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April 17, 1997

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Lanard Toys, Ltd.
v.
Hasbro, Inc.

Opposition No. 91,212
to application Serial No. 74/295,943
filed on July 20, 1992

Russell H. Falconer and Parker H. Bagley of Brumbaugh,
Graves, Donohue & Raymond for Lanard Toys, Ltd.

Elliot A. Salter of Salter & Michaelson for Hasbro, Inc.

Before Simms, Cissel and Quinn, Administrative Trademark
Judges.

Opinion by Quinn, Administrative Trademark Judge:

Hasbro, Inc. has applied to register the mark BATTLE
CORPS for "toy action figures, toy vehicles and accessories
for use therewith," asserting a bona fide intention to use
the mark in commerce.¹

Lanard Toys, Ltd. has opposed registration of the mark.
As grounds for opposition, opposer has alleged that it is a
manufacturer and distributor of toys, including "toy action

¹ Application Serial No. 74/295,943, filed July 20, 1992. The
record includes testimony that applicant began using its mark in
September 1992.

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figures"; that, since at least as early as 1988, it has used the mark THE CORPS! on and in association with "toy action figures"; and that applicant's mark, when used on applicant's identified goods, so resembles opposer's mark, when used on opposer's goods, as to be likely to cause confusion or mistake or to deceive.

In its answer, applicant denied the salient allegations in the notice of opposition.

The record before the Board in this proceeding consists of the following: the pleadings; the file of the opposed application; the testimonial deposition of James Hesterberg, managing director of Lanard Toys, Inc., and related exhibits, including a photocopy of opposer's registration for its mark THE CORPS! for "toy action figures";² the testimonial deposition of Vincent D'Allewa, marketing director of "boys toys" for Hasbro Inc., and related exhibits; the discovery deposition of Vincent D'Allewa and related exhibits, and applicant's answers to opposer's

² Exhibit 12 is a photocopy of Registration No. 1,797,970, issued on October 12, 1993, setting forth a date of first use as September 21, 1988 and a date of first use in commerce as November 29, 1988. The deponent confirmed that the photocopy is "a true and accurate copy of the actual certificate of registration for THE CORPS! in the United States Patent & Trademark Office." (dep., p. 22). Exhibit 12 was then offered into evidence. There is an absence of testimony, however, regarding the ownership and subsistence of the registration. Mr. Hesterberg merely identified a copy of the registration. He was not asked for, nor did he volunteer, specific information regarding the current status or title of the registration. Moreover, a status and title copy was not submitted. While the submission of this evidence may be technically deficient, applicant has made no objections thereto.

In view of applicant's apparent concession relative thereto, the registration is deemed to be stipulated into the record and entitled to the presumptions under Section 7(b) of the Trademark Act.

interrogatory nos. 1, 2, 3, and 9, made of record in opposer's notice of reliance; and opposer's responses and supplemental responses to applicant's first set of interrogatories, made of record in applicant's notice of reliance. Both parties have filed briefs on the case.³

Opposer, a toy company, has offered "toy action figures" under the mark THE CORPS! in the United States since late 1988-early 1989. The "toy action figures" offered under the mark are generally described as having military or fantasy characteristics with "good guy" and "bad guy" personalities. The goods normally are sold through mass market retailers such as Wal-Mart, K-Mart, and J.C. Penney, among others. Opposer's total sales of goods offered under the mark THE CORPS! from 1989 to 1995 were between \$16 and \$17 million.⁴ Opposer's promotional efforts

³ The parties are no strangers to controversy between themselves. In its brief, applicant made reference to prior litigation between the parties reported at *Hasbro Inc. v. Lanard Toys, Ltd.*, 858 F.2d 70, 8 USPQ2d 1345 (2d Cir. 1988). Inasmuch as the marks involved in that litigation were different from the ones involved here, and the decision was made on a different record, the Board need not refer to the findings made therein. Applicant also attached to its brief a copy of the Board's unpublished decision in Opposition Nos. 89,707 and 89,708 to support the proposition that applicant's G.I. JOE trademark is famous. However, exhibits and other evidentiary materials attached to a party's brief on the case can be given no consideration unless they were properly made of record during the time for taking testimony. See, for example, *Maytag Co. v. Luskin's, Inc.*, 228 USPQ 747, 748 n.5 (TTAB 1986). Applicant also should be aware that the Board does not permit citation of nonprecedential decisions, except in limited circumstances, none of which exists here. See *General Mills Inc. v. Health Valley Foods*, 24 USPQ2d 1270, 1275 n.9 (TTAB 1992). In any event, the fame of applicant's G.I. JOE mark is not at issue, nor is it relevant, in the instant case.

⁴ Although the summary of sales (Exhibit 11 to the Hesterberg testimonial deposition) was marked "confidential," the testimony relating thereto was not similarly designated.

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consist of distribution of its annual catalogs to its retail industry customers and potential retail industry customers, and to individual customers, upon request; attendance at trade fairs; negotiation of special prices with retail industry customers to get such customers to feature opposer's products in their stores; and advertisements of the products in print media paid for by the retail industry customers.

Applicant and opposer are direct competitors. Applicant, a large toy company, offered "toy action figures, toy vehicles and accessories for use therewith" under the mark BATTLE CORPS from 1992 through part of 1995.⁵ Applicant was not aware of opposer's use of its mark THE CORPS! when applicant developed and began using its mark BATTLE CORPS. The "toy action figures" offered under applicant's mark are generally described as being military characters with "good guy" and "bad guy" personalities. Applicant further indicated, and provided evidence in support thereof, that its mark, BATTLE CORPS, is always used in close proximity to its prominently displayed mark G.I. JOE and that the mark BATTLE CORPS is used to identify a sub-segment of the G.I. JOE line of action figures. Applicant's goods are sold through mass retailers such as Wal-Mart, K-Mart, and Toys "R" Us, among others.

⁵ Mr. D'Alleva testified that applicant sold the product through the first half of 1995; and that, at the time of Mr. D'Alleva's testimonial deposition, some products were still on the shelves of various retail stores. Mr. D'Alleva testified further that applicant has plans to resume usage of the mark. Opposer has not raised abandonment as an issue in this case.

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Applicant's total sales of the goods offered under the mark BATTLE CORPS in the three year period from 1992 to 1994 were approximated to be between \$75 and \$90 million. Applicant's advertising activity is extensive, including television advertising and point of purchase displays. Applicant's advertising expenditures for the goods marketed under the mark BATTLE CORPS between 1992 and 1994 were approximated to be between \$8 and \$10 million.

Priority is not an issue in view of opposer's registration offered into evidence, and opposer's testimony, with corresponding exhibits, establishing use of its mark prior to applicant's constructive use date.

A determination of likelihood of confusion requires an analysis of the relevant factors listed in *In re E.I. duPont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (CCPA 1973). As dictated by evidence, different factors may play dominant roles in determining likelihood of confusion. See *Nina Ricci, S.A.R.L. v. E.T.F. Enterprises Inc.*, 889 F.2d 1070, 1073, 12 USPQ2d 1901, 1903 (Fed. Cir. 1989).

The record establishes, and there is no dispute between the parties, that the goods involved are the same, that is, "toy action figures"; that the channels of trade are the same; that the consumers are the same; and that the parties' goods are inexpensive, the subject of impulse purchases not requiring careful, sophisticated decisions. Thus, the crux

of the controversy centers on the similarities between the marks.⁶ We now turn our attention to this *duPont* factor.

Preliminarily, the Board notes that when marks appear on identical goods, as here, the degree of similarity between the marks necessary to support a conclusion of likelihood of confusion declines. See *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). Further, in considering the marks, we have kept in mind the normal fallibility of human memory over time and that the average consumer retains a general rather than a specific impression of trademarks encountered in the marketplace.

We recognize, at the outset, that there are specific differences between opposer's THE CORPS! mark and applicant's BATTLE CORPS mark. However, when these two marks are compared in their entireties, the differences are not sufficient so as to distinguish them when they are applied to identical, inexpensive toy action figures.

The term "corps" is defined as:⁷

1. a body of people associated in some work, organization, etc., under common direction [a diplomatic *corps*]; 2.

⁶ There also is no issue as to the fame of opposer's mark as opposer expressly clarified in its reply brief that it "made no claim of fame." Indeed, the record does not support a finding of fame. Cf. *Kenner Parker Toys Inc. v. Rose Art Industries Inc.*, 963 F.2d 350, 22 USPQ2d 1453 (Fed. Cir. 1992).

⁷ See *Webster's New World Dictionary*, p. 318 (2nd ed. 1972). The Board may properly take judicial notice of dictionary definitions. See *Hancock v. American Steel & Wire Co. of New Jersey*, 203 F.2d 737, 97 USPQ 300, 332 (CCPA 1953); and *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., Inc.*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

Mil. a) a branch of the armed forces having some specialized function [the *Signal Corps*, the *Marine Corps*], b) a tactical subdivision of an army, normally composed of two or more divisions, plus auxiliary service troops.

The term "CORPS" in both marks, as applied to the action figures of opposer and of applicant, is suggestive of a military theme. In applicant's mark, BATTLE CORPS, the term "BATTLE" amplifies the term "CORPS", serving to emphasize the suggestive military definition of the term "CORPS." Accordingly, the connotations of the parties' marks, THE CORPS! and BATTLE CORPS, are the same, essentially that of a military group. When the respective marks are applied to the same goods, "toy action figures," with similar military themes, the commercial impression of each mark is similar.

The Board is not persuaded by applicant's argument that the term "corps" is synonymous with "the Marine Corps."⁸ We would point out that the military aspect of the definition of "corps" is not limited to "the Marine Corps." The other, more general military applications of the term are equally as important in determining the connotation and the resulting commercial impression. In addition, opposer's toy figures are not all representative of Marine Corps characters, but rather include a variety of fantasy and imaginative characters. As such, any Marine Corps theme that may exist in opposer's characterizations of its toy

⁸ Applicant, at page four of its brief, made reference to a dictionary listing for "Marine Corps" wherein the Marine Corps is referred to as "the Corps". A copy of the listing was not submitted.

figures is not being promoted in such a manner as to dominate the perception of the potential consumer.

In finding a likelihood of confusion, the Board, as stated above, is aware that CORPS has a suggestive connotation for "toy action figures" with a military theme. However, there is no evidence in the record of any third-party uses of the term "corps" from which the Board could conclude that consumers are so familiar with this term, as applied to "toy action figures" and related goods, that they have learned to distinguish among CORPS marks by other elements present in the marks.⁹

The Board has also considered applicant's argument that it uses the mark BATTLE CORP in close proximity to its prominently displayed G.I. JOE trademark. We find, however, that this argument is unpersuasive inasmuch as only the mark as set forth in the application may be considered in determining applicant's right to register. The fact that applicant's mark may be prominently associated with another of applicant's marks is not controlling.¹⁰ See *Frances*

⁹ The only evidence of record of third-party uses is a computerized printout from a trademark search report showing two third-party registrations. Such evidence may not be made of record by filing a search report wherein the registration is mentioned. TBMP Section 703.02(b). Thus, this evidence was not properly introduced. Nonetheless, even if the search report were properly of record, it is not probative on the issue of likelihood of confusion where there is no evidence of actual use of the marks shown. See, e.g., *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992).

¹⁰ We also note in passing Mr. D'Alleva's testimony that had opposer's mark been registered at the time of applicant's adoption of the mark BATTLE CORPS, "the normal procedure is that we [applicant] would not have gotten an approval to use BATTLE CORPS in the first place" because "we [applicant] usually don't

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Denney v. Elizabeth Arden Sales Corp., 263 F.2d 374, 120 USPQ 480, 481 (CCPA 1959); and *INB National Bank v. Metrohost Inc.*, 22 USPQ2d 1585, 1588 (TTAB 1992).

With respect to actual confusion, applicant testified that it is unaware of any instances of actual confusion. Opposer, however, argues that actual confusion exists because, during the four year period of contemporaneous sales by opposer and applicant, the sales trends of opposer's goods tracked the sales trends of applicant's goods. That is to say, that when applicant introduced its line and began and maintained an aggressive advertising campaign in 1993 and 1994, the sales of opposer's goods increased significantly, and when applicant ceased advertising in 1995, the sales of opposer's goods dropped off considerably. Applicant's explanation of this situation is that opposer, as a "secondary marketer," does not do its own advertising, but rather relies on the efforts of the primary marketers who heavily advertise their goods. Applicant further asserts that the sales of opposer's THE CORPS! toy figures actually tracked the sales of applicant's G.I. JOE line as a whole, not of applicant's BATTLE CORPS sub-segment in particular.

The Board finds opposer's actual confusion contention to be unpersuasive and conjectural, to say the least. See, e.g., *Electronic Design & Sales Inc. v. Electronic Data Systems Corp.*, 954 F.2d 713, 21 USPQ2d 1388, 1391 (Fed. Cir.

interfere with somebody else's trademark, especially when it's registered and being used." (D'Alleva 3/6/96 dep., pp. 29-30.)

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1992). The best evidence of actual confusion is the testimony of a "reasonably prudent purchaser" who was in fact confused. See J. T. McCarthy, McCarthy on Trademarks and Unfair Competition, Section 23.13 (4th ed. 1996). To infer actual confusion from circumstances that may amount to nothing more than a general market trend is speculative and unfounded. In view thereof, the Board finds that the evidence of record does not support the existence of actual confusion.

In any event, it is well settled that the relevant test is "likelihood of confusion," not actual confusion. It is unnecessary to show actual confusion in establishing likelihood of confusion. See *Weiss Associates Inc. v. HRL Associates Inc.*, 902 F.2d 1546, 1549, 14 USPQ2d 1840, 1842-3 (Fed. Cir. 1990).

For the reasons set forth above, the Board believes that the respective marks of the parties are sufficiently similar that, when used on the same goods, found in the same channels of trade, and purchased by the same potential consumers as impulse purchases, consumers would likely believe that the goods originated with or are somehow associated with or sponsored by the same entity. To the extent that any of applicant's contentions raise a doubt on the issue of likelihood of confusion, such doubt must be resolved in favor of the prior user and registrant. See *In re Martin's Famous Pastry Shoppe Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984).

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Decision: The opposition is sustained and registration to applicant is refused.

R. L. Simms

R. F. Cissel

T. J. Quinn
Administrative Trademark
Judges, Trademark Trial
and Appeal Board