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United States Patent and Trademark Office

Trademark Trial and Appeal Board

Together Again Video Productions, Inc.,

v.

Cambridge House, Ltd.

Opposition No. 109,322

Jill M. Pietrini and Michael B. Adlin of Manatt Phelps & Phillips for Together Again Video Productions, Inc.

Mark S. Schmitt of Maier McIlroy & Kerkman for Cambridge House, Ltd.

Before Hohein, Chapman and Bucher, Administrative Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

Cambridge House, Ltd. has filed an application to register the mark CAPTAIN BIGGLES on the Principal Register for "children's story books and coloring books," in International Class 16; "tote bags and athletic bags," in International Class 18; "clothing, namely, T-shirts," in International Class 25; and "toys, namely, plush soft-

sculpture bears and clothing for the same, and toy airplanes," in International Class 28.<sup>1</sup>

Together Again Video Productions, Inc. has opposed registration on the ground that it is the owner of an application to register the mark BILLY BIGGLE in connection with "toys, namely, plush soft sculpture toys," in International Class 28; that opposer has common law rights in (i) the character names THE BIGGLES, BILLY BIGGLE and RUBY BIGGLE, as featured on a children's music show on television ("KIDSONGS") since April 1994, (ii) the mark BILLY BIGGLE used on plush toys since September 1994, (iii) the character names THE BIGGLES, BILLY BIGGLE and RUBY BIGGLE, as featured on videotapes since March 1995, and (iv) the mark THE BIGGLES used in connection with music books since June 1995; that all of opposer's uses were prior in time to both applicant's filing date and applicant's dates of first use alleged in the application involved in this proceeding; and that based on the confusing similarity in appearance, sound and meaning of the marks, applicant's mark when applied to applicant's

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<sup>1</sup> Application Serial No. 75/060,290, filed on February 20, 1996, alleging dates of first use anywhere and in commerce for all four classes of August 1, 1995. Opposer has brought this action as to all four classes of goods.

named goods so resembles opposer's character names and marks as to be likely to cause confusion or mistake, or to deceive.

Applicant has denied the salient allegations of the notice of opposition.

The record includes the pleadings; the file of the opposed application; and, as part of opposer's case-in-chief, a notice of reliance upon (i) applicant's responses to opposer's first set of interrogatories and applicant's responses to opposer's first set of requests for admission, (ii) periodicals available to the general public in libraries and on LEXIS/NEXIS and/or of general circulation among members of the public and industries related to the goods and/or services of applicant and opposer, and (iii) certain official records of the United States Patent and Trademark Office, including a copy of a suspension form issued by the examining operation in connection with opposer's pending application to register BILLY BIGGLE for plush toys.

Applicant did not file any evidence in its case in chief and did not submit a brief on the case. Neither party requested an oral hearing.

According to the record, opposer created a series known as "The Kidsongs Television Show," a children's

musical television program that is broadcast nationwide.<sup>2</sup> Since its introduction in April 1994, this series has featured two brightly colored, furry creatures known as BILLY BIGGLE and his sister, RUBY BIGGLE - collectively, known as THE BIGGLES. Opposer's use of these three designations was quickly extended from use in connection with the televised music program in April 1994 to uses with videotapes by March 1995 and music books by June 1995. The mark BILLY BIGGLE was first used in connection with plush toys as of September 1994.

We turn first to the issue of whether opposer has proven its standing to bring and maintain this proceeding. Opposer filed an application to register the mark BILLY BIGGLE for plush toys on December 23, 1997 -- the same day it commenced the instant opposition proceeding. That application, Serial No. 75/410,044, alleges September 1994 as the date of first use of the mark BILLY BIGGLE anywhere and in interstate commerce (in connection with plush toys). Subsequently, opposer was advised in an Office Action that applicant's prior pending application for CAPTAIN BIGGLES would be cited, if and when that prior application

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<sup>2</sup> As of November 1995, the show was seen on 288 stations covering 87% of the nation's television audience. (Notice of Reliance, Exhibit 29).

registered, against opposer's later-filed application. Thus, opposer has established its standing in this case by proving that it filed an application with the United States Patent and Trademark Office and that a rejection would follow from the issuance of applicant's registration. See Lipton Industries, Inc. v. Ralston Purina Co., 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982).

Opposer has also alleged and proven priority of use (See Notice of Reliance, Exhibits 7 - 75). Opposer has priority by virtue of the fact that it has used the character names BILLY BIGGLE, RUBY BIGGLE and THE BIGGLES and the marks BILLY BIGGLE and THE BIGGLES in connection with specifically enumerated goods and services since the specified dates in 1994 and 1995 as discussed above. Each of these dates is plainly prior to the February 20, 1996 filing date of applicant's involved application for its CAPTAIN BIGGLES mark, which in the absence of testimony or other proof of an actual date of first use is the earliest date for priority purposes upon which applicant can rely in this proceeding. See Lone Star Mfg. Co., Inc. v. Bill Beasley, Inc., 498 F.2d 906, 182 USPQ 368, 369 (CCPA 1974); and Columbia Steel Tank Co. v. Union Tank & Supply Co., 277 F.2d 192, 125 USPQ 406, 407 (CCPA 1960).

Turning to the question of likelihood of confusion, in the course of rendering our decision herein, we have followed the guidance of In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 1362, 177 USPQ 563, 567-68 (CCPA 1973). The du Pont case sets forth each factor that should be considered, if relevant information is of record, in determining likelihood of confusion. Moreover, in considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." See Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). See also In re Azteca Restaurant Enterprises, Inc., 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein.

With respect to the goods of the parties, we note that there is some overlap between the goods identified in the application and the goods with which opposer has established use. Opposer's "plush soft sculpture toys," sold under the mark BILLY BIGGLE, encompass applicant's "toys, namely, plush soft-sculpture bears," sold under the mark CAPTAIN BIGGLES. Opposer markets music books to young children, using the mark THE BIGGLES and featuring characters named BILLY BIGGLE and RUBY BIGGLE,

collectively known as THE BIGGLES, while applicant claims use of CAPTAIN BIGGLES with storybooks and coloring books targeted to young children.

The evidence of record establishes that opposer has built on the success of its popular, nationwide television program with its attendant character names BILLY BIGGLE, RUBY BIGGLE and THE BIGGLES, and marks BILLY BIGGLE and THE BIGGLES by using the character names and marks on collateral goods that would appeal to its pre-school age viewing audience. Accordingly, it moved aggressively into producing and releasing a series of videotapes, music books, and electronic video games employing the character names BILLY BIGGLE, RUBY BIGGLE and THE BIGGLES and marks BILLY BIGGLE and THE BIGGLES. According to the record, only the mark BILLY BIGGLE has been used in connection with plush toys.

Similarly, applicant's imaginary character, CAPTAIN BIGGLES, is not limited to children's storybooks and coloring books. It too has been extended to character merchandising with a number of items typical of such extensions. In addition to plush toys and toy airplanes, applicant has placed its mark on tote bags, athletic bags

and T-shirts.<sup>3</sup> It is certainly not a new marketing tool to emblazon the names and/or likeliness of popular television characters on T-shirts. Cf. In re Paramount Pictures Corporation, 213 USPQ 1111 (TTAB 1982) [Images, character names and TV show title of MORK & MINDY serves as a secondary indication of source when applied to T-shirts]. Similarly, tote bags or athletic bags covered with trademarks, trade names, character names, etc., are also frequently handy "souvenirs for the pilgrims of popular culture" Cf. Rock and Roll Hall of Fame and Museum Inc. v. Gentile Productions, 134 F.3d 749, 45 USPQ2d 1412, 1419 (6<sup>th</sup> Cir. 1998). Hence, we conclude that if sold under the same or confusingly similar marks, all of applicant's listed items would mistakenly be seen as sponsored by or affiliated in some way with opposer's popular television show.

We turn now to two other du Pont factors related to the nature of the parties' respective goods. In this regard, we conclude that the channels of trade and classes of purchasers of the parties' goods will be the same. Applicant's listing of goods is broadly worded, without any

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<sup>3</sup> Not surprisingly, opposer too has extended use of its character names and marks to T-shirts. (Notice of Reliance, Exhibit 76).

limitations as to channels of trade or classes of purchasers. Hence, we presume that the goods of applicant will be sold in all of the normal channels of trade to all of the usual purchasers for goods of the various types identified. See Canadian Imperial Bank v. Wells Fargo, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). Opposer has submitted evidence of the varied ways in which it reaches out to consumers without limitation (e.g., through the Internet, mail order, retail outlets, etc.).

In looking at opposer's basic services, we note that entertainment programs broadcast on public television stations are generally available without cost to the viewer. Furthermore, young children<sup>4</sup> are certainly not presumed to possess a perfect recollection of trademarks. The preschool child who enjoys watching THE BIGGLES on television and who requests that a parent purchase opposer's BIGGLES character merchandise for the child will likely use some form of the words BIGGLE or BIGGLES to communicate this request. Moreover, in light of the relatively inexpensive nature of these collateral goods, even the parents who are pleased that their young child is

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<sup>4</sup> The record characterizes the target demographics for opposer's television show and videos as "ages 2 to 6" (Notice of Reliance, Exhibit 13) or as "pre-school" (Notice of Reliance, Exhibit 30).

watching an educational program on public television<sup>5</sup> who then purchase a BIGGLES plush toy creature at the behest of the child, cannot be presumed to be sophisticated enough to avoid the purchase of applicant's CAPTAIN BIGGLES merchandise by mistake.

Turning next to the character names and marks, we note that while we must base our determination on a comparison thereof in their entirety, we are guided, equally, by the well established principle that, in articulating reasons for reaching a conclusion on the issue of confusion, "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark [or name], provided the ultimate conclusion rests on consideration of the marks [or names] in their entirety." In re National Data Corp., 732 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

Opposer contends that its character names and marks are strong and well known indications that are entitled to a broad scope of protection; that BIGGLE/BIGGLES is the dominant portion of both parties' character names and marks; and that the word BIGGLE/BIGGLES in opposer

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<sup>5</sup> The record is replete with testimonials of parents who are delighted to find an educational program of this nature for their pre-school children.

character names and marks and BIGGLES within applicant's character name and mark both represent the surnames of imaginary characters. In opposer's character names BILLY BIGGLE and RUBY BIGGLE, we have what appear to be given names of "Billy" and "Ruby." The publicity surrounding this show and collateral products, in addition to frequently invoking "the Biggles" designation alone, also introduces us to "Biggleland," "Biggletown," a bandleader known as "Alexander Ragtime Biggle," etc.

With this background, we conclude that the title "Captain" in applicant's CAPTAIN BIGGLES character name could easily be mistakenly seen by those familiar with opposer's goods and services as naming yet another member of opposer's BIGGLES clan. As noted earlier, in both cases, these naming designations are associated with "collateral goods" - in the instant case, character-driven merchandise marketed in conjunction with entertainment media directed to children. Accordingly, as used on the involved goods, the connotations are very similar.

We agree with opposer that the BIGGLE/BIGGLES name is arbitrary as applied to its television show, recordings and assorted collateral goods to which the mark is affixed. Accordingly, opposer's marks are inherently distinctive as

applied to these services and goods. Moreover, there is no indication in the record that anyone else is using any variations of BIGGLE/BIGGLES on related goods or services. As to the similarity in overall appearance, each of these marks has a short name ("Billy" or "Ruby"), title ("Captain") or article ("The") followed by the dominant word "Biggle(s)." Similarly, when spoken, none of these leading terms will receive the same emphasis as will the BIGGLE(S) portion of each mark.

Finally, we turn to the du Pont factor dealing with the renown of opposer's character names and marks. The record shows that opposer has met with a great deal of success in the marketplace. THE BIGGLES -- BILLY BIGGLE and RUBY BIGGLE -- star in a television program set in "Biggleland" that has been shown nationwide on public television continually since 1994. Judging by the articles opposer has submitted from newspapers and magazines of general circulation, it has received significant public acclaim in the print media across the country for its educational television programs and videotaped music programs (Notice of Reliance, Exhibits 30, 51 - 60). It has sponsored song-writing contests and sweepstakes (Notice of Reliance, Exhibits 15, 16, 17, 29) sent costumed characters on a national tour (Notice of Reliance, Exhibit

15) to malls (Notice of Reliance, Exhibits 5, 16, 17, 27, 29, 33, 34), parades and other special events (Notice of Reliance, Exhibits 16, 22, 23 & 24), taken out numerous print ads in family-oriented magazines (Notice of Reliance, Exhibits 16, 27, 29), and promoted the television program, videos and other merchandise through cross-promotions (Notice of Reliance, Exhibits 15, 17), through network and cable outlets (Notice of Reliance, Exhibits 15, 17), on its Web site (Notice of Reliance, Exhibit 17), etc. We have determined from this record that these character names and marks are arbitrary and hence inherently distinctive for these goods and services. There is no showing of other third-party usage of the BIGGLE/BIGGLES designation on the same or similar goods. Accordingly, we find that opposer's BIGGLE and BIGGLES designations are well-known character names and marks in the area of children's educational television, musical videotapes and for the involved items of character merchandising products that flow naturally from these related forms of children's entertainment.

However, as to opposer's contention that it possesses a "family" of marks, the existence of such a family has not been proven on this record. Opposer need not establish a family of marks in order to prevail on the issue of likelihood of confusion herein.

In summary, we find that applicant's mark creates a similar overall commercial impression to opposer's character names and marks; that the goods are in part identical and otherwise closely related; that the goods will be marketed through similar channels of trade to the same purchasers; and, that opposer's character names and marks should be accorded a relatively broad scope of protection.

Decision: The opposition is sustained and registration to applicant is refused as to all four classes of goods identified herein.