

THIS DISPOSITION  
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PRECEDENT OF THE TTAB

Mailed: September 30, 2005

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re James Cahill

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Serial No. 76483453

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George W. Hoover of Blakely Sokoloff Taylor & Zafman, for  
James Cahill.

Jean H. Im, Trademark Examining Attorney, Law Office 101  
(Ronald R. Sussman, Managing Attorney).

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Before Seeherman, Bucher and Zervas, Administrative  
Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

James Cahill has appealed from the final refusal of  
the examining attorney to register WIGGLE WORDS (standard  
character drawing) as a trademark for the following goods:  
"computer game software, educational software featuring  
instruction in language skills."<sup>1</sup>

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<sup>1</sup> Application Serial No. 76483453, filed January 21, 2003,  
asserting a bona fide intention to use the mark in commerce under  
Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

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The trademark examining attorney has finally refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark so resembles (i) the mark WIGGLEWORKS<sup>2</sup> (in standard character form) and (ii) the mark shown below,<sup>3</sup>



- both previously registered to the same owner, Scholastic Inc. - that, if used on or in connection with applicant's goods, it would be likely to cause confusion. Both registrations recite the following identifications of goods:

pre-recorded audio and video cassettes and computer software for children focusing on reading and writing skills all sold as [a] unit for educational purposes in International Class 9; and

paperback books for children and teaching guides for teachers and parents focusing on reading and writing skills all sold as a unit for educational purposes in International Class 16.

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<sup>2</sup> Registration No. 1971679, issued April 30, 1996. Section 8 affidavit accepted and Section 15 affidavit acknowledged.

<sup>3</sup> Registration No. 2004645, issued October 1, 1996. Section 8 affidavit accepted and Section 15 affidavit acknowledged. "BEGINNING LITERACY SYSTEM" disclaimed.

The appeal has been fully briefed.<sup>4</sup> Applicant did not request an oral hearing.

We affirm the refusal of registration.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

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<sup>4</sup> The examining attorney filed her brief on June 24, 2005, beyond the time allowed under Trademark Rule 2.142(b)(1). According to the examining attorney, the April 5, 2005 order issued by the Board forwarding applicant's brief to the examining attorney "was not received until June 6, 2005."

Because the examining attorney has provided an acceptable explanation for the late filing of her brief, the examining attorney's motion is granted and her brief is accepted. See *In re Tennessee Walking Horse Breeders' and Exhibitors' Ass'n*, 223 USPQ 188 (TTAB 1984).

We note that if we had not considered the examining attorney's brief, the appeal would not have been dismissed - rather, our decision herein would be the same. See TBMP 1203.02(b) (2d ed. rev. 2004).

We first turn to the similarity or dissimilarity of applicant's and registrant's goods. Applicant has stated that it "does not dispute the goods recited in the subject application and those recited in the cited registrations are related." (Brief at p. 1.) In view thereof, and inasmuch as the record supports applicant's concession, we find that applicant's and registrant's goods are related, and that the first *du Pont* factor weighs in favor of finding a likelihood of confusion.

With respect to the trade channels and purchasers of the respective goods, we note that the identifications of goods in the application and the cited registration do not contain any restriction as to trade channels. We presume, therefore, that applicant's and registrant's goods are marketed in the same, overlapping trade channels to the same classes of purchasers. See *In re Elbaum*, 211 USPQ 639 (TTAB 1981). Thus, the third and fourth *du Pont* factors also weigh in favor of finding a likelihood of confusion.

Next, we consider the similarities and dissimilarities of the marks, comparing applicant's mark WIGGLE WORDS with WIGGLEWORKS. In one cited registration, WIGGLEWORKS is registrant's entire mark. In the other cited registration, WIGGLEWORKS is the dominant portion of registrant's mark. WIGGLEWORKS dominates over the other components of

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registrant's design mark for several reasons. First, it is part of the literal portion of registrant's mark, and it is the literal portion of the mark that will be used by purchasers in recollecting the marks and purchasing the goods. *In re Appetito Provisions Co., Inc.*, 3 USPQ2d 1553 (TTAB 1987). Second, WIGGLEWORKS is highlighted at the top of the mark, in letters that are substantially larger than the letters of the remaining wording in the mark. Third, the disclaimed wording, BEGINNING LITERACY SYSTEMS, is descriptive of a feature of the goods and is hence accorded less trademark significance than the remainder of the mark.

It is apparent that WIGGLE WORDS and WIGGLEWORKS are highly similar in sound and appearance in that both contain three syllables, both begin with the word "wiggle" and are followed by a single syllable, five letter word in the plural form, beginning with the same three letters. In fact, other than the space after "wiggle," the terms only differ by one letter.

In view of the foregoing, we find that applicant's mark is highly similar in sound and appearance to registrant's word mark and the dominant term in registrant's design mark. We also find that the overall commercial impressions of the marks is very similar, particularly in view of the fallible memories of consumers,

who retain general impressions of marks and cannot be presumed to have the luxury of being able to compare applicant's and opposer's marks side-by-side.<sup>5</sup> *Weiss Associates Inc. v. HRL Associates Inc.*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990), and *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd*. No. 92-1086 (Fed. Cir. June 5, 1992). Thus, the first *du Pont* factor also weighs in favor of finding a likelihood of confusion.

We next turn to the sixth *du Pont* factor which focuses on the number and nature of similar marks in use on related goods. In addition to the two registrations cited by the examining attorney, applicant relies on the following registrations:<sup>6</sup>

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<sup>5</sup> For these reasons, applicant's argument that "consumers will take note of the difference between a single word versus two words" is not well taken.

<sup>6</sup> Applicant submitted these third-party registrations with his request for reconsideration filed October 14, 2004.

MARK	RELEVANT GOODS	OWNER
WIGGLE N' TUNES <sup>7</sup>	Electronic media, namely audio cassettes, audio tapes, CDs, video cassette tapes and multimedia software featuring children's music, stories, games and plays in International Class 9.	Carolyn Zorn
THE WIGGLES <sup>8</sup>	Manuals, brochures and teaching materials, namely, textbooks for teaching reading, writing, mathematics, music, spelling, drama and magic tricks to children in International Class 16.	The Wiggles Pty Limited
THE WIGGLES <sup>9</sup>	Computer software and computer programs, compact discs, cassettes, records, video tapes and CD ROMs featuring entertainment for children, namely, music, stories, costumed characters and animation; spectacles and eyewear in International Class 9.	The Wiggles Pty Limited

Applicant maintains that "[t]he existence of third-party registrations is probative to show that a registered mark may be 'weak' and entitled to only a narrow scope of protection within a specific field," citing *Marcal Paper Mills, Inc. v. American Can Co.*, 212 USPQ 852, 863 (TTAB 1981); and that "[t]hese third-party registrations clearly demonstrate that the word 'wiggle' is diluted in the field of children's educational products and that these marks, as

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<sup>7</sup> Registration No. 2033028, registered January 21, 1997. Section 8 affidavit accepted and Section 15 affidavit acknowledged.

<sup>8</sup> Registration No. 2207356, registered December 1, 1998. Section 8 affidavit accepted and Section 15 affidavit acknowledged.

<sup>9</sup> Registration No. 2279552, registered September 21, 1999. Section 8 affidavit accepted and Section 15 affidavit acknowledged.

well as the mark cited by the Examining Attorney are relatively weak." (Brief at p. 4.)

We are not persuaded by applicant's "evidence" that WIGGLE is a weak or diluted term as applied to the goods at issue here, or by applicant's argument that the cited registered marks should be accorded a narrow scope of protection. The Federal Circuit, our primary reviewing court, has stated that third-party registrations are not evidence that the marks are currently in use or that the public is aware of them, and they therefore are of no probative value under the sixth *du Pont* evidentiary factor (i.e., "the number and nature of similar marks in use on similar goods"). See *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992). Additionally, applicant's "evidence" reflects that only two other entities have registered a mark containing the term "wiggle," and the marks cited by the examining attorney are far closer in commercial impression to applicant's mark than the marks identified by applicant.

In cases such this case, where the applicant's goods are identical in part to the registrant's goods, the degree of similarity between the marks which is required to support a finding of likelihood of confusion is less than it would be if the goods were not identical. *Century 21*

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*Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992). In view thereof, and because the second, third and fourth *du Pont* factors considered above weigh in favor of a finding of likelihood of confusion, we conclude that confusion with registrant's marks is likely to occur if applicant's WIGGLE WORDS mark were to be used on or in connection with the goods identified in applicant's application.

**Decision:** The refusal to register under Section 2(d) of the Trademark Act is affirmed.