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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re J.G. Julian Toys, LLC

Serial No. 78916820

David G. Oberdick, of Meyer, Unkovic & Scott LLP for J.G. Julian Toys, LLC.

Jay C. Besch, Trademark Examining Attorney, Law Office 108 (Andrew Lawrence, Managing Attorney).

Before Holtzman, Rogers, and Ritchie de Larena, Administrative Trademark Judges.

Opinion by Ritchie de Larena, Administrative Trademark Judge:

J.G. Julian Toys, LLC filed an application to register the mark WILDCARD BASEBALL, in standard character format, for "Non-electronic baseball-themed board games, namely, non-electronic board gaines [sic] for simulating baseball game play and tracking statistics for baseball game play; equipment sold as a unit for playing non-electronic baseball-themed board games, specifically excluding, computer game software, video game software, trading cards, liquid crystal display game machines, hand-held game

apparatus with liquid crystal displays, dolls and on-line games" in International Class 28.[1]

The trademark examining attorney refused registration under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. §1052(d), on the ground that applicant's mark so resembles the WILD CARD mark in the cited registration[2] that, when used in connection with the identified goods, it will be likely to cause confusion. The WILD CARD mark is registered for:

Computer game software; electronic publications, namely magazines in the field of computer games downloadable from computer networks; computer game software downloadable from computer networks; video game software for home use downloadable from computer networks; video game software for home use, in International Class 9;

Magazines in the field of computer games and video games; video game strategy guidebooks; stationery; photographs; photograph stands; trading cards, in International Class 16;

LCD game machines; hand-held game apparatus with liquid crystal displays; dolls, in International Class 28; and

Providing on-line games via computer networks; providing information relating to computer games via computer networks, in International Class 41.

Upon final refusal of registration, applicant filed a timely appeal. Both applicant and the examining attorney

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[1] Application Serial No. 78916820, filed June 26, 2006, pursuant to Section 1(b) of the Trademark Act, 15 USC §1051(b), alleging a bona fide intent to use the mark in commerce. Applicant has disclaimed the exclusive right to use "BASEBALL" apart from the mark as shown.

[2] Registration No. 2703748, issued April 18, 2003, based on Section 44(e) of the Trademark Act, and claiming a priority date of January 26, 2001.

filed briefs. For the reasons discussed herein, the Board affirms the final refusal to register.

We base our determination under Section 2(d) on an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). *See also, In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities and/or dissimilarities between the marks and the similarities and/or dissimilarities between the goods. *See Federated Foods, Inc. v. Fort Howard 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"). We consider each of the factors as to which applicant or the examining attorney presented arguments or evidence.

<u>The similarity or dissimilarity of the marks in their entireties</u>

We consider and compare the appearance, sound, connotation and commercial impression of the marks in their entireties. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). Applicant states in its brief that it "does not contest the examiner's conclusion" that

the marks are "visually similar," adding that "[i]ndeed, the two marks are nearly identical."

Although we compare the marks in their entireties, we note that WILDCARD is the dominant term in both applicant's mark and the registered mark. Applicant has disclaimed the only other word in its mark, BASEBALL. Descriptive and disclaimed matter is generally viewed as a less dominant or significant feature of a mark. *In re National Data Corp.*, 753 F.2d 1956, 224 USPQ 749 (Fed. Cir. 1985) ("Regarding descriptive terms, this court has noted that the 'descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion'"). Although the registered mark includes a space between WILD and CARD while applicant's mark does not, we find that consumers are not likely to notice that minor distinction. When spoken, the first two syllables of applicant's mark are identical to the entire mark in the cited registration. Accordingly, the dominant portions of the marks look nearly identical, sound the same, and are likely to have the same commercial impression.

In view of the foregoing, the first *du Pont* factor weighs in favor of finding that there is a likelihood of consumer confusion.

<u>The similarity or dissimilarity and nature of the goods and channels of trade</u>

Applicant argues that goods are different, and that they will travel in different channels of trade. In

particular, applicant argues that it seeks to register its mark for board games and related equipment whereas the cited registration covers online and electronic games (among other goods). However, the examining attorney offered evidence of websites featuring advertisements for electronic versions of popular board games. The examining attorney additionally offered evidence of third-party registrations covering both board games and electronic or online games (or other goods included in the cited registration) in the same registration.

We consider the evidence offered by the examining attorney to be probative of a close relationship between applicant's goods and those of registrant. Although third-party registrations are not evidence of use, they do serve to indicate the likelihood that consumers may expect the goods to derive from the same source. *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993). Furthermore, our precedent dictates that the greater the degree of similarity between the applicant's mark and the cited registered mark, the lesser the degree of similarity between their respective goods necessary to support a finding of likelihood of confusion. *In re Opus One, Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001).[3] The crux of the *du Pont*

[3] Applicant argues that the "zone of expansion" doctrine is inapposite. Applicant's argument is moot since the examining attorney did not rely on it. In any event, such argument would not be well taken in an *ex parte* context. *In re 1st USA Realty Professionals, Inc.*, 84 USPQ2d 1581, 1584 (TTAB 2007).

analysis on the relatedness of the goods is that the use of nearly identical marks on products that may be complementary or competitive, as here, will likely lead consumers to the assumption that there is a common source. *See In re Shell Oil Co.,* 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993).

Similarly, our analysis of the channels of trade and classes of consumers must be based on the identifications in the registration and application at issue. In the absence of specific limitations in either the registration and/or the application, we must presume that the goods at issue will travel in all normal and usual channels of trade and methods of distribution and be sold to all classes of consumers, which in this case may overlap. *Squirtco v. Tomy Corporation*, 697 F.2d 1038, 216 USPQ 937 (Fed. Cir. 1983). Applicant argues that board games are sold via different channels of trade than electronic and online games. However, applicant has not submitted any evidence to support that argument, whereas the examining attorney has presented evidence via web printouts to show that electronic and online games may be sold through the same channels as board games.

In view of the foregoing, the second and third *du Pont* factors weigh in favor of finding a likelihood of consumer confusion.

Balancing The Factors

Considering all of the evidence of record as it pertains to the *du Pont* factors, we conclude that the marks are nearly identical; the goods are related, and they are likely to be sold through the same channels of trade. Furthermore, it is well-established that any doubts as to likelihood of confusion are to be resolved in favor of the registrant. *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988). Accordingly, we find a likelihood of confusion between applicant's mark and the registered mark when applied to the respective goods.

Decision: The refusal to register is affirmed.