

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB

JAN. 25, 99

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Child's Play (International), Ltd.

v.

Justin Products Inc.

Opposition No. 90,054
to application Serial No. 74/159,425
filed on April 22, 1991

Steven J. Soucar of Wood, Phillips, VanSanten, Clark &
Mortimer for Child's Play (International), Ltd.

David A. Einhorn of Anderson, Kill, Olick & Oshinsky, P.C.
for Justin Products Inc.

Before Quinn, Hohein and Chapman, Administrative Trademark
Judges.

Opinion by Chapman, Administrative Trademark Judge:

Justin Products Inc. has filed an application to
register the mark shown below



for "radios, phonographs, compact disc players, audio cassette players, walkie talkies and calculators" in Class 9.¹

Child's Play (International), Ltd. has opposed the application, alleging that since June 17, 1976 it has continuously used the mark CHILD'S PLAY for "a variety of goods including books, card games, and prerecorded audio and video tapes featuring children's stories"; and that applicant's mark, when used on its goods, so resembles opposer's previously used and registered mark, CHILD'S PLAY, for "prerecorded audio and video tapes featuring children's stories" in Class 9,² and for "children's books" in Class 16 and "deck of cards sold as a unit for playing a card game" in Class 28,³ as to be likely to cause confusion, mistake or deception.

¹ Application Serial No. 74/ 159,425, was filed on April 22, 1991, based on an alleged bona fide intent to use the mark in commerce. During the ex parte prosecution of the application, the Office accepted applicant's amendment to allege use, which claims dates of first use and first use in commerce of January 31, 1992. Applicant has disclaimed the term "electronics".

² Reg. No. 1,638,928, issued March 26, 1991, Section 8 affidavit accepted, Section 15 affidavit acknowledged. The claimed dates of first use and first use in commerce are December 6, 1988.

³ Reg. No. 1,091,403, issued May 16, 1978, Section 8 affidavit accepted, Section 15 affidavit acknowledged, renewed. The

Applicant has denied the salient allegations of the notice of opposition, and affirmatively pleaded that opposer's rights are narrow in scope in view of numerous third-party uses and registrations for identical and similar marks.

The record consists of the pleadings; status and title copies of opposer's pleaded registrations submitted under a notice of reliance; the declaration⁴ of Neil Burden⁵, opposer's director and general manager; opposer's notices of reliance on certain of applicant's answers and supplemental

claimed dates of first use and first use in commerce for both classes are June 17, 1976.

⁴ On May 19, 1994 the parties filed a stipulation pursuant to Trademark Rule 2.123(b) that testimony could be submitted by affidavit, and specifically agreed that the parties did not waive the right to object to any affidavit testimony (or exhibit) "on grounds of relevance or materiality."

⁵ Opposer submitted the declaration of Neil Burden and a notice of reliance (both filed on May 19, 1994) under seal. The Burden declaration is stamped "confidential" on each page, and the notice of reliance is stamped "confidential" only on the pages of Exhibit B (applicant's supplemental answer to opposer's interrogatory No. 6) and Exhibit C (applicant's second supplemental response to opposer's document request No. 12). The Board is at a loss to understand why opposer's brief on the case was not filed as "confidential", and opposer referred to the information in these materials throughout its brief when these materials had been filed as confidential. Moreover, it is clear that much of the material submitted under seal is not "confidential" business information, such as opposer's first use information, references to opposer's pleaded registrations and copies of advertisements for opposer's goods. Trademark Rule 2.27 provides that trademark records are to be public, except for material properly filed under seal pursuant to a proper protective order. The rule further provides that when a party protected by the protective order voluntarily discloses the material, then the material shall not be kept as confidential. In this case, opposer has voluntarily disclosed the involved material in its brief on the case. Applicant has made no statement regarding this material. Based on the above, the Board will not treat either the declaration of Mr. Neil Burden,

answers to opposer's first set of interrogatories, certain of applicant's second supplemental answers to opposer's first set of requests for documents, and certain of applicant's responses to opposer's second set of requests for documents; the affidavit of Leonard Kaye, applicant's chairman of the board; the affidavit of Sheila Gonzalez, one of applicant's employees; applicant's notice of reliance on four third-party registrations; applicant's notice of reliance on certain of opposer's answers and supplemental answers to applicant's first set of interrogatories, certain of opposer's answers, third supplemental answers and fourth supplemental answers to applicant's first set of document requests⁶; opposer's rebuttal notice of reliance on certain official records from the Code of Federal Regulations and from the Assignment Branch of this office; opposer's rebuttal notice of reliance on certain of its supplemental answers to applicant's first set of interrogatories; and the

nor the material in opposer's May 19, 1994 notice of reliance, as confidential.

⁶ Both opposer and applicant have submitted notices of reliance on certain documents produced by the other party in response to document requests. Trademark Rule 2.120(j)(3)(ii) provides that responses to document production requests cannot be made of record by notice of reliance unless the documents could be made of record by notice of reliance under Trademark Rule 2.122(e). Documents are also generally admissible if produced in response to an interrogatory. See Trademark Rule 2.120(j)(3)(i). To the extent any submitted documents are not admissible by way of notice alone, they have not been considered. See also, TBMP §711. We add that even if the otherwise inadmissible documents submitted by both parties were considered, the result reached herein would be the same.

rebuttal affidavit of Steven J. Soucar, one of opposer's attorneys.⁷

Only opposer filed a brief on the case⁸. Neither party requested an oral hearing.

Opposer has filed status and title copies of its two pleaded registrations.⁹ Because opposer owns valid and

⁷ In a letter dated February 6, 1995 opposer listed four objections to testimony and documents submitted by applicant (i.e., the affidavit testimony of both Kaye and Gonzalez as hearsay; and certain documents submitted by applicant by way of notice of reliance). Opposer specifically stated in the letter that it was not requesting a decision on the objections, but rather was preserving its right to present arguments in its brief. Subsequently, in opposer's brief on the case, opposer stated that it "will brief its objections only if Applicant attempts to use the objected to testimony." (Opposer's Brief, p.11.)

Opposer's vague statements and conditional objections are not an appropriate way to raise objections to any particular matter offered into the record. Opposer's objections are considered waived. (We reiterate, as stated in footnote 6, that of course, any of the documents offered by applicant which were inappropriate for introduction by way of notice of reliance under Trademark Rule 2.120(j)(3)(ii), have not been treated as of record. Regarding opposer's objections to certain Bates-numbered documents offered by applicant, the parties are advised that many of the Bates numbers on the involved documents are completely illegible.)

⁸ In its brief opposer asserted that applicant's amendment to allege use (filed February 25, 1992) contained "inconsistencies" which would "jeopardize the validity of the application or any resulting registration." Specifically, opposer referred to applicant's claimed type of commerce and failure to use the mark on all of the goods listed in the application, and concluded that applicant "has failed to properly comply with §2.76(c)." (Opposer's brief, pp. 11-12.) The validity of applicant's amendment to allege use is not a pleaded issue in this case, and opposer did not otherwise support or pursue this matter. Thus, the Board will not further consider the validity of applicant's amendment to allege use in this case.

⁹ Opposer's pleaded Registration No. 1,091,403, issued on May 16, 1978 in Classes 16 and 28. The status and title copy of opposer's registration submitted with the notice of reliance was prepared by the Patent and Trademark Office in June 1994, and thus, does not include information as to the renewal, which was due on May 16, 1998. The records of this Office indicate that

subsisting registrations for its pleaded mark, the issue of priority does not arise with respect to the goods recited therein. See King Candy Company v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108(CCPA 1974); and Humana Inc. v. Humanomics Inc., 3 USPQ2d 1696 (TTAB 1987).

Thus, the only issue before the Board is likelihood of confusion. Based on the record before us in this case, we find that confusion is likely.

In the declaration of Neil Burden, opposer's director and general manager, he avers that since June 17, 1976 opposer has continuously used the mark CHILD'S PLAY for books, card games, board games, soap and prerecorded audio and video tapes for children; that until April 1991 opposer distributed its goods in the United States through Playspaces International, Inc. and thereafter opposer shifted to direct distribution of its goods; and that

opposer timely filed a renewal affidavit, and that said renewal was accepted by this Office.

Opposer's pleaded Registration No. 1,638,298, issued on March 26, 1991 in Class 9. The status and title copy of opposer's registration submitted with the notice of reliance was prepared by the Patent and Trademark Office in June 1994, and thus, does not include information as to the Section 8 affidavit, which was due on March 26, 1997. The records of this Office indicate that opposer timely filed a combined Section 8 and 15 affidavit, and that said combined affidavit was accepted by this Office.

(footnote continued)

When a registration owned by a party has been properly made of record in an inter partes case, and there are changes in the status of the registration between the time it was made of record and the time the case is decided, the Board will take judicial notice of, and rely upon, the current status of the registration as shown by the records of the Patent and Trademark Office. See TBMP §703.02(a), at page 700-10, and the cases

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opposer distributes its goods through, inter alia, Discovery Toys, a home-party company with over 10,000 representatives, and School Book Fairs, which distributes opposer's and others' products at local school book fairs. Opposer sells to retailers, wholesalers, mail-order companies and other trade customers through a sales office and warehouse in Maine, utilizing a network of approximately 20 independent representatives serving over 10,000 independent retailers; that opposer's goods are available in such stores as Walden Books, FAO Schwarz, and Imaginarium; that opposer annually distributes approximately 60,000 to 90,000 of its own catalogs in the United States; that opposer attends the New York Toy Fair (annually since 1977), the American Booksellers' Association Conference Exhibition (annually since 1982), and the American Library Association Exhibition (sporadically since 1980); that opposer's customers include stores, wholesalers, buyers, catalog distributors, teachers, principals, librarians, day care providers, parents and other relatives of children, children and anyone interested in children's education; and that opposer's goods are intended for children from infancy to 15 years of age.

Mr. Burden further avers that opposer's goods vary in cost from about \$3.00 to \$16.00; that since 1991 opposer has spent approximately \$62,000 annually on advertising; that

cited therein. The Board hereby takes judicial notice of the current status of opposer's two pleaded registrations.

opposer's sales in the United States of goods bearing the mark CHILD'S PLAY were \$547,662 (for the ten-month period ending March 31, 1992) and \$790,925 (for 1993); and that opposer has successfully opposed three separate entities and prevented them from registering marks confusingly similar to opposer's mark.

Applicant's answers to interrogatories, relied upon by opposer, show that applicant's goods come directly from Hong Kong to major retail stores and catalog houses in the United States, are sold throughout the United States, and are intended for "boys and girls, ages 4 and up".

Applicant's chairman of the board of directors, Leonard Kaye, avers that applicant uses the mark CHILD'S PLAY ELECTRONICS and design on alarm clocks, "sing-a-long" cassette players, walkie talkies, intercoms, AM-FM radios, calculators and walk-along cassette players; that he is aware of no actual confusion; that he believes there is no likelihood of confusion between these involved marks; and that he is aware of numerous third parties using the mark CHILD'S PLAY (or a similar mark) for goods and services aimed at children.

Sheila Gonzalez, an employee of applicant, stated in her affidavit that she "personally investigated the use of the mark CHILD'S PLAY throughout the United States"; and that she verifies the mark is being used by ten different

companies for a variety of goods, such as, candy, a children's clothing store, "different licensed merchandise", periodical newsletters, and toys and games.

Applicant also submitted a notice of reliance on four third-party registrations to show that other marks are registered for "CHILD'S PLAY or a close variation thereof, for children's goods".

In the rebuttal affidavit of opposer's attorney, Steven J. Soucar, he offered three exhibits into evidence, each consisting of correspondence between opposer and various third parties regarding the third-parties' possible cessation of use of the mark CHILD'S PLAY or similar marks.

In determining the issue of likelihood of confusion, we must base our analysis of all the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

Turning first to the marks, opposer's mark is CHILD'S PLAY and applicant's mark is CHILD'S PLAY ELECTRONICS (in stylized lettering) enclosed in a broken-line rectangle. Generally the word portion of a mark, i.e., the portion utilized in calling for the goods, is most likely to be impressed in the purchaser's memory and to serve as the indicium of origin. See *Consumers Building Marts, Inc. v. Mr. Panel, Inc.*, 196 USPQ 510 (TTAB 1977). The only spoken

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portion of the marks are CHILD'S PLAY and CHILD'S PLAY ELECTRONICS. In this case, both applicant's mark and registrant's mark include the identical wording, CHILD'S PLAY. Applicant's addition of the descriptive word "ELECTRONICS" and a simple background rectangular outline is not sufficient to distinguish the marks since, even if consumers noted the additional word and design element, they would be likely to think that opposer was using the CHILD'S PLAY ELECTRONICS mark for a line of electronic goods for children. That is, consumers may see applicant's mark as a mere variation of opposer's mark, CHILD'S PLAY. Applicant has merely added non-distinctive matter to opposer's mark, which is insufficient to distinguish the marks. See Spoons Restaurants Inc. v. Morrison Inc., 23 USPQ2d 1735 (TTAB 1991), aff'd unpub'd, Appeal No. 92-1086 (Fed. Cir. June 5, 1992); In re Denise, 225 USPQ2d 624 (TTAB 1985); and Proctor & Gamble Company v. Glamorene Products Corporation, 188 USPQ2d 704 (TTAB 1975), aff'd, 190 USPQ2d 543 (CCPA 1976).

Moreover, the differences in the marks are not likely to be recalled by purchasers seeing the marks at separate times. The emphasis in determining likelihood of confusion is not on a side-by-side comparison of the marks, but rather must be on the recollection of the average purchaser, who normally retains a general rather than a specific impression of the many trademarks encountered; the purchaser's

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fallibility of memory over a period of time must also be kept in mind. See *Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller*, 477 F.2d 586, 177 USPQ 573 (CCPA 1973); and *Edison Brothers Stores v. Brutting E.B. Sport-International*, 230 USPQ 530 (TTAB 1986).

The marks are highly suggestive, with a double entendre connoting the idea that the goods are intended for children to play with, or that the products are simple and easy to understand and use as in, "child's play." Thus, both marks connote the same idea.

The marks are similar in sound, appearance and connotation. A purchaser familiar with opposer's goods sold under the registered mark would, upon seeing applicant's mark on its goods, assume that applicant's goods come from the same source as opposer's goods.

Applicant's evidence regarding third-party uses and registrations is not convincing that opposer's mark is a weak mark in its field. First, the affidavit of Sheila Gonzalez merely states that she "investigated the use of the mark CHILD'S PLAY throughout the United States and verified that this mark is currently being used by the following individuals or companies...." There is no information in her affidavit as to how her investigation was accomplished. Nor has she provided any information as to the extent of such uses, e.g., amount of sales, or areas in which goods

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are sold. Second, the goods as listed in Ms. Gonzalez' affidavit include a wide variety of items, such as, candy, sweaters, inflatable toys, toys and games, and periodical newsletters. Many of the goods of the third parties listed by Ms. Gonzalez are less related to opposer's goods than are applicant's. The information in the affidavit of Ms. Gonzalez accordingly does not prove that opposer's mark is weak in its field.

Applicant's notice of reliance on four third-party registrations also does not prove that opposer's mark is weak. First, third-party registrations are not evidence of use of the marks, or what happens in the marketplace, or that consumers are familiar with the third-party marks. See *Olde Tyme Foods Inc., v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1545 (Fed. Cir. 1992); and *Spoons Restaurants Inc. v. Morrison Inc.*, *supra*, at 1740. Second, the four registrations are for the following marks and goods: (1) CHILDS PLAY for "children's sweaters," (2) CHILD'S PLAY for "candy," (3) CHILD'S PLAY and balloons design for "children's fragrance and daily needs line, namely, cologne, shampoo, talc, body lotion," and (4) KIDSPLAY (in stylized lettering) for "retail toy catalog services." Three of these four third-party registrations indicate that the words CHILD'S PLAY have been registered (sometimes with designs), but the CHILD'S PLAY registrations are all for goods

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unrelated to those sold by opposer; and the fourth registration is for a different mark, KIDSPLAY (in stylized lettering), and is registered for a service. Thus, the registration evidence does not prove that opposer's mark CHILD'S PLAY used for opposer's goods is a weak mark.

Even if applicant had proven that opposer's mark is weak, such marks are still entitled to protection against registration by a subsequent user of the same or similar mark for the same or closely related goods. See *Hollister Incorporated v. Ident A Pet, Inc.*, 193 USPQ 439 (TTAB 1976).

Turning then to a consideration of the goods, it is well settled that goods need not be identical or even competitive to support a finding of likelihood of confusion, it being sufficient instead that the goods are related in some manner or that the circumstances surrounding their marketing are such that they would likely be encountered by the same persons under circumstances that could give rise to the mistaken belief that they emanate from or are associated with the same source. See *In re International Telephone and Telegraph Corporation*, 197 USPQ 910 (TTAB 1978); and *In re Peebles Inc.*, 23 USPQ2d 1795 (TTAB 1992).

Here, the goods in applicant's application are "radios, phonographs, compact disc players, audio cassette players, walkie talkies and calculators", while the goods covered by opposer's registrations are "prerecorded audio and video

tapes featuring children's stories," "children's books," and "deck[s] of cards sold as a unit for playing a card game."

In addition, the record shows that opposer also uses its mark, CHILD'S PLAY, on board games and soap. Opposer argues that it provides its goods "to educate and entertain children" (Opposer's Brief, p. 1); and maintains that applicant sells its products to "educate and entertain children" (Opposer's Brief, p. 12).

In this case applicant's "audio cassette players" and opposer's "prerecorded audio and video tapes featuring children's stories" clearly are complementary, closely related products. Prerecorded audio tapes are played in audio tape players. The relationship of audio tapes to audio tape players seems obvious in that anyone using the products must have an audio tape to play in an audio tape player, and vice versa. The existence of one without the other is inconceivable. See *Data Packaging Corporation v. Morning Star, Inc.*, 212 USPQ 109 (TTAB 1981) (holding confusion is likely when there is use of similar marks on audio tapes and on devices for handling and storing magnetic tape used in audio equipment, such as cassettes and cartridges); and *Lexicon, Incorporated v. Lexicon Music, Inc.*, 225 USPQ 201 (TTAB 1985) (holding confusion is likely when there is use of similar marks on phonograph records and tape recordings, on the one hand, and on audio equipment,

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such as audio signal processors, digital delay processors, on the other).

Applicant's goods are not restricted in any way, but could be used by children. Applicant's exhibit attached to the affidavit of Leonard Kaye (pictures of applicant's goods), as well as applicant's answers to opposer's interrogatory Nos. 15 and 16 (made of record by opposer's notice of reliance), clearly establish that applicant's goods are directed to boys and girls ages 4 and up, and are marketed as children's products. Thus, the goods of both parties would be encountered by purchasers in circumstances that would give rise to the belief that both parties' goods come from or are associated with the same source. See *Dan Robbins & Associates, Inc. v. Questor Corporation*, 599 F.2d 1009, 202 USPQ 100 (CCPA 1979).

The record shows that opposer markets its goods through a wide variety of selling methods, including major retail stores, mail-order catalogs, home parties, and wholesalers; and that applicant sells its goods through major retail stores and catalog sales. Inasmuch as some of the parties' goods (applicant's audio cassette players and opposer's prerecorded audio tapes) are complementary and closely related, and both parties' goods are sold through major retail stores and catalogs, we find that the parties' goods travel in the same channels of trade to the same general

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class of purchasers, i.e., persons purchasing goods for children.

Because of the virtual identity of the marks; the close relationship of some of the parties' goods; and the similarity of the trade channels and purchasers; confusion is likely between applicant's mark and opposer's mark when used on the respective goods of the parties.

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

T. J. Quinn

G. D. Hohein

B. A. Chapman
Administrative Trademark Judges,
Trademark Trial and Appeal Board