

THIS OPINION IS  
NOT A PRECEDENT  
OF THE T.T.A.B.

Mailed:  
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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Duke University

v.

Apogee Software, Ltd.

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Opposition No. 91117365

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Susan Freya Olive and Zaneta Moore Robinson of Olive & Olive, P.A. for Duke University.

Charles B. Kramer, Esq. for Apogee Software, Ltd.

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Before Seeherman, Zervas and Bergsman, Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

On April 30, 1997, Apogee Software, Ltd. ("applicant") filed an application (Serial No. 75283811) for registration on the Principal Register of the mark DUKE (in standard character form) for the following goods and services:

"computer game software; virtual reality game software, cassettes, discs and tapes; downloadable computer game software; video game software" in International Class 9;

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"brooches, belt buckles for precious metal, figurines for precious metal, watches containing an electronic game function, ornamental lapel pins, watches" in International Class 14;

"appliques in the form of decals, comic books, printed art reproductions, ball point pens, bank checks, looseleaf binders, a series of fiction books, educational books in the field of computer games; reference books in the field of computer games; guide books in the field of computer games; paper gift wrap bows, bumper stickers, calendars, cardboard floor display units for merchandising products, greeting cards, playing cards, trading cards, cards bearing universal greetings, newspaper cartoons; paper filters for coffee makers, non-magnetically encoded credit cards; non-magnetically encoded debit cards, decals, computer game instruction manuals, gift wrapping paper, greeting cards, picture postcards, postcards, posters, stamp albums, stamp pads, rubber stamps, stationery, trivia cards" in International Class 16;

"plaster figurines, plastic figurines, furniture, plastic key chain tags, non-metal key chains, plastic novelty license plates" in International Class 20;

"cloth banners, bath linen, bed linen" in International Class 24;

"bandannas, boxer shorts, caps (clothing), athletic footwear, gym shorts, jackets, leather jackets, neckties, polo shirts, rubbers, shirts, shoes, shorts, ski wear, socks, sun visors, sweat shirts, T-shirts, tank tops, wrist bands" in International Class 25;

"amusement park rides, toy action figures and accessories therefor, action skill games, mechanical action toys, card games, cases for action figures, cases for play accessories, craft sets for decorating balloons, dice, electric action toys, electronic game equipment with a watch function, hand held units for playing electronic games, board games, pinball-type games, role playing games, arcade games, costume masks, coin operated pinball machines, non-coin operated pinball machines, jigsaw puzzles, manipulative

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puzzles, three dimensional puzzles, role playing game equipment in the nature of game book manuals, role playing games, skateboards, toy figures, toy vehicles, non-riding transportation toys, ride-on toys" in International Class 28;

"breakfast cereals, bubble gum, candy, chocolate, coffee, popped popcorn, puffed corn snacks, snack food (cereal-based), snack foods (rice-based), snack foods (wheat-based)" in International Class 30; and

"amusement arcades, amusement centers, entertainment in the nature of an amusement park ride, audio recording and production, fan clubs, motion picture film production, motion picture distribution, television show programming, entertainment in the nature of on-going radio programs featuring drama; entertainment services, namely, providing on-line computer games, video tape production" in International Class 41.

The application sets forth a claim of a bona fide intention to use the mark in commerce pursuant to Section 1(b) of the Trademark Act, 15 U.S.C. §1051(b).

Opposer, Duke University, has opposed registration of applicant's mark on the ground of likelihood of confusion. At paragraph 3 of its amended notice of opposition, opposer pleaded that it "owns the following United States Trademark Registrations, among others, for its marks." Opposer subsequently made these registrations of record:

- Registration No. 1003662, issued January 28, 1975 and renewed, for the collective membership mark



for "indicating membership in the Iron Dukes an unincorporated organization of alumni and friends of Duke University who have as their common purpose the support of the University's athletic program" in International Class 200;

- Registration No. 1702350, issued July 21, 1992 and renewed, for the mark DUKE UNIVERSITY STORES (in typed form with STORES disclaimed) for "retail store and mail order services in the field of clothing, furniture, toys, games, sports equipment, school and office supplies, educational materials, computers, books, photography, housewares, towels, floor coverings, jewelry, ornaments, stationery, prints, camping equipment, pennants, decals, memorabilia, items bearing Duke University trademarks, and items depicting Duke University or its students, faculty, or campus life" in International Class 42;

- For the mark DUKE UNIVERSITY in stylized form, shown below, Registration No. 1701827, issued July 21, 1992 and renewed, for "pillows" in International Class 20; "cups" in International Class 21; and "shirts" in International Class 25; and Registration No. 1702830, issued July 28, 1992 and renewed, for the following goods:

"key rings made primarily of metal and metal license plates" in International Class 6;

"business card holders, decals, postcards, notepaper, envelopes, stationery, notebooks, loose leaf binders, pens, pencils, pen and pencil sets and paper bags" in International Class 16;

"trunks for traveling, travel bags, and toiletry cases sold empty" in International Class 18; and

"tablecloths not of paper, blankets, and cloth flags" in International Class 24;

**Duke University**

- Registration No. 1717941, issued September 22, 1992 and renewed, for the mark



for "jewelry; namely, pins" in International Class 14;

- Registration No. 2026492, issued December 31, 1996 and renewed, for "clothing, namely, T-shirts" in International Class 25; Registration No. 2122067, issued December 16, 1997, for "decals, stickers, stationery, and note pads" in International Class 16; and "drinking glasses, cups and mugs" in International Class 21; and Registration No. 2082553, issued July 22, 1997 and renewed, for "balloons" in International Class 28, all for the mark



- Registration No. 2092314, issued August 26, 1997 and renewed, for the mark



for "pennants not of paper" in International Class 24.<sup>1</sup>

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<sup>1</sup> Opposer pleaded additional registrations but did not make them of record; the registrations listed above are only those registrations opposer has specifically identified in the notice of opposition and made of record.

Additionally, opposer has entered several registrations into the record which it owns but which were not pleaded in the amended notice of opposition. We give these registrations no further consideration because they were not specifically pleaded and are not necessary to our disposition of this case.

Further, we note that opposer pleaded Registration No. 1248673 for the mark DUKE CHILDREN'S CLASSIC and Design, and Mr. Wilkerson has testified that the registration is currently in effect. However, Office records show that the Office cancelled the registration in 2004.

We refer to the **D♥KE** and **D♥KE** marks collectively as "the Duke Design marks."

In addition, opposer alleged prior common law rights in the term DUKE for educational services and a variety of electronic products, toys and games, clothing, glassware, paper products, jewelry items, decorative household products, cards that function as credit cards and retail stores in which computer software, including DUKE branded software and entertainment software, are sold; that "its mark DUKE is a famous mark"; and that applicant's mark so resembles opposer's marks as to be likely to cause confusion, mistake or deception. See Section 2(d) of the Trademark Act of 1946, 15 U.S.C. §§ 1052(d).<sup>2</sup>

Applicant has denied the salient allegations of the amended notice of opposition.

The record consists of the pleadings; the file of the involved application; the trial testimony of opposer's witness, James Earl Wilkerson, opposer's director of trademark licensing and stores operations, and exhibits thereto; and, pursuant to opposer's notice of reliance,

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<sup>2</sup> Opposer has also set forth a claim of dilution under Section 43(c) of the Trademark Act, 15 U.S.C. § 1125(c). Because opposer has not submitted arguments in support of its dilution claim in its brief, we deem opposer to have waived any such claim. In addition, we note that in its brief, opposer has argued that it has a family of marks. Because opposer did not plead this in its notice of opposition, we have given it no consideration in connection with opposer's Section 2(d) claim.

opposer's requests for admissions and opposer's statement explaining that applicant failed to respond to the requests for admissions.

Opposer has filed its brief. Applicant did not submit any trial testimony or other evidence during its testimony period and has not filed a brief.

*Standing*

Because opposer has made several of its pleaded registrations of record through Mr. Wilkerson's testimony, opposer has established its standing. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982).

*Priority*

Because opposer, through Mr. Wilkerson's testimony, has entered several of its pleaded registrations into the record, Section 2(d) priority is not an issue for those goods and services which are recited in such registrations. See *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). Opposer has also, as discussed *infra*, established its common law priority through Mr. Wilkinson's testimony and documentary evidence in connection with DUKE marks for additional goods and services.

*Likelihood of Confusion*

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In considering the evidence of record on these factors, we keep in mind that "[t]he 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." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

*The Marks*

We first consider the similarity or dissimilarity of the marks, determining whether the marks are similar in sound, appearance, meaning, and commercial impression. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). While we must consider the marks in their entireties, in articulating reasons for reaching a conclusion on the issue of likelihood of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark. See *In re*

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*National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). Where marks have both a word and a design, such as in opposer's DUKE Design marks, the general framework for analyzing such marks is that the literal portion, i.e., DUKE, is accorded greater weight because purchasers will use the words to request or refer to the services. See *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390 (Fed. Cir. 1983); *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987). Additionally, because applicant's mark is in typed form, we consider that applicant may use any reasonable stylization of lettering, which would include the stylization of opposer's marks in pleaded Registration Nos. 1701827 and 1702830 for DUKE UNIVERSITY. See, e.g., *Phillips Petroleum Co. v. C. J. Webb, Inc.* 442 F.2d 1376, 170 USPQ 35 (CCPA 1971) (a mark registered in typed format is not limited to the depiction thereof in any special form); *INB National Bank v. Metrohost Inc.*, 22 USPQ2d 1585, 1588 (TTAB 1992) ("[a]s the Phillips Petroleum case makes clear, when [an] applicant seeks a typed or block letter registration of its word mark, then the Board must consider all reasonable manners in which ... [the word mark] could be depicted").

We confine our analysis to a comparison of opposer's marks and goods/services that are most similar to applicant's DUKE mark and goods/services: DUKE, DUKE

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UNIVERSITY, DUKE UNIVERSITY STORES, DUKE and building design and the DUKE Design marks. Of course, applicant's mark is identical to those of opposer's marks only containing the term DUKE. Mr. Wilkerson has testified that opposer has used DUKE alone as a mark on a wide variety of goods and services beginning in the early 1900s. The record supports Mr. Wilkerson's testimony. See Wilkerson exhibits 19 and 31 - 49. Applicant's mark is highly similar to opposer's DUKE UNIVERSITY marks; Mr. Wilkerson has testified that opposer is generally known to the public as "Duke"; "[W]hen people hear 'Duke,' they - they think of Duke University." Wilkerson at p. 9. He has added that in his experience, the word "university" is not typically used. *Id.* For this reason, we find that DUKE is the dominant element in the mark DUKE UNIVERSITY. Moreover, consumers viewing applicant's mark will see it as an abbreviated form for DUKE UNIVERSITY, when used in connection with goods and services with which opposer has used its mark or on goods or services likely to emanate from opposer. See *Big M. Inc. v. United States Shoe Corp.*, 228 USPQ 614, 616 (TTAB 1985) ("[W]e cannot ignore the propensity of consumers to often shorten trademarks.") The term STORES in opposer's DUKE UNIVERSITY STORES mark is a disclaimed generic term which contributes little to the commercial impression of the mark. As for the DUKE Design marks which contain a heart in the position of

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the letter "U" in DUKE, we find that the consuming public would perceive these marks as a stylized form of DUKE rather than as a series of letters and a symbol, i.e., "D" "heart" "K" "E." Also, the wording in applicant's mark and the mark of Registration No. 1717941 (DUKE and building design) is identical, and the design in that mark functions less in forming the commercial impression of the mark than does the word DUKE.

In view of the foregoing, we find that applicant's mark is identical in appearance, sound, connotation and commercial impression to those of opposer's word marks only consisting of the term DUKE; that applicant's mark is highly similar in sound and appearance, and highly similar, if not identical in connotation and commercial impression, to those of opposer's marks containing DUKE UNIVERSITY, including DUKE UNIVERSITY STORES; and that applicant's mark is identical in sound and highly similar in meaning, appearance and commercial impression to opposer's DUKE Design marks. The same holds true for applicant's mark and Registration No. 1717941 (DUKE and building design); due to the shared term DUKE, the marks are identical in sound, meaning and commercial impression, and are highly similar in appearance.

*The Goods and Services*

We turn next to the *du Pont* factor regarding the similarity or dissimilarity of opposer's and applicant's

goods and services as stated in the identifications of goods and services. We consider the following:

- the goods and services need not be identical or even competitive in order to support a finding of likelihood of confusion; it is sufficient that the goods and services are related in some manner or that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons in situations that would give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of the services, see *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991); *In re International Telephone & Telegraph Corp.*, 197 USPQ 910 (TTAB 1978);
- when both parties are using the identical mark, the relationship between the goods or services on which the parties use their marks need not be as great or as close as in the situation where the marks are not identical or substantially similar; see *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993) ("even when goods or services are not competitive or intrinsically

related, the use of identical marks can lead to an assumption that there is a common source"); *In re Concordia International Forwarding Corp.*, 222 USPQ 355 (TTAB 1983); and

- in order to sustain an opposition, it is only necessary that we find likelihood of confusion with respect to at least one item in each class of applicant's goods or services; see *Tuxedo Monopoly, Inc. v. General Mills Fun Group, Inc.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981) ("[L]ikelihood of confusion must be found if the public, being familiar with [opposer's] use of MONOPOLY for board games and seeing the mark on any item that comes within the description of goods set forth by appellant in its application ....").

Additionally, applicant has admitted opposer's request for admissions no. 38; "The goods and services that Applicant seeks to provide under the Mark<sup>3</sup> are substantially similar to the goods and services provided by Opposer under Opposer's DUKE marks." Opposer relies heavily on this admission in establishing its case. However, we give

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<sup>3</sup> "Mark" is defined in opposer's discovery requests as "any mark in block letters or any logo or other form which includes the character string DUKE (including, by way of example and not limitation, the word DUKE and the phrase DUKE NUKEM.)"

limited weight to this admission because the admission does not specify which of opposer's and applicant's goods or services are similar to one another.

**International Class 9:** computer game software; virtual reality game software, cassettes, discs and tapes; downloadable computer game software; video game software.

Mr. Wilkerson testified that "Duke has ... licensed the 'Duke' name for use in computer games and video games for well over a decade, including games published by Electronic Arts and Sony for use in PlayStations and other video-gaming equipment and on computers"; and that "these uses" began before April of 1997 and continue today. Wilkerson dep. at 89 - 90. Wilkerson Exhibit 22 depicts a CD container and a box which is a "Duke computer-game ... software package featuring Duke's basketball team," where "the name 'Duke' appears on the front." *Id.* at 50. Exhibit 23 is a depiction of packaging for a "computer football game, which Duke plays a part in." *Id.* at 51. In view of these uses of DUKE in connection with computer games where opposer has licensed the mark DUKE for use in the game, and DUKE appears in the packaging for the game and in the game itself, the consuming public, when encountering applicant's mark used in connection with computer, video and virtual reality game software, will likely mistakenly associate the source of such goods with opposer. We therefore find applicant's

computer, video and virtual reality game software related to the computer and video games for which opposer has licensed the use of its name.

**International Class 14:** brooches, belt buckles for precious metal, figurines for precious metal, watches containing an electronic game function, ornamental lapel pins, watches.

Registration No. 1717941 for DUKE and building design recites "jewelry; namely pins." Also, Mr. Wilkerson has testified that opposer and its licensees first sold prior to 1997 and currently sell DUKE brand watches, belt buckles and jewelry, including brooches and lapel pins. *Id.* at 91.

Applicant's International Class 14 goods are in part identical to opposer's goods.

**International Class 16:** appliques in the form of decals, comic books, printed art reproductions, ball point pens, bank checks, looseleaf binders, a series of fiction books, educational books in the field of computer games; reference books in the field of computer games; guide books in the field of computer games; paper gift wrap bows, bumper stickers, calendars, cardboard floor display units for merchandising products, greeting cards, playing cards, trading cards, cards bearing universal greetings, newspaper cartoons; paper filters for coffee makers, non-magnetically encoded credit cards; non-magnetically encoded debit cards, decals, computer game instruction manuals, gift wrapping paper, greeting cards, picture postcards, postcards, posters,

stamp albums, stamp pads, rubber stamps, stationery, trivia cards.

Registration No. 1702830 for DUKE UNIVERSTIY (stylized) recites the following goods; decals, postcards, stationery, loose leaf binders and pens. Also, Mr. Wikerson has testified that opposer has used DUKE since prior to 1997 and currently uses DUKE in connection with bumper stickers, comic books, coloring books, posters and photographs. *Id.* at 92 - 94. In view thereof, we find applicant's International Class 16 goods are identical in part to opposer's goods.

**International Class 20:** plaster figurines, plastic figurines, furniture, plastic key chain tags, non-metal key chains, plastic novelty license plates.

Mr. Wilkerson has testified that since prior to 1997 opposer has used and currently is using DUKE in connection with statuettes, various types of furniture including rocking chairs and other chairs, step stools, outdoor umbrellas and folding chairs, and other items such as plastic key-chain tags, key chains and license plates. *Id.* at 96. In view thereof, we find applicant's International Class 20 goods to be identical in part and otherwise similar to opposer's goods.

**International Class 24:** cloth banners, bath linen, bed linen.

Registration No. 2092314 for DUKE design recites "pennants not of paper" which is closely related, if not legally

identical, to "cloth banners." Also, Mr. Wilkerson testified that opposer has used DUKE since prior to 1997 and currently is using DUKE in connection with cloth banners, bath towels, and comforters and blankets. *Id.* at p. 97. In view thereof, we find applicant's International Class 24 goods are identical as to opposer's cloth banners and bath linen and similar as to bed linen.

**International Class 25:** bandannas, boxer shorts, caps (clothing), athletic footwear, gym shorts, jackets, leather jackets, neckties, polo shirts, rubbers, shirts, shoes, shorts, ski wear, socks, sun visors, sweat shirts, T-shirts, tank tops, wrist bands.

Registration No. 1701827 for DUKE UNIVERISTY (stylized) recites "shirts," and Registration No. 2026492 for DUKE design recites "t-shirts." Also, Mr. Wilkerson has testified that since prior to 1997 opposer has used DUKE and currently is using DUKE in connection with bandanas, underwear, hats, bed slippers, jackets and outerwear, sun visors, gym shorts, shirts of various kinds, pants, and headbands and wristbands. *Id.* at 98 - 99. In view thereof, we find applicant's International Class 25 goods are identical in part and otherwise similar to opposer's goods.

**International Class 28:** amusement park rides, toy action figures and accessories therefor, action skill games, mechanical action toys, card games, cases for action figures, cases for play accessories, craft sets for decorating balloons, dice, electric action toys, electronic game

equipment with a watch function, hand held units for playing electronic games, board games, pinball-type games, role playing games, arcade games, costume masks, coin operated pinball machines, non-coin operated pinball machines, jigsaw puzzles, manipulative puzzles, three dimensional puzzles, role playing game equipment in the nature of game book manuals, role playing games, skateboards, toy figures, toy vehicles, non-riding transportation toys, ride-on toys.

Mr. Wilkerson has testified that since prior to 1997 opposer has sold and currently sells DUKE plush toys, playing cards, toy figures, board games, puzzles, cheerleader dolls, teddy bears and bobbleheads. *Id.* at 100 - 101. See also Wilkerson dep. ex. 19 (teddy bears). In view thereof, we find applicant's toy action figures, mechanical action toys, card games, electric action toys, board games, jigsaw puzzles, manipulative puzzles, three dimensional puzzles and toy figures are identical or legally identical to opposer's goods, and that applicant's dice, toy vehicles, non-riding transportation toys and ride-on toys are similar to opposer's goods.

**International Class 30:** breakfast cereals, bubble gum, candy, chocolate, coffee, popped popcorn, puffed corn snacks, snack food (cereal-based), snack foods (rice-based), snack foods (wheat-based)

Mr. Wilkerson has testified that since prior to 1997 opposer has sold and currently sells popcorn and other snack foods

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in DUKE gift tins, coffee mugs stuffed with snack goodies, wine and "cakes and other confections" and that these items are available today. Wilkerson dep. at pp. 102 - 103. He also testified that opposer "operate[s] Duke Blue Devil concessions where we sell snack food." *Id.* at 103. In view thereof, we find applicant's International Class 30 goods are identical as to popcorn and snack foods.

**International Class 41:** amusement arcades, amusement centers, entertainment in the nature of an amusement park ride, audio recording and production, fan clubs, motion picture film production, motion picture distribution, television show programming, entertainment in the nature of on-going radio programs featuring drama; entertainment services, namely, providing on-line computer games, video tape production

Mr. Wilkerson testified that opposer has operated a small DUKE amusement center for use by children at Duke Hospital, and has done so since prior to April of 1997. In the amusement center, which at the time of trial was temporarily closed but would reopen, opposer offers pinball games, electronic games, pool and darts. In addition, since prior to 1997 and through the present time, opposer has offered entertainment in the form of athletic events; has fan clubs; has operated DUKE recording studios, which produce audio and video recordings; has operated a DUKE radio station which produces radio programs; has operated a DUKE television

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station and a news service; and, through its department of theater studies, has produced movies and plays. *Id.* at 101 - 102, 104 - 105. In view thereof, we find applicant's International Class 41 services are identical as far as amusement centers, and are similar with regard to, at least, applicant's identified audio recording and production, fan clubs, television show programming and entertainment in the nature of on-going radio programs featuring drama.

Additionally, the identification of services for Registration No. 1702350 (DUKE UNIVERSITY STORES) recites the retail sale of various common consumer goods. Those goods and the retail sales of those goods are inherently related. See, e.g., *Fortunoff Silver Sales, Inc. v. Norman Press, Inc.*, 225 USPQ 863, 866 (TTAB 1985) ("there is little question that jewelry store services and jewelry are highly related goods and services"); J. Thomas McCarthy, *Trademarks and Unfair Competition* § 24:25 (2006) ("[w]here the services consist of retail sales services, likelihood of confusion is found when another mark is used on goods which are commonly sold through such a retail outlet.").

In view of the foregoing, the *du Pont* factor regarding the similarity of the goods and services weighs in favor of finding a likelihood of confusion.

*Trade Channels*

Under the *du Pont* factor regarding the similarity or dissimilarity of the trade channels, we note that none of the identifications of goods and services in opposer's registrations or applicant's application includes any trade channel limitations. We therefore assume that the goods and services of the application and registrations travel in all the normal channels of trade for such goods and services. *Schieffelin & Co. v. Molson Companies Ltd.*, 9 USPQ2d 2069, 2073 (TTAB 1989) ("Moreover, since there are no restrictions with respect to channels of trade in either applicant's application or opposer's registrations, we must assume that the respective products travel in all normal channels of trade ....").

Additionally, Mr. Wilkerson testified that DUKE branded products are sold in "all sorts of types of stores, department stores, discount stores, convenience stores, athletic stores, gift stores, novelty stores, even ... Walmart." Wilkerson at 85. Further, applicant has admitted that applicant's goods bearing applicant's mark would be sold in retail department stores, retail discount stores, bookstores, and online retailers; and that applicant's goods bearing its mark "would be sold through many of the same channels of commerce as those through which Opposer's goods

bearing Opposer's DUKE mark are sold." See requests for admissions nos. 43 - 47.

Because there are no trade channel restrictions in either opposer's or applicant's identifications of goods and services, for those goods in International Classes 14, 16, 24 and 25 which are identical to the goods in opposer's registered DUKE and design, DUKE (stylized) and DUKE UNIVERSITY marks, the trade channels are also identical. For those goods in International Classes 9, 20, 28 and 30, we find that the trade channels overlap in view of Mr. Wilkerson's testimony and applicant's admissions.

As far as the services in International Class 41, there is no direct testimony from opposer's witness as to the trade channels of its related services. Even if opposer's activities are limited to the Duke University campus, because applicant's identification of services does not include any trade channel restrictions, consumers of opposer's services are likely to be exposed to applicant's services.

The *du Pont* factor regarding the trade channels therefore weighs in favor of finding a likelihood of confusion.

*Conditions of Purchase*

We now consider opposer's contention at p. 15 of its brief that opposer's and applicant's goods and services "are

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neither expensive ... nor marketed to a group of specialized consumers. Such unsophisticated consumers are unlikely to notice fine distinctions between the marks of the parties." Opposer's catalog made of record as Wilkerson Exhibit 19 reflects that many of opposer's goods are low cost items. See, e.g., \$4.00 lapel pin; \$7.00 pennants; \$1.00 decals; \$13.00 T-shirts; \$21.00 shorts; \$14.00 caps; \$13.00 puzzles; \$6.00 key rings; and \$1.00 bumper stickers. Thus, for the goods in International Classes 14, 16, 20, 24, 25 and 28, we find that many of opposer's and applicant's goods are low cost consumer goods and that purchasers of such goods would be likely to exercise a lesser degree of care in purchasing such goods. Thus, the *du Pont* factor regarding the conditions of purchase weighs in favor of a finding of likelihood of confusion with respect to the application in these International Classes. As for the goods and services in the remaining classes, i.e., International Classes 9, 30 and 41, there is no information in the record to reflect on pricing or the level of care consumers will exercise in making their purchases. As to these classes, this *du Pont* factor is neutral.

*Third-party Uses*

Opposer, in addressing the *du Pont* factor regarding the number and nature of similar marks in use on similar goods, has pointed out at p. 15 of its brief that the "there is no

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evidence that any third party has used or registered any DUKE mark for related goods or services, nor that any similar marks are in use on similar goods or services." It is typically an applicant in an opposition proceeding that would make a showing of third-party use and applicant herein has not filed any testimony or other evidence. As a result, the record before us does not show any third-party uses of DUKE. Because we must base our decision on the record before us, we resolve this factor in opposer's favor to the extent that the scope of protection accorded to opposer's marks is not reduced.

*Fame*

The only evidence which opposer cites to in its brief in support of opposer's contention that its marks are famous is applicant's admission of opposer's request for admissions no. 42, which states "Opposer's mark DUKE is a famous mark." Because request for admissions no. 42 does not specify what goods or services opposer's mark is allegedly famous for, we consider this "admission" too vague to have any real probative value. Also, Mr. Wilkerson's testimony regarding income from sales of DUKE branded goods and services does not aid opposer in establishing that its marks are famous; Mr. Wilkerson has only identified the income from the sale of all goods bearing its marks and the income from all of opposer's businesses. Thus, on this record, we do not

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conclude that any of opposer's marks are famous for the goods and services involved in this case. The *du Pont* factor regarding fame is neutral.

*Conclusion*

In view of the foregoing, we find that applicant's mark, when used in connection with the goods and services set forth in applicant's application, is likely to cause confusion with opposer's pleaded marks for the goods and services set forth in its registrations and for the goods and services for which opposer has established prior common law rights.

**DECISION:** The opposition is sustained on the basis of likelihood of confusion under Section 2(d) and registration to applicant is refused for each International Class in its application.