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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Mary Jo Puma

Serial No. 76644762

Clifford G. Franyne for Mary Jo Puma.

Kevin L. Chisolm, Trademark Examining Attorney, Law Office  
103 (Michael Hamilton, Managing Attorney).

Before Quinn, Walsh and Taylor, Administrative Trademark  
Judges.

Opinion by Quinn, Administrative Trademark Judge:

Mary Jo Puma filed an application to register the mark  
ON THE ROAD TO THE WHITE HOUSE (in standard character form)  
for "[a] board game."<sup>1</sup>

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 used in

<sup>1</sup> Application Serial No. 76644762, filed August 15, 2005,  
alleging a bona fide intention to use the mark in commerce.  
Applicant subsequently filed an amendment to allege use alleging  
first use anywhere on November 18, 2005, and first use in  
interstate commerce on November 21, 2005.

connection with applicant's goods, so resembles the previously registered mark ELECTING A PRESIDENT THE ROAD TO THE WHITE HOUSE ("ELECTING A PRESIDENT" disclaimed) (in typed form) for "[a] board game."<sup>2</sup>

When the refusal was made final, applicant appealed. Applicant and the examining attorney filed briefs.

Applicant contends that the marks, when considered in their entireties, are dissimilar, with the words "ELECTING A PRESIDENT" in registrant's mark serving to sufficiently distinguish the marks in terms of sound and appearance. Although applicant admits that "both board games may be sold in toy or game departments," "they are not related and cannot be played together, nor can they be sold together in order to be played." (Brief, p. 4). Applicant also contends that applicant began using her mark prior to the date of first use set forth in the cited registration.

The examining attorney maintains that the goods are identical and that the marks are similar.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are 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). See also: *In re Majestic*

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<sup>2</sup> Registration No. 3071334, issued March 21, 2006.

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*Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). 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 (CCPA 1976).

With respect to the goods, it is well settled that the question of likelihood of confusion must be determined based on an analysis of the goods recited in applicant's application vis-à-vis the goods identified in the cited registration. *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 n. 4 (Fed. Cir. 1993); and *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1783 (Fed. Cir. 1992). Where the goods in the application at issue and/or in the cited registration are broadly identified as to their nature and type, such that there is an absence of any restrictions as to the channels of trade and no limitation as to the classes of purchasers, it is presumed that in scope the identification of goods encompasses not only all the goods of the nature and type described therein, but that the identified goods are offered in all channels of trade which would be normal therefore, and that they would be purchased by all potential buyers thereof. *In re Elbaum*, 211 USPQ 639, 640

(TTAB 1981). In the present case, both the application and the cited registration identify the goods as "[a] board game." Thus, for purposes of our analysis, the goods are considered to be identical. We presume that the goods move through the same trade channels to the same purchasers, including ordinary consumers. The identity in these factors heavily favors a finding of likelihood of confusion.

Turning next to a consideration of the marks, we must compare the marks in their entireties as to appearance, sound, connotation and commercial impression to determine the similarity or dissimilarity between them. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in their entireties that confusion as to the source of the goods offered under the respective marks is likely to result. In comparing the marks, we focus on the fallibility of the average purchaser, who normally retains a general rather than a specific impression of trademarks. Finally, where, as in the present case, the marks are used in connection with identical goods, the degree of similarity between the marks

that is necessary to support a finding of likely confusion declines. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992).

In a likelihood of confusion analysis, it is well settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). In the past, disclaimed matter has been accorded subordinate status relative to the more distinctive portions of a mark. *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997); and *In re Code Consultants Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001) [Disclaimed matter is often "less significant in creating the mark's commercial impression"]. In the present case, applicant adopted the dominant portion of registrant's mark, THE ROAD TO THE WHITE HOUSE; applicant then merely deleted the disclaimed portion of registrant's mark, "ELECTING A PRESIDENT," and added the word "ON" to its mark. Any differences in sound and appearance are clearly outweighed by the identity in meaning, and the very similar overall commercial impressions engendered by the marks. Both marks convey the same thought, namely the board game involves a

Presidential race; "the road to the White House" necessarily includes electing a President and, thus, in registrant's mark, the "ELECTING A PRESIDENT" portion reinforces "THE ROAD TO THE WHITE HOUSE" portion.

We conclude that consumers familiar with registrant's board game sold under the mark ELECTING A PRESIDENT THE ROAD TO THE WHITE HOUSE would be likely to believe, upon encountering applicant's mark ON THE ROAD TO THE WHITE HOUSE for a board game, that the goods originated with or are somehow associated with or sponsored by the same entity.

Finally, applicant relies on the fact that her alleged dates of first use are earlier than the dates of first use set forth in the cited registration. To the extent that applicant's allegations constitute a collateral attack on registrant's registration, they are impermissible. Section 7(b) of the Trademark Act, 15 U.S.C. §1057(b), provides that a certificate of registration on the Principal Register shall be *prima facie* evidence of the validity of the registration, of the registrant's ownership of the mark and of the registrant's exclusive right to use the mark in connection with the goods or services identified in the certificate. During *ex parte* prosecution, including an *ex parte* appeal, an applicant will not be heard on matters

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that constitute a collateral attack on the cited registration (e.g., applicant's claim of priority over the cited mark). *In re Dixie Restaurants, Inc.*, 41 USPQ2d at 1534; and *In re Peebles Inc.*, 23 USPQ2d 1795, 1797 n.5 (TTAB 1992). See TMEP §1207.01(d)(iv) (5<sup>th</sup> ed. 2007). Further, there is nothing to indicate that applicant has sought to cancel the cited registration. Accordingly, no consideration has been given to applicant's arguments in this regard.

**Decision:** The refusal to register is affirmed.