

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

Mailed: January 29, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Free Willy Keiko Foundation, Inc.  
v.  
Bodil Korshamn

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Opposition No. 91163812  
to application Serial No. 76520604  
filed on May 28, 2003

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Heidi L. Sachs of Perkins Coie LLP for Free Willy Keiko  
Foundation, Inc.

Donald L. Dennison of Dennison Schultz Dougherty & MacDonald  
for Bodil Korshamn.

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Before Walters, Kuhlke and Taylor, Administrative Trademark  
Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Applicant, Bodil Korshamn, a Norwegian citizen, seeks  
registration of the mark **KEIKO** for goods identified in the  
application as "sleeping bags for children for use in prams  
and baby carriages; mattresses, and pillows" in

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International Class 20 and "quilts; quilt covers; bed sheets and pillowcases" in International Class 24.<sup>1</sup>

Opposer, Free Willy Keiko Foundation, Inc., has opposed registration of applicant's mark on the ground that, as applied to applicant's goods, the mark so resembles opposer's previously used and registered mark KEIKO, for a variety of goods and services as to be "likely to cause confusion, or to cause mistake, or to deceive" within the meaning of Section 2(d) of the Lanham Act, 15 U.S.C. §1052(d). Notice of Opposition ¶ 12. In addition, opposer asserts a claim of dilution under Section 43(c) of the Trademark Act. However, inasmuch as opposer has not argued dilution in its brief, we have considered only the claim of priority of use and likelihood of confusion under Trademark Act Section 2(d), 15 U.S.C. §1052(d).

Applicant has filed an answer by which it has admitted that "there is no issue of priority of use of the KEIKO mark on goods of the type listed in Opposer's registrations, but denies that Opposer has priority of use on the goods set forth in the opposed application." Answer ¶ 7. Applicant also admitted that "both registration of Opposer's Mark in connection with Opposer's Goods and first use of Opposer's Mark are substantially prior to Applicant's Filing Date."

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<sup>1</sup> Serial No. 77520604, filed May 28, 2003, under Section 44(e) of the Trademark Act, 15 U.S.C. §1126.

Notice of Opposition ¶ 8; Answer ¶ 8. In addition, applicant admitted that "Applicant's mark is identical, [in] sound, meaning and appearance to Opposer's Mark." Answer ¶ 10.

The evidence of record consists of the pleadings herein and the file of the opposed application. In addition, opposer submitted the following material under a notice of reliance: certified copies of opposer's pleaded registrations; excerpts from pages of various printed publications regarding opposer; third-party registrations showing overlap between applicant's sleeping bags and bed sheets, and opposer's toys; and opposer's first set of requests for admission.<sup>2</sup> Opposer did not take any testimony. Applicant did not take any testimony, file a notice of reliance or file a brief.

**PRIORITY AND LIKELIHOOD OF CONFUSION**

Applicant has admitted that priority is not in issue. Moreover, opposer has made the following registration of

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<sup>2</sup> Opposer also submitted a declaration and webpage printouts from various online sources. However, this is not proper subject matter for a notice of reliance. *Raccioppi v. Apogee Inc.*, 47 USPQ2d 1368 (TTAB 1998). In view thereof, we have not considered these exhibits. *Original Appalachian Artworks Inc. v. Streeter*, 3 USPQ2d 1717 n. 3 (TTAB 1987) (inasmuch as applicant did not submit evidence or file a brief, Board could not determine whether applicant treated it as being of record thus material improperly offered by notice of reliance not considered).

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record which is in full force and effect and is owned by opposer:<sup>3</sup>

Registration No. 2233367 for the mark KEIKO (in typed form) for "scale toy animals; dolls and accessories therefor; balloons; playground balls; sports balls; hand held unit for playing electronic games" in International Class 28, and "production of motion picture films, television programs" in International Class 41, issued on March 23, 1999, Section 8 accepted.

In view of the above, opposer has established its standing to oppose registration of applicant's mark and its priority is not in issue. See *King Candy Co., Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

Our likelihood of confusion determination under Section 2(d) 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 and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). 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). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

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<sup>3</sup> While opposer made other registrations of record, they have since been cancelled under Section 8.

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Applicant has not denied opposer's contentions that the requests for admission were timely served, received by applicant, and not responded to by applicant. Further, applicant did not, in any way, contest or object to opposer's filing of its notice of reliance. Because applicant failed to respond to opposer's requests for admission, each of the requests is deemed admitted by applicant. See Fed. R. Civ. P. 36(a), made applicable to this proceeding by Trademark Rule 2.116(a), 37 C.F.R. 2.116(a) ("The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow or as the parties may agree to in writing, subject to Rule 29, the party to whom the request is directed serves upon the party or the party's attorney.")

Any matter admitted under Federal Rule 36 "is conclusively established unless the court on motion permits withdrawal or amendment of the admission." See Fed. R. Civ. P. 36(b). See also *American Automobile Ass'n v. AAA Legal Clinic of Jefferson Crooke, P.C.*, 930 F.2d 1117, 19 USPQ2d 1142, 1144 (5<sup>th</sup> Cir. 1991) ("An admission that is not withdrawn or amended cannot be rebutted by contrary testimony or ignored by the district court..."). The prejudice that would fall upon opposer if we were to ignore applicant's admissions is manifest, because opposer has

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clearly relied, at least in part, on the admissions to prove its case. See American Automobile Ass'n, 19 USPQ2d at 1145.

The most pertinent admissions are as follows:

Admit that Opposer's Mark is identical to Applicant's Mark.

Admit that Applicant's Goods are marketed to children.

Admit that Applicant's Goods are marketed to parents.

Admit that Applicant's Goods are intended to be used by children.

Admit that Applicant's Goods are commonly sold in retail environments.

Admit that Applicant's Goods are commonly sold in department stores.

Admit that Applicant's Goods are commonly sold in children's toy stores.

Admit that Applicant's Goods are commonly sold through mail-order catalogs.

Admit that Applicant's Goods are commonly sold by online retailers.

Admit that U.S. consumers understand the mark KEIKO to refer to Opposer's Goods and Services.

Admit that Applicant's Goods are closely related to Opposer's Goods and Services.

Admit that Applicant's Goods are complementary to Opposer's Goods and Services.

Admit that Applicant's Goods are "impulse" purchases.

Admit that Opposer's Mark is used for a wide variety of goods and services.

Admit that consumers would be likely to be confused as to source, sponsorship, affiliation,

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and/or endorsement of Applicant's Goods if Applicant uses Applicant's Mark.

Admit that consumers would be likely to be confused as to source, sponsorship, affiliation, and/or endorsement of Applicant's Goods if Applicant registers Applicant's Mark.

As noted above, applicant has admitted that her involved mark is identical to opposer's mark, applicant's goods are related and complementary to opposer's goods and services, the parties' goods move in the same channels of trade, are sold to the same consumers and applicant's goods are "impulse" items.<sup>4</sup> In addition, the third-party registrations support a finding that applicant's sleeping bags and bed sheets are related to opposer's toys. See, e.g., Reg. No. 2941044 for the mark UFC for, inter alia, sleeping bags, rubber action balls, plush toys, and crib toys; Reg. No. 2619385 for the mark HE-MAN for, inter alia, sleeping bags, stuffed toy animals, plush toys, and sport balls; Reg. No. 1953191 for the mark SAN DIEGO WILD ANIMAL PARK for, inter alia, sleeping bags, plastic animal replica figurines, plush animals, and dolls; Reg. No. 2461981 for the mark MICKEY FOR KIDS and design, for, inter alia, bed sheets, rubber action balls, plush toys, and dolls; and Reg. No. 3052640 for the mark AUBURN TIGERS for, inter alia, sheets, balloons, playground balls, and plastic figurine

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<sup>4</sup> While applicant also admitted that opposer's mark is famous, under the circumstances of this case, this is not a necessary finding to support a determination of likelihood of confusion.

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toys. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993) (Third-party registrations which individually cover a number of different items, and which are based on use in commerce, serve to suggest that the listed goods are of a type which may emanate from a single source). In view thereof, opposer has made a prima facie case under Section 2(d) of the Trademark Act that applicant has not rebutted.

Thus, we conclude that the record as it pertains to the relevant du Pont factors supports a finding of a likelihood of confusion as between applicant's KEIKO mark and opposer's KEIKO mark, such that registration of applicant's mark is barred under Trademark Act Section 2(d). As noted above, applicant has not submitted any evidence, taken any testimony or presented any legal argument to rebut opposer's showing. To the extent we have any doubt, we must resolve that doubt in favor of opposer, the prior registrant. See *Hard Rock Cafe International (USA) Inc. v. Thomas D. Elsea*, 56 USPQ2d 1504, 1514 (TTAB 2000) and *W.R. Grace & Co. v. Herbert J. Meyer Industries, Inc.*, 190 USPQ 308, 311 (TTAB 1976).

**Decision:** The opposition is sustained as to opposer's claim of priority and likelihood of confusion under Section 2(d) of the Trademark Act.