

**THIS OPINION IS NOT A
PRECEDENT OF THE TTAB**

Mailed:
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Bucher

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Baby Love, Inc.

v.

The Brainy Baby Company, LLC

Opposition No. 91166831
against Serial No. 78492463

Daniel S. Polley of Daniel S. Polley, P.A. for Baby Love,
Inc.

Lee B. Beitchman of Beitchman & Hudson for The Brainy Baby
Company, LLC.

Before Bucher, Kuhlke and Bergsman, Administrative Trademark
Judges.

Opinion by Bucher, Administrative Trademark Judge:

The Brainy Baby Company, LLC seeks registration on the
Principal Register of the mark **BABY LOVE** (*in standard
character format*) for goods identified as a "series of
prerecorded videotapes, audio cassettes, digital video discs
and compact discs featuring live and animated educational
materials intended to develop and improve the creative and

intellectual faculties of infants and children" in International Class 9.¹

Baby Love, Inc. has opposed the application on the ground of likelihood of confusion, alleging that applicant's mark, when used in connection with the identified goods, so resembles opposer's previously used marks, also registered by opposer as follows:

BABY LOVE	for "retail store services featuring infant and child clothing, furniture, accessories and toys" in Int. Class 42; ² and
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baby I love	for "retail store services featuring infant and child clothing, furniture, accessories and toys" in Int. Class 42; ³
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as to be likely to cause confusion, to cause mistake or to deceive under Section 2(d) of the Lanham Act, 15 U.S.C.

§ 1052(d). Opposer also claimed prior common law trademark and service mark rights in the words **BABY LOVE** and the **baby I love** logos from its continuous use in commerce in connection with a plethora of goods and services directed to toddlers, children and juveniles.

¹ Application Serial No. 78492463 was filed on September 30, 2004 based upon applicant's allegation of a *bona fide* intention to use the mark in commerce.

² Registration No. 1780709 issued on July 6, 1993; renewed.

³ Registration No. 1784606 issued on July 27, 1993; renewed.

Opposer also alleges, as a second ground for opposition, that applicant's mark so resembles opposer's mark as to cause dilution of the distinctive quality of opposer's mark.

Applicant, in its answer, has denied all of the salient allegations in the notice of opposition.

The Record

By operation of the rules, the record includes the pleadings and the file of the opposed application. In support of its case, opposer made of record the testimony declaration of Elliot Komroff, Vice President of Opposer, with Exhibits A through P (submitted pursuant to the parties' joint stipulation for declaration testimony); and evidence under three separate Notices of Reliance: on February 23, 2007, certified status and title copies of opposer's valid and subsisting pleaded U.S. Trademark Registrations as well as copies of third-party registrations; on February 27, 2007, copies of applicant's responses to opposer's First Request For Admissions to Applicant, with opposer specifically relying on applicant's responses to Requests for Admission 1, 2, 5, 6, 8-10 and 18-38; and on February 28, 2007, a copy of a Federal Trade Commission complaint of May 1, 2006. Applicant made of record the April 2007 testimony declaration of Dennis

Fedoruk, CEO and manager of applicant, with the attached exhibits (which as noted previously, was submitted pursuant to the parties' joint stipulation that testimony could be submitted by declaration testimony). Finally, during its rebuttal testimony period, opposer filed another declaration from Elliot Komroff, which included additional exhibits. The parties have fully briefed the case.

Preliminary matters

Opposer has raised objections to that portion of applicant's brief referring to a search of the Internet that yielded more than four million hits for the term "Baby Love Products." We agree with opposer that this claim must be stricken from the record inasmuch as applicant failed to submit any evidence or testimony to this alleged fact during its testimony period.

The Parties

Since its inception in 1973, opposer has continuously used the service mark and trade name **BABY LOVE** in connection with its retail store services featuring clothing, furniture, accessories and toys that are directed to the infant, toddler, children, and juvenile market. As noted above, Opposer also claimed prior common law trademark and

service mark rights in the words **BABY LOVE** and the **baby love** logos from its continuous use in commerce in connection with a plethora of goods and services directed to toddlers, children and juveniles. For example, every day since November 2000, opposer has been offering for sale through its online e-commerce website most of the products it offers at its retail store. www.babylove.com Even before the launch of its website, opposer had consumers in and shipped product to forty-eight states and Canada. Opposer continues to have customers located nationwide, in Canada, and in numerous other foreign countries. The record shows that opposer offers at its physical and online retail store over 60,000 different infants' and children's products produced by more than 650 different manufacturers, including a wide variety of the same type of goods listed in applicant's application. A partial listing of the types of products drawn from this record includes furniture, cribs, strollers, clothing, car seats, diapers, DVD's, games, CD's, videos, electronic toys, booties, books, printed materials, sleepers, baby carriers, bottle bags, bouncers, car seat accessories, car sun shades, diaper bags, exersaucers, walkers, swings, bassinets, sheets, liners, cradles, blankets, changing tables, laundry hampers, rocking chairs, gliders, ottoman, dressers, chests, monitors, thermometers,

first aid safety kits, humidifiers, nasal aspirators, vaporizers, thermoscans, bottle sterilizers, bottle warmers, breast pumps, burp pads, high chairs, juice and water bottles, feeding seats, nursing pillows, nursing pads, crib bumpers, bibs, dust ruffles, mobiles, lamps, quilts, comforters, receiving blankets, valances, learning products, and playards.

Since its inception in 2001, applicant has been producing audio and audio/video products for infants and children. Many of these products are marketed under its house mark, BRAINY BABY, as well as having separate trademarks used in connection with other themed series or individual product lines. Applicant has received recognition nationally and internationally for the quality of its products. Applicant has developed three trademarks for a series of faith-based audio/video titles to be sold in religious and faith-based bookstores and similar outlets, entitled "Baby Hope," "Baby Joy" and "Baby Love."

Standing

Opposer must prove at trial its alleged standing to file this complaint. Accordingly, opposer has alleged and then proved at trial a real commercial interest, as well as a reasonable basis for the belief that opposer would be

damaged by the registration of applicant's mark. Ritchie v. Simpson, 170 F.3d 1092, 50 USPQ2d 1023, 1025-26 (Fed. Cir. 1999). Opposer has presented evidence of the ownership and validity of its pleaded registrations for the mark **BABY LOVE** and the baby I♥ve logos.

Priority

Opposer has established its ownership of valid and subsisting registrations for the mark **BABY LOVE** and the baby I♥ve logos for "retail store services featuring infant and child clothing, furniture, accessories and toys." Therefore, we find that priority is not at issue in view of opposer's ownership of its pleaded registrations. See King Candy Company v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108 (CCPA 1974); and Carl Karcher Enterprises Inc. v. Stars Restaurants Corp., 35 USPQ2d 1125 (TTAB 1995). In any event, opposer's demonstration of continuous use of the **BABY LOVE** service mark establishes actual prior use vis-à-vis applicant's application filing date, which is the earliest date upon which applicant can rely for priority purposes. Either way, opposer's showing is clearly sufficient to defeat the contingent constructive use date of applicant's recently-filed intent-to-use application.

Analysis: Likelihood of Confusion

Our determination under Section 2(d) is based upon an analysis of all of the probative 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). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the relationship of the goods and/or services. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

The Marks

Applicant argues that the trade dress of the marks is different, and that applicant's applied-for mark will be used with its BRAINY BABY house mark. Suffice it to say, the marks that we must compare do not involve the use of trade dress, and applicant's applied-for mark does not include its so-called house mark. Thus, applicant's arguments are to no avail.

The actual marks involved herein are identical. Although applicant has adopted opposer's word mark in its entirety, it argues that this is a case where a contextual, secondary connotation should change the result of our registrability decision. For example, an identical term may

take on very different meanings as applied to related goods, overcoming a likelihood of confusion. See *In re British Bulldog, Ltd.*, 224 USPQ 854 (TTAB 1984) [the Board held that the mark PLAYERS on men's underwear and men's shoes would not result in consumer confusion as to the source of the goods inasmuch as "'PLAYERS' for shoes implies a fit, style, color and durability adapted to outdoor activities. 'PLAYERS' for men's underwear implies something else, primarily indoors in nature."]. However, while applicant argues that it has developed "Baby **Hope**," "Baby **Joy**" and "Baby **Love**" for a series of faith-based audio/video titles to be sold in religious and faith-based bookstores, the principles of the *British Bulldog* case would only be applicable herein if applicant's goods were so restricted, which they are not.

Applicant alludes to a second analogous pattern under the Lanham Act, namely, when a newly-coined combination of descriptive components creates a readily-understood, alternative meaning. Such a mark is known to comprise a "double entendre." A double entendre will not be refused registration as merely descriptive if one of its meanings is not merely descriptive in relation to the involved goods or services. See *In re Kraft, Inc.*, 218 USPQ 571, 573 (TTAB 1983) [the Board found inappropriate a requirement for a disclaimer of the word LIGHT apart from the mark LIGHT N' LIVELY

for reduced calorie mayonnaise: "The mark LIGHT N' LIVELY as a whole has a suggestive significance which is distinctly different from the merely descriptive significance of the term LIGHT *per se*. That is, the merely descriptive significance of the term LIGHT is lost in the mark as a whole. Moreover, the expression as a whole has an alliterative lilting cadence which encourages persons encountering it to perceive it as a whole."]. See also In re Symbra'ette, Inc., 189 USPQ 448 (TTAB 1975) [SHEER ELEGANCE for panty hose held to be a registrable unitary expression; thus, no disclaimer of SHEER considered necessary]; In re Colonial Stores Inc., 394 F.2d 549, 157 USPQ 382 (CCPA 1968) [SUGAR & SPICE for bakery products]; and In re National Tea Co., 144 USPQ 286 (TTAB 1965) [NO BONES ABOUT IT for fresh pre-cooked ham]. In each of these cases, the secondary interpretations that make each expression a double entendre consist of an association that members of the public would make quite readily. However, applicant has not proffered an explanation for exactly how the term BABY LOVE in the context of its goods creates such a unique commercial impression that it is able to distinguish the marks among potential customers with knowledge of opposer's mark.

Accordingly, this *du Pont* factor favors a finding of likelihood of confusion.

Strength of opposer's mark

Opposer argues that the strength of its mark is determined by the nature of the mark, by the commercial success of the mark, and by the number and nature of use of similar third party marks for related goods or services. *Palm Bay Imports. Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 1372-75, 73 USPQ2d 1689 (Fed. Cir. 2005). Under this standard, opposer argues that its mark and trade name are strong.

Certainly, it would appear from these incontestable registrations that the mark is inherently distinctive as applied to these goods, opposer has been using the mark continuously for over thirty years and has demonstrated a degree of success in the marketplace.

Although applicant points to what it claims are third-party uses that it located on the Internet, opposer notes that inasmuch as these companies are located in Australia, Malaysia and Canada, we must presume on this record that opposer's marks are strong and entitled to a relatively broad scope of protection.

Accordingly, this *du Pont* factor too favors a finding of likelihood of confusion.

Renown of opposer's marks

Opposer argues that because it has demonstrated that its BABY LOVE marks and trade name have developed substantial goodwill for well over thirty years, this *du Pont* factor weighs heavily in favor of Opposer. We disagree.

Clearly, our primary reviewing court has determined that the fame of an opposer's mark plays a "dominant role in the process of balancing the *du Pont* factors." *Recot, Inc. v. M.C. Becton*, 54 USPQ2d 1894, 1897-98 (Fed. Cir. 2000), on remand, 56 USPQ2d 1859 (TTAB 2000) [likelihood of confusion between FIDO LAY and FRITO-LAY]; and *Kenner Parker Toys v. Rose Art Industries*, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992) [likelihood of confusion between FUNDOUGH and PLAY-DOH - "[F]ame of the prior mark plays a dominant role in cases featuring a famous or strong mark."] Our primary reviewing Court, employing compelling imagery, held that "[a] strong mark ... casts a long shadow which competitors must avoid," and "[t]here is no excuse for even approaching the well-known trademark of a competitor ... and ... all doubt as to whether confusion, mistake, or deception is likely is to be resolved against the newcomer, especially where the established mark is one which is famous." *Kenner Parker Toys, supra*.

However, based upon this record, we find that opposer has not demonstrated the fame of its mark as that concept is used in this context. While we do know the length of time that the mark has been in use, it seems as if during much of this time, opposer was a retailer with a single brick-and-mortar location. Certainly, we have no evidence as to opposer's volume of sales, market share or advertising expenditures. Accordingly, this is a neutral factor, neither helping nor hurting opposer's position herein.

The goods and services

We turn then to the relationship of the goods and services as described in the application and in opposer's registrations. As noted above, the marks are identical in every respect. With both opposer and applicant using the identical designation, "the relationship between the goods 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 strikingly similar." *Amcor, Inc. v. Amcor Industries, Inc.*, 210 USPQ 70, 78 (TTAB 1981). See also *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993) ["[E]ven 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 order to support a holding of likelihood of confusion, it is sufficient that the respective goods are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same producer. See *In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978).

Applicant argues that opposer's registrations are limited to service marks while its application is for a trademark for goods. However, it is well recognized that confusion is likely to occur from the use of the same or similar marks for goods, on the one hand, and for services involving those goods, on the other. Applicant admits that applicant's goods and opposer's services are closely-related and both directed to the infant, toddler and children industry. Opposer's retail store services include the sale of "clothing, furniture, accessories and toys." Opposer's catalogues show that its toys include educational toys and games. Opposer has introduced by witness testimony, third-party advertisements and multiple copies of its competitors'

third party registrations [e.g., BabiesRUs, Baby Superstore, Lil'Things] demonstrating that consumers are accustomed to seeing the same mark being used for retail store services as are being used as a trademark for products sold within the retail establishment. According to marketing materials, orders and invoices, opposer has actually purchased a variety of children and infant products from applicant (such as flash cards, electronic toys and books) for sale in its retail operations. Accordingly, on this record, we find a close relationship between applicant's goods and opposer's services.

Moreover, opposer is not limited to the services recited in its registrations. Rather, through testimony and exhibits, opposer has demonstrated common law rights in its online retail store services featuring infant and child clothing, furniture, accessories and toys. One of the categories of products on the opposer's website is entitled "Books, Tapes and Videos," reflecting a wide variety of vendors. Another menu choice is "Baby Einstein," a product line very much like that of applicant.

Channels of Trade and Conditions of Sale

As to two related *du Pont* factors, we find that in the absence of any restrictions on either party's channels of

trade, we must presume that the goods and services will move through all the normal channels of trade for such goods and services and will be marketed to the same classes of ordinary consumers.⁴ In any case, in applicant's responses to opposer's requests for admission, applicant has essentially admitted that the respective channels of trade are identical.

Moreover, the products identified in applicant's application are not high priced items and will not be purchased with an undue amount of deliberation.

Accordingly, these *du Pont* factors also weighs in favor of a finding of likelihood of confusion.

Conclusion on Likelihood of Confusion

In weighing the relevant *du Pont* factors, we find that the marks are identical, the goods and services are closely related, and that they will move through the same channels of trade to the same classes of ordinary purchasers. While opposer's mark is clearly entitled to the scope of protection accorded an inherently distinctive mark that appears to have been used exclusively and continuously for

⁴ As noted earlier, applicant argues throughout its trial brief that it intends to sell these products to the faith-based industry at faith-based stores. Of course, opposer's services do not exclude faith-based shoppers. More importantly, however, applicant's identification of goods contains no such restrictions, so this alleged distinction is irrelevant.

more than thirty years, we cannot find on this record that it is has the renown of a well-known mark.

Dilution

Finally, we note that opposer also charges that given the demonstrated fame of opposer's **BABY LOVE** mark, applicant's use of its **BABY LOVE** mark is likely to cause dilution of opposer's mark under the Federal Trademark Dilution Act of 1995. Given our determination that opposer has priority of use and that there is a likelihood of confusion herein, we find it unnecessary to reach a determination on the question of dilution in this proceeding.⁵

Decision: The opposition is sustained on the basis of opposer's priority and a likelihood of confusion with opposer's marks, and registration to applicant is hereby refused.

⁵ We note, in passing, that this ground would have to fail as to pleading and proof. In its pleading, opposer never explicitly claimed that its mark was distinctive and became famous before applicant filed the instant application. Moreover, given our finding above that applicant has failed to demonstrate the requisite level of renown to qualify as a well-known mark for purposes of the likelihood of confusion determination, then *ipso facto* it would not have proven fame for purposes of dilution.