;

In comparing two trademarks for confusing similarity, the Examining Attorney must compare the marks for resemblances in sound, appearance and meaning or connotation. In re E.I. DuPont de Nemours & Co., 476 F.2d 1357, 177 U.S.P.Q. 563 (C.C.P.A. 1973). Similarity in one respect – sight, sound, or meaning – does not support a finding of likelihood of confusion, even where the goods or services are identical or closely related. TMEP §1207.01(b)(i).

It has long been established under the “anti-dissection rule” that “the commercial impression of a trademark is derived from it as a whole, not from its elements separated and considered in detail. For this reason it should be considered in its entirety.” Estate of P. D. Beckwith, Inc. v. Commissioner of Patents, 252 U.S. 538, 545–46, 64 L. Ed. 705, 40 S. Ct. 414 (1920). It violates the anti-dissection rule to focus on the “prominent” feature of a mark, ignoring other elements of the mark, in finding likelihood of confusion. Massey Junior College, Inc. v. Fashion Institute of Technology, 492 F.2d 1399, 181 U.S.P.Q. 272 (C.C.P.A. 1974). See Franklin Mint Corp. v. Mas- ter Mfg. Co., 667 F.2d 1005, 212 U.S.P.Q. 233 (C.C.P.A. 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.”); Sun-Fun Products, Inc. v. Suntan Research &

Develop- ment, Inc., 656 F.2d 186, 213 U.S.P.Q. 91 (5th Cir. 1981) (the test is “overall impression,” not a “dissection of individual features”).

1. No Explicit Rule that Likelihood of Confusion Applies Where Junior User’s Mark Contains the Whole of Another Mark.

There is no explicit rule that likelihood of confusion automatically applies where a junior user’s mark contains in part the whole of another mark. See, e.g., Colgate-Palmolive Co. v. Carter-Wallace, Inc., 432 F.2d 1400, 167 U.S.P.Q. 529 (C.C.P.A. 1970) (PEAK PERIOD not confusingly similar to PEAK); Lever Bros. Co. v. Barcolene Co., 463 F.2d 1107, 174 U.S.P.Q. 392 (C.C.P.A. 1972) (ALL CLEAR not confusingly similar to ALL); In re Ferrero, 479 F.2d 1395, 178 U.S.P.Q. 167 (C.C.P.A. 1973) (TIC TAC not confusingly similar to TIC TAC TOE);

Conde Nast Publications, Inc. v. Miss Quality, Inc., 507 F.2d 1404, 184 U.S.P.Q. 422 (C.C.P.A. 1975) (COUNTRY VOGUES not confusingly similar to VOGUE); In re Merchandising Motiva- tion, Inc., 184 U.S.P.Q. 364 (T.T.A.B. 1974) (there is no absolute rule that no one has the right to incorporate the total mark of another as a part of one’s own mark: MMI MENSWEAR not con- fusingly similar to MEN’S WEAR); Plus Products v. General Mills, Inc., 188 U.S.P.Q. 520 (T.T.A.B. 1975) (PROTEIN PLUS and PLUS not confusingly similar). See Monsanto Co. v. CI- BA-GEIGY Corp., 191 U.S.P.Q. 173 (T.T.A.B. 1976) (use of portion of another’s mark to indi- cate that defendant’s product contains plaintiff’s product held not likely to cause confusion). Even the use of identical dominant words or terms does not automatically mean that two marks are similar. Luigino’s Inc. v. Stouffer Corp., 50 USPQ2d 1047, the mark LEAN CUISINE was not confusingly similar to MICHELINA’S LEAN ‘N TASTY though both products were similar low-fat frozen food items and both shared the dominant term “lean.” Finally, “marks tend to be perceived in their entirety, and all components thereof must be given appropriate weight.” In re Hearst, 982 F.2d 493, 494 (Fed.Cir. 1992). In Hearst, Applicant registered VARGA GIRL for calendars and was refused registration by the Trademark Trial and Appeal Board because of ear- lier registration of VARGAS for posters, calendars, and greeting cards. The Federal Circuit re- versed the refusal on appeal. The higher court found that the Board inappropriately changed the mark by diminishing the portion of “girl.” When the entire mark was reviewed in its entirety, there was no likelihood of confusion. Here the mark share the term “Bully” and that is where the similarity ends. There are sufficient distinctions in sight, sound, commercial impression and in the nature of the goods that minimize a likelihood of confusion.

2. *Marks Differ in Sight, Sound, and Appearance*

a. *Marks Differ in Sight*

Where there is an addition of a distinctive element, as in a term or a design, or there is a significantly different display of the same terms, there is little likelihood of confusion. *First Sav-ings Bank, F.S.B. v. First Bank Systems, Inc.*, 40 U.S.P.Q.2d 1865 (10th Cir. 1996) (no confusion between FIRST BANK and FIRST BANK SYSTEM (and design). Likelihood of confusion is minimized where a design is used as part of a mark. *Harlem Wizards*, 952 F. Supp. at 1096 (citing McCarthy at §23:15[51]).

A visual comparison of the literal elements of the marks reveals clear and obvious differences. The Applicant's mark UnBully Me! comprising a combination of uppercase and lowercase letters, an exclamation point (special character) at the end of the mark presenting expression or phrase format. The prefix "Un" addition creates an entirely new and uncommon word and expression visually and in meaning. "UnBully Me!", While in standard character " UnBully Me!", distinctive and uncommon present a stylized appearance considering mixture of upper and lowercase letters in conjunction with the exclamation point placed at end. Opposser's BULLY mark in standard character forming a single common word in appearance comprising of all uppercase letters.

Examining attorneys may opine that the average consumer's general inclination is to focus on the "first word, prefix or syllable in any trademark". In this case, "Un" comprise easily recognizable English language words, ie., "bully" where particular focus should be placed on the prefix "Un" creating a new word "UnBully" and word meaning, representing opposite, reverse and not similar to root word "bully".

Furthermore, with respect to the UnBully Me! and BULLY mark, the general inclination by an examining attorney assumes that the average consumers will entirely disregard the many distinctive literal and visual elements in both the Applicant's and the Opposser's mark, and fixate solely on "bully". This is unlikely given predictable and typical consumer behavior when encountering literal or visual elements incorporated strategically to create and maintain brand identity and familiarity.

Given the literal and visual differences between the Applicant's mark and the Opposser's mark, a likelihood of confusion is minimal in this case.

b. *Marks Differ in Sound*

Here, the marks vary substantially in sound. The Applicant's mark is two words pronounced with four syllables. The cited mark BULLY is a single word mark pronounced with two syllables. As such, these marks sound little alike and have an entirely different phonetic profile. However, even where two marks are phonetically similar, no likelihood of confusion exists if other differentiating factors can be established. See *National Distillers & Chemical Corporation v. William Grant and Sons, Inc.*, 505 F.2d 719 (finding that DUVET and DUET did not raise likelihood of confusion where other differentiating factors existed such as the term "duet" was a common word whereas "duvet" was not). As stated above, the visual differences between Applicant's mark and the Registrant's mark provide one of many differentiating factors that do not support a claim of likelihood of confusion.

c. Marks Differ in Commercial Impression

The marks in this case vary substantially in commercial impression. The marks convey distinct mental impressions to the average consumer. The Applicant's mark UnBully Me! as applied to "action figure toys; board games; card games; children educational toys for developing cognitive skills; decorative toy mobiles and plush toys for children made of felt; dolls and doll accessories, namely, clothing for dolls, doll rooms, doll beds, doll houses, toy fabrics and linens for dolls and strollers for dolls; educational card games; electronic interactive board games for use with external monitor; electronic novelty toys, namely, toys that electronically record, play back, and distort or manipulate voices and sounds; equipment sold as a unit for playing board games; equipment sold as a unit for playing card games; game equipment set sold as a unit comprised primarily of a playing board and playing cards and also including rules of play, dry erase boards and erasers, markers, a timer and t-shirts; gaming paper, namely, paper printed with regular grid and hexagon patterns for use in playing war games, role playing games and miniature games; hand held units for playing electronic games; infant development toys; infant toys; memory games; parlour games; playing card game accessories, namely, playing card cases, playing card holders, mats for use in connection with playing card games, playing card shuffling devices and dice; playing cards and card games; plush toys; positionable printed toy figures for use in games; role playing games; squeezable squeaking toys; squeeze toys; stuffed and plush toys," conveys the idea of wholesome, educational, anti-bullying related, creative, and youthful playfulness.

Indeed the combination of visual, and literal impression of the Applicant's mark indicates that the mark is for pre-school through eighth grade. The nature of Applicant's "UnBully Me!" mark and goods indicates and suggests anti-bullying educational games, anti-bullying electronic games toys and accessories located on the toy and educational section.

The BULLY as applied to "computer game programs and software and computer game cartridges", "printed matter, namely, books, pamphlets, magazines, periodical

publications featuring games interactive software and videogames, posters, and pictures”, “entertainment services in the nature of animated motion picture films; entertainment services in the nature of computer games provided and played through a global computer network”, “clothing, namely, shirts, t-shirts.

The BULLY mark goods suggest: computer programs, computer game cartridges and software as well as entertainment publication and services.

Indeed the nature of the goods themselves indicates that they are for older children, aged 11 and up for entertainment value and located in the video section.

Given the significant differences in commercial impressions, there is little likelihood of confusion among the marks.

The dissimilarity and nature of the goods or services as described in an application or registration in connection with which a prior mark is in use;

Goods and services fall into three categories: (1) competitive, (2) non-competitive but related, and (3) non-competitive and non-related. Homeowners Group, Inc. v. Home Mktg. Special- ists Inc., 931 F.2d 1100, 18 USPQ2d 1587,1593 (6th Cir. 1991). Services in the last category are unlikely to be confused. Murray v. Cable National Broadcasting Co., 86 F.3d 858,861 39 USPQ2d 1214 (9th Cir. 1996). Moreover, "the presence of goods in the same store does not necessarily lead to the conclusion that confusion would arise under such conditions." 7-Eleven, Inc. v. HEB Grocery Company, LP, 83 U.S.P.Q.2d 1257 at *22 (TTAB 2007)(citations omitted).

Here, while both Applicant's and Opposser's goods can broadly be described as play things, this broad generalization does not necessarily put the goods in the same genre. The Applicant's goods are in the nature of anti-bullying education, boardgame, electronic games, toy action figures and accessories, dolls, vehicles and other playthings and the Opposser's goods are in the nature of computer programs, game cartridges, software and entertainment publication and services.

Albeit related in a general sense, the goods in this case are non-competitive and will not likely be sold in the same area of a toy store.

Given the dissimilar nature of the goods of both parties, there is little likelihood of confusion.

CONCLUSION

For the reasons listed above, Applicant respectfully dismiss the Opposition and allow Applicant's application, serial no. 86,157,616 to register in International Class 028 and dismiss the Opposser's Opposition.

Respectfully submitted:

Robert Styles
/Robert Styles/

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 31, 2014, I caused a true and complete copy of the foregoing Notice of Opposition to be sent via First Class Mail, postage prepaid, to Opposer's address as follows:

Take -Two Interactive Software, Inc.
1133 Avenue of the Americas
New York, New York 10036-6799

/Robert Styles/
Robert Styles

ANSWER TO NOTICE OF OPPOSITION