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**THIS DISPOSITION  
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Paper No. 10  
DEB

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

In re Rumpus Corporation

Serial No. 75/589,564

Stephen D. Kahn, Amanda C. Samuel and Lawrence R. Miller of  
Weil Gotshal & Manges, LLP for Rumpus Corporation.

Jay C. Noh, Trademark Examining Attorney, Law Office 110  
(Chris A.F. Pedersen, Managing Attorney).

Before Hanak, Bucher and Drost, Administrative Trademark  
Judges.

Opinion by Bucher, Administrative Trademark Judge:

Rumpus Corporation seeks to register HARRY HAIRBALL for  
"a plush toy cat with removable insides."<sup>1</sup>

The Trademark Examining Attorney has refused registration  
under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d),  
on the ground that applicant's mark, when applied to  
applicant's goods, so resembles the previously registered mark  
HAIRBALL for "toy balls, namely children's throwing toys for

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<sup>1</sup> Ser. No. 75/589,564 filed on December 1, 1998 with claimed  
first use dates of July 31, 1998.

use indoors and outdoors; stuffed toys, and pet toys,"<sup>2</sup> as to be likely to cause confusion, to cause mistake or to deceive.

Applicant timely appealed the final refusal to register. Applicant and the Trademark Examining Attorney have each filed briefs, but applicant did not request an oral hearing.

We affirm the refusal to register.

Applicant argues: that the cited mark is a single word while its mark is two words; that "hairball" is suggestive of these goods, and hence is relatively weak; and, that the goods are conspicuously different, inasmuch as applicant emphasizes registrant's product line (sold under the HAIRBALL mark) known as bouncing balls.

The Trademark Examining Attorney takes the position that the cited mark, HAIRBALL, is a strong mark in the toy field; that the respective marks are similar in overall connotation; and, that the respective goods are closely related.

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. See 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

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<sup>2</sup> Reg. No. 2,098,371 issued on September 16, 1997.

similarities between the marks and the similarities between the goods. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

We turn first to a consideration of the registrant's and applicant's respective goods. In support of its argument as to the differences in the goods, applicant has submitted a copy of portions of the trademark application file for registrant's HAIRBALL mark. The old file jacket shows the original identification of goods to be "throwing toys and play balls." Photocopies of the HAIRBALL specimen depict what appears to be trade dress in the nature of a cardboard backing for a blister pack containing "super bounce balls." However, as the Trademark Examining Attorney points out, in comparing applicant's goods to registrant's goods, we must compare the goods as "recited in applicant's application vis-à-vis the goods ... recited in [the cited] registration, rather than what the evidence shows the goods ... to be." Canadian Imperial Bank v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987).

Applicant is marketing a plush toy cat sold with eight tiny, removable, stuffed toys inside (e.g., a goldfish, a mouse, "hairballs" of yarn, etc.). In short, this plush toy itself comes "stuffed" with "stuffed toys." In spite of applicant's contentions to the contrary, we must acknowledge

that registrant's identified goods include toys called "stuffed toys."

These two identifications of goods are consistent with the fact that the majority of *plush toys* and *stuffed toys* are made in the form of various animals or pets. Generally, "plush" suggests the exterior softness of a cuddly toy because the covering fabric has a thick, deep pile. In the world of toys, "stuffed" usually refers to the soft, squeezable interior materials giving form to a cuddly toy. Hence, it is not inconceivable that a stuffed toy having a deep pile surface might well be described as a "plush, stuffed toy."

In any case, these products are of a type that consumers would expect to emanate from a single source. Hence, as to this first du Pont factor, these goods must be deemed to be quite closely related.

We turn next to a consideration of the registrant's and applicant's respective marks. Registrant's mark in its entirety is HAIRBALL. Based upon the record before us, we must consider the term "hairball" to be at worst, suggestive, with respect to the goods at issue in this case. With regard to the du Pont factor focusing on the number and nature of similar marks in use on similar goods, the Trademark Examining Attorney argues that "... there are no registrations [other than the cited one] (or applications) [other than applicant's] that

have the word HAIRBALL or "HAIR BALL," either by itself or in conjunction with any other words or design elements, with reference to plush toys or stuffed toys, toys in general, or in class 28." (appeal brief, p. 3). That would suggest to us that registrant's HAIRBALL mark is arguably unique in the toy field and hence must be deemed to be a fairly strong source identifier.

Applicant's mark is HARRY HAIRBALL. Inasmuch as the word "HARRY" is not just a portion of applicant's mark, but indeed, is the first word of applicant's mark, we must take it into consideration. However, we do note that during the prosecution of this application, applicant argued that the term "Harry" is weak in the field of toys and games. This was done in applicant's attempt to overcome the Trademark Examining Attorney's now withdrawn rejection based on his citation to a prior registration of the word HARRY alone for "toys and games; namely, plush dolls, action figures and puppets."<sup>3</sup> Even if applicant's earlier admission of weakness for the name "Harry" is not clearly demonstrated on this record, it is certainly possible that if HARRY HAIRBALL is perceived as the name for applicant's toy cat, this

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<sup>3</sup> The Trademark Examining Attorney withdrew the Section 2(d) refusal based upon Reg. No. 1,847,766, but not until the time of his appeal brief. We regret any inconvenience to applicant this may have caused.

designation could easily be shortened to "Mr. Hairball." In any case, of the two terms in applicant's mark, we find that "Harry" is the weaker component as the unmistakable image of a "hairball" is the one most prospective purchasers will retain the longest!

Accordingly, when these marks are considered in their entirety, especially when we take into account the fact that the ordinary consumers to whom relatively inexpensive, children's toys are sold have imperfect recollection and will not necessarily be comparing these marks on a side-by-side basis, the marks are quite similar. Contrary to applicant's contention that they create different overall images, we find them to connote the same thing -- the image of a recently-convulsed hairball.

In conclusion, the use of these quite similar marks on such closely related goods would be likely to cause confusion.

Decision: The refusal to register is affirmed.