

THIS DECISION IS NOT
CITABLE AS PRECEDENT
OF THE TTAB

Mailed: 2/6/2006

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Robert J. Thate
v.
YaYa, LLC and YaYa Media, Inc.,
joined as party defendants

Opposition Nos. 91152180; 91152228; 91152320; and 91152712

Robert J. Thate, pro se.

Elizabeth Barrowman Gibson, Bernard R. Gans, and Alan A.J. Leggett of Jeffers, Mangels, Butler & Marmaro for YaYa LLC and YaYa Media, Inc.

Before Quinn, Kuhlke and Walsh, Administrative Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

Applications were filed by YaYa, LLC¹ to register the mark YAYA for "computer game software for use on third[-] party web sites to promote the goods, services, and business of the third party" (in International Class 9);² and for

¹ In view of assignments of the involved applications, and pursuant to the parties' agreement, the Board, on October 1, 2003, joined YaYa Media, Inc. as a party defendant. The joined party defendants will be referred to as "applicant" in this decision.

² Application Serial No. 76105574, filed August 9, 2000, based on an allegation of a bona fide intention to use the mark in commerce.

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"dissemination of advertising for others via an on-line electronic communications network, developing promotional campaigns for business, and promoting the goods and services of others by providing video games which are placed on web sites of others including allowing users of the web site to send challenges to others thereby expanding the promotional value of the web site" (in International Class 35);

"entertainment services, namely, providing an on-line computer game" (in International Class 41); and "product development, namely, developing computer video games for others" (in International Class 42);³ and the mark YAYA.COM for "computer game software for use on third[-] party web sites to promote the goods, services, and business of the third party" (in International Class 9);⁴ and for "providing computer games that may be accessed through a global computer network" (in International Class 41).⁵

Robert J. Thate opposed registration in each instance pursuant to Section 2(d) of the Trademark Act on the ground that each of applicant's marks, when used in connection with applicant's goods and services, so resembles opposer's

³ Application Serial No. 76198605, filed January 20, 2001, based on an allegation of a bona fide intention to use the mark in commerce.

⁴ Application Serial No. 76105564, filed August 9, 2000, based on an allegation of a bona fide intention to use the mark in commerce.

⁵ Application Serial No. 76105571, filed August 9, 2000, based on an allegation of a bona fide intention to use the mark in commerce.

previously used and registered mark shown below



for "toys, namely, spinning tops"⁶ as to be likely to cause confusion.

Applicant, in its answer, denied the allegation of likelihood of confusion.

The Board, in an order dated December 27, 2002, consolidated the four opposition proceedings, indicating that the case could be presented on the same record and briefs. The record consists of the pleadings; the files of the involved applications; and a status and title copy of opposer's pleaded registration introduced by way of opposer's notice of reliance.⁷ Applicant did not take testimony or offer any other evidence. Only opposer filed a brief.⁸ An oral hearing was not requested.

In view of opposer's ownership of a valid and

⁶ Registration no. 2470111, issued July 17, 2001. The registration indicates that the drawing is lined for the colors red and blue.

⁷ In this situation, where opposer offered no evidence other than a copy of its registration, applicant could have filed a motion for judgment under Trademark Rule 2.132(b) on the ground that upon the law and facts opposer had shown no right to relief. However, applicant was under no obligation to file such a motion; the motion is optional, not mandatory. TBMP § 534.03 (2d ed. rev. 2004).

⁸ The filing of a brief on the case is optional, not mandatory, for a party in the position of defendant. TBMP § 801.02(b) (2d ed. rev. 2004).

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subsisting registration, there is no issue regarding opposer's priority. *King Candy, Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). Thus, the only issue to decide herein is likelihood of confusion.

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. 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 similarities or dissimilarities between the marks and the similarities or dissimilarities between the goods and/or services. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). Opposer, as plaintiff in the opposition, bears the burden of proving that there is a likelihood of confusion. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); and *Eastman Kodak Co. v. Bell & Howell Document Mgmt. Products Co.*, 994 F.2d 1569, 26 USPQ2d 1912 (Fed. Cir. 1993).

With respect to the parties' YAYA marks, opposer's YAYA mark (stylized and in color) is identical in sound to applicant's YAYA mark. Further, the stylization in opposer's mark is relatively minimal, and is insufficient to distinguish the mark in terms of appearance from applicant's

mark. The YAYA marks would appear to be arbitrary for the involved goods and services; we can discern no difference in the meanings that would be conveyed by the marks. In addition, the marks convey virtually identical commercial impressions.

Likewise, opposer's YAYA mark (stylized and in color) is substantially similar to applicant's mark YAYA.COM. The mere addition of the generic top level domain name ".COM" in applicant's mark is hardly sufficient to distinguish the mark from opposer's mark. In this connection, we have taken judicial notice of various dictionary definitions of ".com." See: *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983)[dictionary definitions are proper subject matter for judicial notice]. The term ".com" is defined in the following ways: "a domain type used for Internet locations that are part of a business or commercial enterprise" CNET Glossary (1998); "abbreviation of commercial organization (in Internet addresses)" The American Heritage Dictionary of the English Language (4th ed. 2000); and "Internet abbreviation for company: used to show that an Internet address belongs to a company or business" Cambridge Dictionaries Online (2001).

Applicant's YAYA.COM mark is dominated by the arbitrary "YAYA" portion. In re *National Data Corp.*, 753 F.2d 1056,

224 USPQ 749, 751 (Fed. Cir. 1985) ["there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided [that] the ultimate conclusion rests on consideration of the marks in their entirety"]. "YAYA" is the first portion of the mark, and would be used by relevant purchasers in calling for applicant's goods and services. Opposer's mark YAYA (stylized and in color) and applicant's mark YAYA.COM are similar in sound and appearance. Although the ".COM" portion of applicant's mark connotes a connection with the Internet, the marks convey similar meanings given the commonality of "YAYA." The marks, YAYA (stylized and in color) and YAYA.COM, when considered in their entirety, engender similar overall commercial impressions.

In sum, the differences between opposer's mark YAYA (stylized and in color) and applicant's marks YAYA and YAYA.COM do not sufficiently distinguish the marks so as to create separate and distinct commercial impressions. We find that the parties' marks, considered in their entirety, are similar in sound, appearance, connotation and commercial impression so that, if they were used in connection with similar goods and/or services, confusion would be likely to occur among purchasers.

Inasmuch as opposer has filed no evidence in this case other than a copy of its registration, the similarity

between opposer's goods and applicant's goods and/or services turns *solely* upon a consideration of the identifications of goods and services in the respective registration and applications. *American Grease Stick Co. v. Chemplast, Inc.*, 341 F.2d 942, 144 USPQ 676 (CCPA 1965).

Opposer contends that its spinning top toys, on the one hand, and applicant's computer game software for use on the Internet, and applicant's Internet services related thereto, on the other hand, are similar. Opposer, in its brief, alleges that "games and playthings and 'online computer games' are forms of toy and gaming equipment"; that "both parties provide consumers, as well as third[-]party businesses, product development services and goods that are considered entertainment products"; that the parties' goods and services "are likely to be marketed in the same trade channel, i.e. the World Wide Web"; and that "[w]ith [the] advent and continued expansion of the Internet as a source of information and acquisition of consumer products and entertainment, Opposer believes that a large segment of its potential customers, primarily children, will lack the sophistication required to discern the difference between the goods and services offered by both parties."

Suffice it to say, opposer's allegations are entirely unsupported by any evidence. TBMP § 704.06(b) (2d ed. rev. 2004) [statements in a brief have no evidentiary value and

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can be given no consideration unless they are supported by evidence properly introduced at trial]. Although toys and computer games may be tangentially related in a very broad, general sense, there is no evidence in the record to establish a relatedness between opposer's spinning tops and applicant's computer games offered on the Internet and applicant's Internet services related thereto. Any relationship between the specific goods and services involved herein on which to base a finding of likelihood of confusion is not apparent from the face of the involved registration and applications.

We find that the mere introduction of opposer's registration is insufficient to make out a prima facie case of likelihood of confusion. Opposer, as the party with the burden of proof, has failed to sustain its burden.

Decision: The opposition is dismissed.