

This Opinion Is Not a
Precedent of the TTAB

Mailed: May 27, 2026

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Dillon M. Fink

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Serial No. 98418182

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Christopher W. Brody and Scott J. Major, of Millen, White, Zelano & Branigan P.C.,
for Dillon M. Fink.

Daniel Capshaw, Trademark Examining Attorney, Law Office 110,
Loksye Lee Riso, Managing Attorney.

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Before Greenbaum, Thurmon and Stanley, Administrative Trademark Judges.

Opinion by Thurmon, Administrative Trademark Judge:

Dillon M. Fink (“Applicant”) seeks registration on the Principal Register of the mark WHIRL PONG, in standard characters, with “PONG” disclaimed, for “Equipment sold as a unit for playing drinking games featuring a rotating turntable that holds cups,” in International Class 28.¹ The Trademark Examining Attorney

¹ Application Serial No. 98418182, was filed on February 23, 2024, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), alleging a bona fide intent to use the mark in commerce.

Citations to the prosecution file are to entries in the USPTO’s Trademark Status & Document Retrieval (“TSDR”) system in .pdf format. Citations to the appeal record are to TTABVUE, the Board’s online docketing system.

issued a final refusal of registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), finding a likelihood of confusion, based on a Registration of the mark WHIRLBALL, in standard characters, for “portable action skill games; portable target games; the aforementioned goods specifically excluding amusement park equipment,” in International Class 28.²

The appeal is briefed and ready for final decision. We affirm the refusal to register.

I. Section 2(d) – Applicable Law

Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E. I. DuPont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) (“*DuPont*”), cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138 (2015); see also *In re Majestic Distilling Co.*, 315 F.3d 1311, 1314 (Fed. Cir. 2003). We must consider each *DuPont* factor for which there is evidence and argument. See, e.g., *In re Guild Mortg. Co.*, 912 F.3d 1376, 1378-79 (Fed. Cir. 2019). “Whether a likelihood of confusion exists between an applicant’s mark and a previously registered mark is determined on a case-by-case basis, aided by application of the thirteen *DuPont* factors.” *Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 1318 (Fed. Cir. 2018). When analyzing these factors, the overriding concerns are not only to prevent buyer confusion as to the source of the goods or services, but also to protect the registrant from adverse commercial impact due to use of a similar mark by a newcomer. See *In re Shell Oil Co.*, 992 F.2d 1204, 1208 (Fed. Cir. 1993).

² Registration No. 7361630, issued April 16, 2024.

“Each case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 1199 (CCPA 1973). Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v. Cap. City Bank Grp. Inc.*, 637 F.3d 1344, 1356 (Fed. Cir. 2011); *Shell Oil*, 992 F.2d at 1206 (“the various evidentiary factors may play more or less weighty roles in any particular determination”). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. *See In re i.am.symbolic, llc*, 866 F.3d 1315, 1322 (Fed. Cir. 2017) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1164-65 (Fed. Cir. 2002)); *In re Chatam Int’l Inc.*, 380 F.3d 1340, 1342 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103 (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.”).

II. Likelihood of Confusion – Analysis

The Applicant and the Trademark Examining Attorney presented arguments in their briefs under *DuPont* factors one, two and six. We address these factors below.

A. Similarity of the Goods

We evaluate the second *DuPont* factor based on the goods identified in the Application and the cited Registration. *See Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 1323 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 942 (Fed. Cir. 1990). It is sufficient for a finding of likelihood of confusion as to a class of goods in the application if relatedness is established between

any of the goods identified in that class and the cited Registration. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 1336 (CCPA 1981); *see also Double Coin Holdings Ltd. v. Tru Dev.*, No. 92063808, 2019 TTAB LEXIS 347, at *18; *In re Aquamar, Inc.*, No. 85861533, 2015 TTAB LEXIS 178, at *9 n.5.

The cited Registration identifies “portable action skill games; portable target games; the aforementioned goods specifically excluding amusement park equipment,” in International Class 28. The Application identifies “Equipment sold as a unit for playing drinking games featuring a rotating turntable that holds cups,” in International Class 28. While the application was filed based on an intent to use the mark, Applicant submitted evidence showing its intended goods, and we provide an image below:



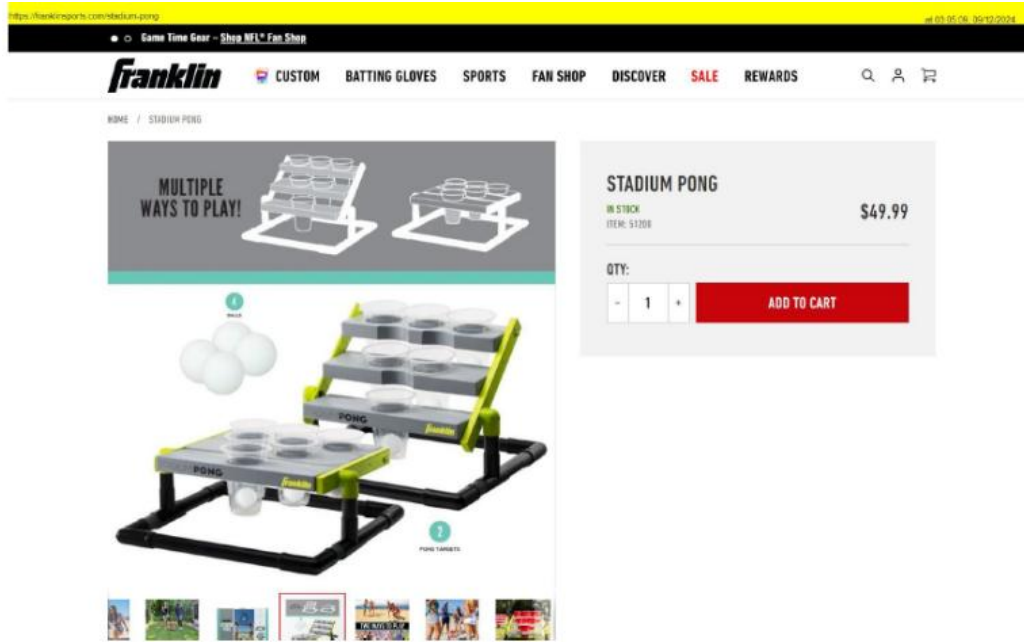
We use this image as an example of the goods Applicant intends to sell, while noting that the actual identification of goods controls our analysis. The product is a drinking

³ *Id.* at 53.

game that apparently consists of a rotating platform holding cups that serve as targets for a small ball, that looks like a ping-pong ball. This product is within the scope of the goods identified in the Application, and it shows that this game, while intended to be played while drinking (likely drinking alcoholic beverages, like beer), is a skill game and a target game. Participants need skill (or luck) to successfully get the small ball into one of the rotating cups.

The point of this evaluation of Applicant's goods is to show that these goods are fully subsumed within the scope of the goods identified in the cited Registration. The game shown in Applicant's evidence is a "portable action skill game" and a "portable target game," both specific types of goods from the cited Registration. The goods, therefore, are identical in part, and this fact increases the likelihood of confusion.

The Trademark Examining Attorney submitted evidence from what appears to be a website operated by the owner of the cited WHIRLBALL mark. The image below shows a game featured on this website, a game that is both a portable action skill game and a portable target game (i.e., it is a product within the scope of the goods identified in the cited Registration).



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We provide this example, because it confirms that the goods overlap. While this game does not rotate, it appears to be another variation of the same concept of trying to get small ping-pong balls into cups. The identification of goods in the Application is narrower than that in the cited Registration, but that does not avoid overlap. It simply shows that Applicant has identified a subsegment of the range of games identified in the cited Registration. We find Applicant's goods to be subsumed within the broader scope of the goods identified in the cited Registration. The second *DuPont* factor strongly supports the refusal.⁵

⁴ Office Action dated September 17, 2024, at 38. This game does not use the WHIRLBALL mark.

⁵ The Trademark Examining Attorney also submitted evidence of third-party uses via internet screenshots and third-party registrations to show that other parties offer goods identified in both the Application and cited Registration under a single mark. This evidence was submitted to show the goods are related. Because we find the goods are identical in part, we need not address the relatedness evidence.

B. Similarity of the Marks

To evaluate the similarity of the marks under the first *DuPont* factor, we consider the marks in their entireties as to appearance, sound, connotation and commercial impression. See, e.g., *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 1371 (citing *DuPont*, 476 F.2d at 1361). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s LLC*, No. 87075988, 2018 TTAB LEXIS 170, at *13 (quoting *In re Davia*, No. 85497617, 2014 TTAB LEXIS 214, at *4), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019); accord *Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 732 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”) (citation omitted).

“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.” *Coach Servs. Inc. v. Triumph Learning, LLC*, 668 F.3d 1356, 1368 (Fed. Cir. 2012). The focus is on the recollection of the average purchaser, who normally “retains a general rather than a specific impression of marks.” *In re i.am.symbolic, llc*, No. 85916778, 2018 TTAB LEXIS 281, at *11.

The marks are similar. Applicant’s mark is WHIRL PONG and the cited mark is WHIRLBALL. The word “whirl” is the first part of both marks and is the dominant

part of each mark.⁶ *In re Detroit Athletic Co.*, 903 F.3d 1296, 1303 (Fed. Cir. 2018) (finding “the identity of the marks’ two initial words is particularly significant because consumers typically notice those words first”); *Palm Bay Imps.*, 396 F.3d at 1372-73; *Presto Prods., Inc. v. Nice-Pak Prods. Inc.*, 1988 TTAB LEXIS 60, at *8 (“it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered”). Applicant disclaimed the word “pong,” a word that describes a key aspect of the goods which are a variation of the beer pong game, as the evidence of record shows.⁷ We will evaluate that evidence more below when we consider the similarity of the goods, but it suffices here to note that the word “pong” is descriptive of Applicant’s goods and therefore has little to no source identifying function on its own. The cited mark is a single compound word, but we find the word “ball,” as used in the cited mark, is also descriptive of an aspect of the goods identified in the cited Registration, which, as discussed further in the next section, encompass portable action skill games and portable target games that are played with a ball.

The word “whirl,” therefore, is the only distinctive part of both marks.⁸ That leaves the marks similar in appearance, sound, meaning and commercial impression. Applicant is correct that the marks are distinguishable, particularly when compared

⁶ Whirl means “to move in a circle or similar curve especially with force or speed,” according to a dictionary definition submitted by Applicant. Request for Reconsideration dated March 23, 2025, at 41.

⁷ Request for Reconsideration dated March 23, 2025, at 53.

⁸ We find below, under the sixth *DuPont* factor, that the word “whirl” is commonly used within the relevant market to connote a rotating or spinning feature of the goods. This finding shows that the word “whirl” is not very distinctive within the market, but it remains the dominant element of these marks because the remaining elements are descriptive or generic for the identified goods.

side-by-side. But that isn't the question before us. We must determine if the marks are similar in a way that will increase or decrease the likelihood of confusion. Here, consumers are likely to remember and rely on the word "whirl" in these marks. When consumers familiar with the cited WHIRLBALL mark see Applicant's mark, some will mistake Applicant's WHIRL PONG goods for the Registrant's.

The marks share the same structure, with a distinctive word or segment (whirl) followed by a descriptive word or segment (ball or pong). This will lead some consumers to mistakenly believe Applicant's WHIRL PONG goods are a line extension of Registrant's WHIRLBALL goods. *See, e.g., Joel Gott Wines, LLC v. Rehoboth Von Gott, Inc.*, 2013 TTAB LEXIS 314, at *32 ("Purchasers of opposer's GOTT and JOEL GOTT wines are likely to assume that applicant's goods, sold under the mark GOTT LIGHT and design, are merely a line extension of goods emanating from opposer."). The structure of the marks involved in this appeal make this type of confusion more likely.

Considering the marks in their entirety, we find the marks similar in appearance, sound, meaning and commercial impression. The first *DuPont* factor supports the refusal.

C. Conceptual Strength of the Cited Mark

Under the sixth *DuPont* factor, we consider "[t]he number and nature of similar marks in use on similar goods." *DuPont*, 476 F.2d at 1361. The sixth *DuPont* factor allows an applicant in an ex parte appeal to contract the scope of protection of a cited mark by adducing evidence of conceptual and commercial weakness. *Id.*

Applicant argues that the word “whirl” is common within the market for games and, as a result, the common use of this term is not likely to cause confusion.⁹ Before we address the evidence Applicant relies upon for these arguments, we note there is a limit on how far this evidence can be taken. Because the cited Registration of the WHIRLBALL mark is “prima facie evidence of the validity of the registered mark,” see Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b), we must assume the mark is inherently distinctive as evidenced by its registration on the Principal Register without a claim of acquired distinctiveness under Section 2(f) of the Trademark Act. See *Tea Bd. of India*, No. 91118587, 2006 TTAB LEXIS 330, at *62; *New Era Cap Co., Inc. v. Pro Era, LLC*, No. 91216455, 2020 TTAB LEXIS 199, at *29-30. Thus, at the very least, we must afford the cited WHIRLBALL mark “the normal scope of protection to which inherently distinctive marks are entitled.” *Bell’s Brewery, Inc. v. Innovation Brewing*, No. 91215896, 2017 TTAB LEXIS 452, at *20. Applicant’s third-party evidence may be relevant to show where, within the range of inherently distinctive marks, the WHIRLBALL mark belongs, but we cannot find the mark merely descriptive given its registration.

If properly made of record, third-party registrations or evidence of third-party uses may be relevant, in the manner of dictionary definitions, “to prove that some segment of the [marks] has a normally understood and well recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak.” *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1339 (Fed. Cir. 2015). See

⁹ 12 TTABVUE 3.

also *Jack Wolfskin*, 797 F.3d 1363 (Fed. Cir. 2015); *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915 (CCPA 1976) (even if “there is no evidence of actual use” of “third-party registrations,” such registrations “may be given some weight to show the meaning of a mark in the same way that dictionaries are used”). “[E]vidence of third-party registrations is relevant to ‘show the sense in which . . . a mark is used in ordinary parlance.’” *In re Guild Mortg. Co.*, No. 86709944, 2020 TTAB LEXIS 17, at *10 (quoting *Juice Generation*, 794 F.3d at 1339 (noting that third-party use and registrations may be used to establish how a term is understood)).

Applicant submitted evidence of third-party registrations of marks and third-party internet uses of marks that include the word “whirl” or a variant and that identify some type of game.¹⁰ While Applicant argues there has been “significant dilution of the shared term ‘whirl’” due to the third party uses, we must examine the evidence to determine whether the third-party uses are on similar goods and convey a consistent meaning of the word “whirl” within the market.¹¹ See *Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 1324-25 (Fed. Cir. 2018) (error to rely on third-party evidence of similar marks for dissimilar goods, as Board must focus “on goods shown to be similar”); *In re i.am.symbolic, llc*, 866 F.3d at 1328 (disregarding third-party registrations for other types of goods where the proffering party had neither proven nor explained that they were related to the goods in the cited registration).

¹⁰ Response to Office Action dated December 6, 2024, at 5-18; Request for Reconsideration dated March 23, 2025, at 6-40.

¹¹ 12 TTABVUE 3.

In *Omaha Steaks*, the Federal Circuit explained the importance of limiting the scope of the inquiry into third-party uses. *Omaha Steaks*, 908 F.3d at 1324-25. The parties in *Omaha Steaks* identified “meat” as their goods, but the third-party evidence included other foods, like popcorn and wine. *Id.* at 1325. Because the identified goods were limited to meat, the court held it was error to consider other registrations for other types of food. *Id.*

We begin with the third-party registration evidence, which consists of seven registrations, though two of these registrations are owned by the same entity.¹² These include the following:

- The New Amazing Whirly Ball and Whirly Pets (each with a design element) for flying toys, in International Class 28;¹³
- WHIRLYBALL for an amusement park game where users try to advance a ball through a goal, in International Class 28;¹⁴
- WHIRL-A-WISH for coin operated amusement machines, in International Class 28;¹⁵
- WHIRL OF FUN for a prize wheel game, in International Class 28;¹⁶
- WHIRLY’S WORLD for a board game, in International Class 28;¹⁷ and,
- WHIRLING BLISS MACHINE for a hand-held game or amusement device, in International Class 28.¹⁸

¹² Response to Office Action dated December 6, 2024, at 5-18.

¹³ *Id.* at 7, 15. These two registrations are owned by the same entity.

¹⁴ *Id.* at 5.

¹⁵ *Id.* at 9.

¹⁶ *Id.* at 11.

¹⁷ *Id.* at 13.

¹⁸ *Id.* at 17.

Applicant also submitted internet screenshots showing uses of marks that include the word “whirl” or a variant for games.¹⁹ This evidence includes board games, cell phone app games and amusement park games, with most of the games appearing to include some rotation or spinning feature. For example, Applicant’s evidence shows three different uses of the mark WHIRL WIN for three different games, apparently provided by three different entities, where all three games feature a rotation or spinning element. We show these three games below to illustrate both their differences and common features.



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¹⁹ Request for Reconsideration dated March 23, 2025, at 6-40.

²⁰ *Id.* at 13-14.

Home > Whirl Win Wooden Game - World Wide Games 1989



Whirl Win Wooden Game - World Wide Games 1989
\$58.00
Shipping calculated in Shopping Cart.

ADD TO CART

Buy with shop Pay

[Here payment options](#)

The image shows a product listing for a wooden game. On the left is a photograph of the game's components: a brown octagonal wooden board with a grid of holes, a white circular wooden disc, and a wooden stick. A black pen is placed below the board for scale. On the right, the product title 'Whirl Win Wooden Game - World Wide Games 1989' is displayed in a stylized font, followed by the price '\$58.00'. Below the price, it says 'Shipping calculated in Shopping Cart.' There are two buttons: a green 'ADD TO CART' button and a blue 'Buy with shop Pay' button. At the bottom right of the product area, there is a link that says 'Here payment options'.

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Whirl-Win



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This evidence fails to show that these products are currently on the market, but it does show that these products were created and sold under identical word marks. The products look nothing alike and it appears two of the three are large devices meant for use in an arcade or other large space. The third appears to be some type of

²¹ *Id.* at 15.

²² *Id.* at 26.

board game. We find this evidence probative, even without knowing the current status of the products, because it shows that three different parties used the mark WHIRL WIN for games with some type of rotational feature.

Most of the third-party evidence submitted by Applicant shares this characteristic. The evidence shows a variety of games, different in many respects, but all with some type of rotation or spinning as part of the game. The mark WHIRL-A-WISH is shown with a game that allows users to roll a coin into a container (the coin apparently rotates down the device in an entertaining manner) where the coins will go to some charity or other organization.²³ WHIRLING WITCHCRAFT is a board game featuring some type of rotation.²⁴ WHIRL-WIND is a pinball machine with rotating or spinning features.²⁵ WHIRL O is a toy with a spinning disc.²⁶ WHIRL-O WIZARD is a board game with a rotation feature.²⁷

There are problems with some of Applicant's evidence. Some of the third-party games are vintage products that may not still be on the market. On the other hand, some of the older games are presented on websites that sell such vintage products, so the marks seem to still be in use or at least in some circulation among consumers.²⁸ Some of the internet evidence comes from websites in different languages that do not

²³ *Id.* 16-18.

²⁴ *Id.* at 20-22.

²⁵ *Id.* at 27.

²⁶ *Id.* at 23-24.

²⁷ *Id.* at 25.

²⁸ *See, e.g., id.* at 8-9, 10, 11-12.

indicate what consumers in the United States see and understand about uses of the word “whirl” in marks for games.²⁹ These are important limitations on the evidence.

Despite these limits, we find Applicant’s third-party evidence probative. This evidence is consistent with the guidance in the *Juice Generation* and *Omaha Steaks* decisions discussed above. Almost every piece of third-party evidence shows use of the word “whirl” or a variant for a game or other amusement product that features some form of rotation or spinning. So, just as the court explained in *Juice Generation*, this evidence is akin to a marketplace dictionary, as it shows that the word “whirl” is used within this market to connote rotation or spinning. This is not surprising as the actual dictionary definition of “whirl” also focuses on rotation or spinning. The third-party evidence confirms that this is a widely used and understood meaning of this word within the market for games and other amusement devices.

The evidence also shows uses on generally consistent goods. The products identified or shown in the third-party evidence are all types of games, toys or other amusement devices. We find these uses are sufficiently similar to the goods identified in the cited Registration to provide insights into actual consumers understanding of the word “whirl” within the relevant market.³⁰

²⁹ See, e.g., *id.* at 34.

³⁰ The cited Registration excludes “amusement park equipment.” Some of the third-party evidence shows amusement park games or systems. While such goods are not within the scope of the cited Registration, we find these types of games are sufficiently similar to the goods identified in the cited Registration to shed light on how consumers understand uses of the word “whirl” within the relevant market.

The three distinct products that all use or used the mark WHIRL WIN appear to confirm Applicant's point: the word "whirl" is used commonly and consistently within this market, forcing consumers to find other means to distinguish between marks. We cannot, however, take this point too far, because the evidence does not show that the three WHIRL WIN products competed or were even on the market at the same time. This evidence shows that three different parties selected and used the same name for their products. This fact shows that the word "whirl" is understood within this market to describe a rotating or spinning feature. This word is not a strong source identifier.

But, as we noted at the outset, we can only go so far down this path. The cited mark was registered without a showing of acquired distinctiveness, so we must treat the mark as inherently distinctive. We find the cited mark WHIRLBALL is highly suggestive for the goods, and thus relatively weak conceptually. The sixth *DuPont* factor does not support the refusal.

D. Conclusion: Weighing the Factors

We have reviewed and evaluated all the evidence of record and all the arguments presented. The first and second *DuPont* factors support the refusal because the marks are similar and the goods overlap. These factors weigh heavily in this appeal, as they do in most of our likelihood of confusion decisions. The cited WHIRLBALL mark, however, is conceptually weak and there is evidence that the word "whirl" is widely-used to connote a rotating or spinning feature of the goods. This fact reduces the likelihood of confusion.

On balance, we find the first two *DuPont* factors outweigh the conceptual weakness of the cited mark. The marks are similar and the goods are identical in part. “When marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines.” *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 877 (Fed. Cir. 1992). While the WHIRLBALL mark is highly suggestive, it is inherently distinctive and entitled to protection. The Section 2(d) refusal is supported by the record.

Decision: The Section 2(d) refusal is affirmed.