

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT  
OF THE TTAB

Mailed: August 31, 2004  
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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Baby Boom Consumer Products, Inc.

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Serial No. 76457920

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Ezra Sutton of Law Offices of Ezra Sutton, P.A. for Baby Boom Consumer Products, Inc.

Steven Foster, Trademark Examining Attorney, Law Office 106 (Mary I. Sparrow, Managing Attorney)

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Before Simms, Quinn and Bucher, Administrative Trademark Judges.

Opinion by Simms, Administrative Trademark Judge:

Baby Boom Consumer Products, Inc., a New York corporation, has appealed from the final refusal of the Trademark Examining Attorney to register the mark MOTION 'N MUSIC for moving musical toys.<sup>1</sup> The Examining Attorney has refused registration under Section 2(d) of the Act, 15 USC §1052(d), on the basis of Registration No. 2,412,918, issued December 12, 2000, for the mark MUSIC N' MOTION

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<sup>1</sup> Serial No. 76457920, filed October 7, 2002, based upon applicant's allegation of a bona fide intention to use the mark in commerce.

Serial NO. 76457920

("MUSIC" disclaimed) for toy musical carousels. Applicant and the Examining Attorney have submitted briefs but no oral hearing was requested.

Briefly, the Examining Attorney argues that applicant's mark is a transposition of the registered mark, that both marks contain the words "MOTION" and "MUSIC" connected with an "N", which is capable of being interpreted as an abbreviation of the word "and." The Examining Attorney argues that these marks do not create different commercial impressions.

With respect to the goods, it is the Examining Attorney's position that applicant's identification, "moving musical toys," is broad enough to encompass registrant's goods, "toy musical carousels." In this regard, the Examining Attorney has relied upon a dictionary definition of the words "carousel" and "merry-go-round" as "a revolving circular platform fitted with seats, often in the form of animals, ridden for amusement."

Applicant, on the other hand, maintains that the respective marks are distinguishable in sound, appearance and commercial impression. Applicant also has made of record copies of 36 third-party registrations and applications with the words "MUSIC" or "MOTION" or variations thereof for various toys, and several other

registrations which contain both words, but not registered in connection with toys. Applicant argues, on the basis of these registrations, that the common portions of the respective marks here are "weak" or descriptive, and that the cited mark is entitled only to a narrow scope of protection.

In response, the Examining Attorney notes that applicant has not argued that applicant's description of goods is not broad enough to include registrant's goods. In fact, applicant has not argued that confusion is unlikely because of the dissimilarities in the goods. As to the third-party registrations, the Examining Attorney states that they contain either the word "MUSIC" or the word "MOTION," but not both. With respect to those third-party registered marks which contain both words, the Examining Attorney notes that they are for unrelated goods and services.<sup>2</sup>

Upon careful consideration of this record and the arguments of the attorneys, we conclude that confusion is likely.

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<sup>2</sup> For example, these third-party registrations are for the marks MUSIC IN MOTION for live disc jockey services, MUSIC IN MOTION for retail store and installation services in the field of automobile and home audio equipment, MUSIC IN MOTION for dance presentation services and STEADY MUSIC IN MOTION for CD players.

First, with respect to the goods, we agree with the Examining Attorney that "moving musical toys" is broad enough to include registrant's toy musical carousels, which may be considered a moving musical toy. Accordingly, for practical purposes, we must consider the respective goods to be identical, or at least very closely related. Also, such musical toys would likely be sold in the same channels of trade to the same specialty or toy stores or to department stores, and eventually to the same class of ultimate purchasers.

When the respective goods are the same or very closely related, the degree of similarity between the marks necessary to support a finding of likelihood of confusion declines. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). Here, we agree with the Examining Attorney that the respective marks MOTION 'N MUSIC and MUSIC N' MOTION are very similar transpositions with similar commercial impressions. Further, when one focuses on the recollection of the average purchaser who normally retains a general, rather than a specific, impression of trademarks, we believe that a purchaser who had bought or was familiar with registrant's MUSIC N' MOTION toy musical carousel and who, some time later, encounters applicant's MOTION 'N

Serial NO. 76457920

MUSIC moving musical toy may incorrectly believe that both of these goods come from the same source. See, for example, *In re Wine Society of America Inc.*, 12 USPQ2d 1139 (TTAB 1989); and *In re Nationwide Industries Inc.*, 6 USPQ2d 1882 (TTAB 1988).

Finally, we agree with the Examining Attorney that the third-party registrations do not evidence any weakness of the registered mark for toy musical carousels. The third-party registrations of marks that contain both the words "MUSIC" and "MOTION," which could be more relevant to show lack of distinctiveness of the cited mark, are for such unrelated goods and services as CD players, disc jockey services and dance presentation services. Moreover, even if the registered mark were considered somewhat weak or suggestive in nature, even weak marks are entitled to protection against the registration of a similar mark for closely related goods. See *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

Decision: The refusal of registration is affirmed.