



LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADE-MARKS

Citation: 2013 TMOB 34
Date of Decision: 2013-02-22

**IN THE MATTER OF AN OPPOSITION
by Littlewoods Limited to application
No. 1,418,741 for the trade-mark
LADYBUGS AND LULLABIES in the
name of Allyson Grabish**

[1] On November 19, 2008, Allyson Grabish (the Applicant) filed an application to register the trade-mark LADYBUGS AND LULLABIES (the Mark) based on use in Canada since April 9, 2007 for the following wares and services (the Wares and Services):

Wares:

- (1) Baby, toddler, childrens [*sic*] fashion accessories, namely, bows, ribbons, headbands, pacifier clips, bib clips, mitten clips, hats, alligator clips, snap clips, french clips, barrettes, pony tail holders and hair clip holders.
- (2) Printed matter, namely, newsletters, bulletins, brochures, pamphlets, posters, signs, calendars, postcards and directories; Stationery, namely, letterhead, paper, note pads, labels, business cards, binders and folders.
- (3) Promotional items, namely, caps, stickers, bumper stickers, mouse pads, key chains, flags, banners, balloons, buttons, greeting cards, note cards, pencils, pens and coffee mugs; Magnets, namely fridge magnets.

Services:

- (1) Wholesale, retail and online sale of Baby, toddler, childrens [*sic*] fashion accessories, namely, bows, ribbons, headbands, pacifier clips, bib clips, mitten clips, hats, alligator clips, snap clips, french clips, barrettes, pony tail holders and hair clip holders.
- (2) Operating a website and blog providing information in the field of baby, toddler and childrens [*sic*] fashion and fashion accessories.

[2] The application was advertised for opposition purposes in the *Trade-marks Journal* of September 2, 2009.

[3] On October 26, 2009, Littlewoods Limited (the Opponent) filed a statement of opposition. The grounds of opposition can be summarized as follows:

- Pursuant to sections 38(2)(a) and 30(b) of the *Trade-marks Act*, RSC 1985, c T-13 (the Act), the Applicant herself has not used the Mark in Canada in association with each of the Wares and Services within the meaning of section 4 of the Act since the claimed date, nor continuously.
- Pursuant to sections 38(2)(a) and 30(i) of the Act, at the claimed date of first use and at the filing date the Applicant would have been aware of the Opponent's confusingly similar Ladybird marks. If the Applicant did not conduct a search of the Register prior to her adoption and use of the Mark, she would not have been in a position to make the statement of entitlement absent knowledge of conflicting rights on the Register. Where such a statement is made without regard to the known and conflicting prior rights of another, or absent knowledge of possibly conflicting rights, the true intent of section 30(i) is subverted.
- Pursuant to sections 38(2)(b) and 12(1)(d) of the Act, the Mark is not registrable as it confusing with the Opponent's registered trade-marks (the Opponent's Ladybird Marks), as set out below.

- Device of a Ladybird – UCA33310



- Ladybug Design – TMA132,109



- Ladybird & Design – TMA506,350



- Ladybird Design – TMA718,630



- LADYBIRD – UCA016205

- LADYBIRD – TMA654,909
- LADYBIRD – TMA717,591

- Pursuant to sections 38(2)(c) and 16 of the Act, the Applicant was not the person entitled to registration of the Mark because at both the filing date and the claimed date of first use, the Mark was confusingly similar to the Opponent's previously filed application for the trade-mark LADYBUG, application No. 1,260,824 for overlapping wares and services. The associated wares and services are set out in Schedule A to my decision.
- Pursuant to sections 38(2)(d) and 2 of the Act, the Mark is not distinctive. Based on the facts set out in the other grounds of opposition, the Mark does not and cannot distinguish the Wares and Services from the wares and services of the Opponent, nor is it adapted to so distinguish them, nor is it capable of distinguishing them.

[4] The Applicant served and filed a counter statement in which it denied the Opponent's allegations and put the Opponent to the strict proof thereof.

[5] In support of its opposition, the Opponent filed affidavits of Elizabeth Dingman, a reference librarian and trainer; Jean Misurec, a corporate annuals clerk; and David Potter, a student-at-law. All of the Opponent's affiants are employees of the Opponent's agent. None of the affiants was cross-examined. The Opponent also filed certified copies of the registrations and the application cited in the statement of opposition.

[6] The Applicant filed the affidavit of Stephen Paniccia, a Director of Ladybugs and Lullabies Inc., a corporate entity which Mr. Paniccia states is solely owned by the Applicant. A cross-examination order issued, but Mr. Paniccia was not cross-examined on his affidavit.

[7] Neither party filed a written argument.

[8] An oral hearing was scheduled at which the Applicant had indicated that she would represent herself. However, at the appointed time for the oral hearing the Applicant could not be reached at the telephone number provided. Another telephone number was used and contact was made with a Mr. Paniccia, the same Mr. Paniccia who swore an affidavit in support of the application. Mr. Paniccia advised that the Applicant was unavailable. He tried without success to locate the Applicant and asked if he could represent the Applicant at the oral hearing in her absence. Mr. Paniccia was advised that representations could only be received from the Applicant or the Applicant's listed trade-mark agent. In light of the fact that Mr. Paniccia was

neither he was not permitted to represent the Applicant in the oral hearing and as a result the hearing was cancelled.

Onus and Material Dates

[9] The Applicant bears the legal onus of establishing, on a balance of probabilities, that its application complies with the requirements of the Act. However, there is an initial evidential burden on the Opponent to adduce sufficient admissible evidence from which it could reasonably be concluded that the facts alleged to support each ground of opposition exist [see *John Labatt Limited v The Molson Companies Limited* (1990), 30 CPR (3d) 293 (FCTD) at 298].

[10] The material dates that apply to the grounds of opposition are as follows:

- sections 38(2)(a)/30 - the date of filing the application [see *Georgia-Pacific Corp v Scott Paper Ltd* (1984), 3 CPR (3d) 469 at 475 (TMOB) and *Tower Conference Management Co v Canadian Exhibition Management Inc* (1990), 28 CPR (3d) 428 at 432 (TMOB)].
- sections 38(2)(b)/12(1)(d) - the date of my decision [see *Park Avenue Furniture Corporation v Wickes/Simmons Bedding Ltd and The Registrar of Trade Marks* (1991), 37 CPR (3d) 413 (FCA)]
- sections 38(2)(c)/16(1) - the claimed date of first use [see section 16(1) of the Act].
- sections 38(2)(d)/2 - the date of filing of the opposition [see *Metro-Goldwyn-Mayer Inc v Stargate Connections Inc* (2004), 34 CPR (4th) 317 (FC)].

Section 30 Grounds of Opposition

Non-compliance with section 30(b) of the Act

[11] The initial burden on the Opponent is light respecting the issue of non-conformance with section 30(b) of the Act, because the facts regarding the Applicant's first use are particularly within the knowledge of the Applicant [see *Tune Masters v Mr P's Mastertune Ignition Services Ltd* (1986), 10 CPR (3d) 84 (TMOB) at 89]. Section 30(b) of the Act requires that there be continuous use of the applied for trade-mark in the normal course of trade from the date claimed

to the date of filing the application [see *Labatt Brewing Co v Benson & Hedges (Canada) Ltd* (1996), 67 CPR (3d) 258 (FCTD) at 262].

[12] In her affidavit, Ms. Dingman provides printouts from the Applicant's website, located at *www.ladybugsandlullabies.ca* as well as the results of a WHOIS search for the domain name for this website (Exhibits A and B). The WHOIS search shows that the Applicant's domain name was registered on May 24, 2007, which is subsequent to the Applicant's claimed date of first use of April 9, 2007. Ms. Dingman also provides the results of a search of the Internet archive service Wayback Machine for the Applicant's website (Exhibit C). The search results show the oldest archived version of the Applicant's website being from 2008, which again is subsequent to the claimed date of first use.

[13] Mr. Misurec attaches to his affidavit a copy of the corporate and business name profiles for Ladybugs and Lullabies in Ontario (Exhibit A). The document shows a corporation named Ladybugs and Lullabies Inc. which was incorporated on October 27, 2008 as well as a business name registered on January 9, 2008 to a sole proprietorship owned by the Applicant. I note that both of these dates are subsequent to the claimed date of first use of April 9, 2007.

[14] I am not satisfied that this evidence is sufficient to enable the Opponent to meet its evidential burden with respect to some of the Wares and Services. Specifically, I find that there is nothing in the Opponent's evidence which causes me to doubt whether the Applicant was selling the Wares at the claimed date of first use. Factors like the possession of a registered business name, a domain name or an active website, or the incorporation of a company are not necessary preconditions to selling wares in Canada. Rather, it is conceivable that the Applicant was selling wares in association with the Mark prior to incorporating or registering its domain name or business name or developing an active website. The same is true with respect to the services "wholesale, retail ... sale of Baby, toddler, childrens fashion accessories, namely, bows, ribbons, headbands, pacifier clips, bib clips, mitten clips, hats, alligator clips, snap clips, french clips, barrettes, pony tail holders and hair clip holders". Based on the foregoing, I find that the Opponent has failed to meet its evidential burden with respect to the Wares and the above identified services.

[15] I am unable to make the same finding for the remainder of the services, namely, “online sale of Baby, toddler, childrens [*sic*] fashion accessories, namely, bows, ribbons, headbands, pacifier clips, bib clips, mitten clips, hats, alligator clips, snap clips, french clips, barrettes, pony tail holders and hair clip holders” and “operating a website and blog providing information in the field of baby, toddler and childrens [*sic*] fashion and fashion accessories” (hereinafter referred to as the “Online Services”).

[16] For the Online Services, I am of the view that the absence of a registered domain name or an active website at the relevant date is sufficient to cast doubt on the Applicant’s statements that it had used the Mark in association with the Online Services continuously since the claimed date. As a result, I am satisfied that the Opponent has met its evidential burden with respect to the Online Services. Thus, the question becomes whether the Applicant has met her legal onus to demonstrate continuous use of the Mark in association with the Online Services from April 9, 2007 to November 19, 2008.

[17] In his affidavit, Mr. Paniccia attaches results from his review of “various sources to locate information with respect to the history and notoriety of the Applicant and the Applicant’s company Ladybugs and Lullabies Inc.”. Based on the evidence before me it appears that these documents all emanate from third party websites or publications and make reference to the Applicant or to the Applicant’s products. I am not willing to rely upon these third party websites as evidence of the truth of their contents [see *Candrug Health Solutions Inc v Thorkelson* (2007), 60 CPR (4th) 35 (FCTD), reversed (2008), 64 CPR (4th) 431 (FCA)]. Even if I was to place weight on these third party websites and publications, I note that they do not show evidence of use of the Mark by the Applicant or an authorized licensee in association with the Online Services in accordance with section 4 of the Act. Based on the foregoing, the Applicant has failed to discharge its legal onus to evidence continuous use of the Mark in the normal course of trade from the date claimed to the material date in association with the Online Services.

[18] Based on the foregoing, the section 30(b) ground of opposition is successful with respect to the Online Services and dismissed with respect to the remainder of the Wares and Services.

Non-compliance with section 30(i) of the Act

[19] Where an applicant has provided the statement required by section 30(i), a section 30(i) ground should only succeed in exceptional cases such as where there is evidence of bad faith on the part of the applicant [see *Sapodilla Co Ltd v Bristol-Myers Co* (1974), 15 CPR (2d) 152 (TMOB) at 155]. The Applicant has provided the necessary statement and this is not an exceptional case; the section 30(i) ground is accordingly dismissed.

Non-registrability Ground of Opposition – Section 12(1)(d) of the Act

[20] An opponent's initial onus is met with respect to a section 12(1)(d) ground of opposition if the registration relied upon is in good standing as of the date of the opposition decision. The Registrar has discretion to check the register in order to confirm the existence of the registration relied upon by an opponent [see *Quaker Oats of Canada Ltd/La Compagnie Quaker Oats du Canada Ltée v Menu Foods Ltd* (1986), 11 CPR (3d) 410 (TMOB)]. I have exercised that discretion and note that with the exception of the trade-mark Device of a Ladybird (UCA33310) which has been expunged, the remaining registrations for the Opponent's Ladybird Marks remain valid. This ground of opposition is rejected with respect to the Device of a Ladybird (UCA33310); however, the Opponent has met its evidential burden with respect to the remainder of the pleaded registrations.

[21] The test for confusion is one of first impression and imperfect recollection. Section 6(2) of the Act indicates that use of a trade-mark causes confusion with another trade-mark if the use of both trade-marks in the same area would be likely to lead to the inference that the wares or services associated with those trade-marks are manufactured, sold, leased, hired or performed by the same person, whether or not the wares or services are of the same general class.

[22] In applying the test for confusion, the Registrar must have regard to all the surrounding circumstances, including those specifically enumerated in section 6(5) of the Act, namely: (a) the inherent distinctiveness of the trade-marks and the extent to which they have become known; (b) the length of time each has been in use; (c) the nature of the wares, services or business; (d) the nature of the trade; and (e) the degree of resemblance between the trade-marks in appearance or sound or in the ideas suggested by them. These enumerated factors need not be attributed equal

weight. [See, in general, *Mattel, Inc v 3894207 Canada Inc* (2006), 49 CPR (4th) 321 (SCC) and *Masterpiece Inc v Alavida Lifestyles Inc* (2011), 96 CPR (4th) 361 (SCC).]

[23] I am of the preliminary view that the degree of resemblance between the parties' marks is approximately the same for all of the Opponent's Ladybird Marks. I consider the Opponent's case to be strongest with respect to registration No. TMA506,350 for the trade-mark Ladybird & Design, shown below, registered in association with "articles of children's clothing, namely coats, jackets, trousers, shorts, shirts, sweaters, cardigans, skirts, blouses, dresses, t-shirts, polo shirts, sweat shirts; underwear; hats, caps, hairbands, hair clips, hair ribbons, hair grips, hair clasps and hair ornaments; handbags, travelling bags, duffel bags, sports bags, satchels, rucksacks, knapsacks and haversacks; clocks".



[24] The Opponent's case is strongest with respect to registration No. TMA506,350 as it is the only one which includes the wares "hairbands, hair clips, hair ribbons, hair grips, hair clasps and hair ornaments" which directly overlap with the Wares.

[25] If there is no likelihood of confusion between the Mark and registration No. TMA506,350 then there would be no likelihood of confusion with respect to the other registrations. As a result, my determination of a likelihood of confusion as between the Mark and the Opponent's registration No. TMA506,350 will be determinative of the section 12(1)(d) ground of opposition.

Section 6(5)(a) – inherent distinctiveness and the extent to which the marks have become known

[26] The Mark is made up of three dictionary words. I may refer myself to a dictionary to determine the meaning of words [see *Insurance Co of Prince Edward Island v Prince Edward Island Insurance Co* (1999), 2 CPR (4th) 103 (TMOB)]. The *Canadian Oxford Dictionary* defines "ladybug" as "a coleopterous insect of the family Coccinellidae, with wing covers usu. of a reddish-brown colour with black spots" and "lullaby" as "a soothing song to send a child to

sleep”. The Mark gains some degree of inherent distinctiveness by virtue of the fact that the words “ladybugs” and “lullabies” do not have any particular meaning in relation to each other.

[27] The Opponent’s Ladybird & Design mark includes the word “ladybird” and the image of a ladybug. The *Canadian Oxford Dictionary* defines “ladybird” as another word for “ladybug” meaning that the two terms can be used interchangeably to describe the same insect. The inclusion of the design element and stylized script adds some inherent distinctiveness to the Opponent’s Ladybird & Design mark.

[28] Based on the foregoing, I assess the inherent distinctiveness of the parties’ marks as being essentially the same.

[29] The strength of a trade-mark may be increased by means of it becoming known in Canada through promotion or use. I will now turn to the extent to which the trade-marks have become known in Canada.

[30] The Applicant claims use in Canada since April 9, 2007; however, the Applicant has not provided any evidence establishing the extent to which the Mark has become known in Canada.

[31] The Applicant’s evidence includes articles posted on the websites for various news sources as well as reviews in magazines which discuss the Applicant and the Applicant’s products. Specifically, Mr. Paniccia’s affidavit includes the following (Exhibit A):

- a. an article in *The Cambridge Voice* entitled “Local Mom Needs Your Votes to Win Mom Entrepreneur of the Year” dated August 29, 2008 (printed August 12, 2010); the article is by Allyson Grabish. The article refers to Ladybugs and Lullabies being founded in 2007 by the Applicant. The article also refers to the Applicant’s bows being available online, at trade shows and in retail stores. The article also refers to the Applicant’s bows being included in celebrity gift bags.
- b. an article in the *Cambridge Times* entitled “Tinseltown hip in Clips are” by Melissa Hancock dated September 12, 2008 (printed August 12, 2010). The article refers to the Applicant having founded her business in 2007 and being nominated for an entrepreneurial award. The article states that the Applicant’s bows are available for sale at various stores.
- c. an article in the *Windsor Star* entitled “No-slip clips making Hollywood headways” by Dave Hall dated September 25, 2008 (printed August 12, 2010).

The article refers to the launch of the Applicant's website (www.ladybugsandlullabies.ca).

- d. a printout from the *People.com* website entitled "Holiday Gift Guide: Gift of the Month Clubs for Kids" which refers to Ladybugs and Lullabies hair accessories. The article is dated December 9, 2008 but was printed on August 12, 2010.
- e. an excerpt from *South Jersey Mom* magazine December 2010 issue. A review of "Ladybugs and Lullabies Hair Accessories" referring readers to the website at www.ladybugsandlullabies.com.
- f. an excerpt from *Anokhi* magazine November/December 2010 issue. A review of "Ladybugs & Lullabies" accessory line for boys.

[32] I have not been provided with evidence of the number of Canadians who have accessed the websites nor any circulation figures for the magazines. Furthermore, and more importantly, I note that articles and reviews do not constitute advertisement of the Mark [see *Williams Companies Inc et al v William Tel Ltd* (2000), 4 CPR (4th) 253 (TMOB)]. The most that could be inferred from the news articles is that some Cambridge or Windsor citizens would have been informed about the Applicant's business. I am unable to infer anything from the reviews in the magazines in the absence of Canadian circulation figures.

[33] The Applicant's evidence also includes a document that could be construed as an advertisement, namely an emailed copy of an advertisement used on kijiji.ca (Panிக்கா affidavit, Exhibit A). The email is from AGrsh@aol.com; the subject of the email is "Kijiji Ad"; the sent date is 19/05/2007, but the email was printed on December 7, 2010; the email refers to the Applicant's bows being available for purchase by Canadian customers. However, I have not been provided with any details regarding whether this advertisement actually appeared on Kijiji or the number of Canadians who would have seen it if it did so appear and so I am unable to place any weight on it.

[34] While the evidence suggests that the Applicant may have been selling "baby, toddler, childrens [*sic*] fashion accessories" in Canada since approximately 2007, the Applicant has failed to provide any sale figures or advertising expenditures relating to the Wares and Services.

[35] Having regard to the foregoing, I am unable to make any determination as to the extent to which the Mark has become known.

[36] The Opponent has not provided any evidence of use of the Ladybird & Design mark in accordance with section 4 of the Act. The only evidence the Opponent provides is Mr. Potter's evidence which he states is "information with respect to the history of the Opponent's (and its predecessors-in-title) LADYBIRD and LADYBUG brand". Mr. Potter attaches the following search results to his affidavit as Exhibit A:

- a. Wikipedia entry for "Ladybird (clothing)", printed May 20, 2010;
- b. Article entitled "Flying High" from Global License!. The article is dated September 15, 2007, however it was printed from the website on August 5, 2010;
- c. An entry from the website for the Pasold Research Fund entitled "Pasold Fund History". In his affidavit Mr. Potter states that the document is dated May 2008, however, I note that the document has a copyright date of 2010 and the materials were printed from the Internet on August 5, 2010;
- d. An article entitled "Ladybird at Woolworths" from The Woolworths Virtual Museum. Mr. Potter states that the document is dated October 29, 2005 however I note that it was printed from the Internet on August 24, 2009;
- e. An undated document entitled "History of the Ladybird Company" also from The Woolworths Virtual Museum
- f. An article from *The Independent* entitled "Woolworths acquires Ladybird brand for £11m". The article is dated January 17, 2001, however, I note that it was printed from the Internet on August 5, 2010;
- g. An entry for "Ladybird Clothing" on the *babycares.info* website. The materials were printed on August 5, 2010.

[37] I note that there is no evidence regarding whether these third party websites are accessible from Canada or how many Canadians have accessed them. As mentioned previously, Internet evidence of this nature constitutes hearsay and I am not willing to rely on it for the truth of its contents [see *Candrug, supra*].

[38] The registration for the trade-mark Ladybird & Design (TMA506,350) issued subsequent to a declaration of use filed December 17, 1998. However, in the absence of evidence of actual use and reputation for the Opponent's Ladybird & Design mark I can only infer *de minimis* use thereof [see *Entre Computer Centers Inc v Global Upholstery Co* (1991), 40 CPR (3d) 427 (TMOB) at 430]. *De minimis* use does not support a conclusion that the Opponent's Ladybird & Design mark has become known to any significant extent.

[39] Based on the foregoing, this factor does not significantly favour either party.

Section 6(5)(b) – the length of time each has been in use

[40] I have been provided, as part of the Opponent’s evidence, with a copy of the Applicant’s website printed on August 5, 2010. The most I am able to infer from this is that the Applicant’s website was active as of that date and that the Applicant’s “baby, toddler, childrens [*sic*] fashion accessories” may have been available for sale at that date. With respect to the Opponent’s mark, all that can be inferred from the mere registration of the Ladybird & Design mark is *de minimis* use.

[41] Accordingly, this factor does not significantly favour either party.

Section 6(5)(c) and (d) – the nature of wares, services or business and trade

[42] It is the Applicant’s statement of wares and services as defined in its application versus the Opponent’s registered wares that govern my determination of this factor [see *Esprit International v Alcohol Countermeasure Systems Corp* (1997), 84 CPR (3d) 89 (TMOB)].

[43] There is direct overlap between the parties’ wares. The Opponent’s registration for the trade-mark Ladybird & Design (TMA506,350) includes the wares “hairbands, hair clips, hair ribbons, hair grips, hair clasps and hair ornaments” which directly overlap with the Applicant’s “baby, toddler, childrens [*sic*] fashion accessories, namely, bows, ribbons, headbands, pacifier clips, bib clips, mitten clips, hats, alligator clips, snap clips, french clips, barrettes, pony tail holders and hair clip holders”. This also creates a similarity with the Applicant’s Services (1), namely “wholesale, retail and online sale of Baby, toddler, childrens [*sic*] fashion accessories, namely, bows, ribbons, headbands, pacifier clips, bib clips, mitten clips, hats, alligator clips, snap clips, french clips, barrettes, pony tail holders and hair clip holders”.

[44] The remaining Wares and Services differ from the Opponent’s wares in exact nature. However, I note that Services (2) share some similarities with the Opponent’s wares as they all relate to the field of children’s fashion and accessories.

[45] Neither party has provided admissible evidence of the nature of their trade. However, given the overlap in the nature of the parties’ wares and services, at least with respect to Wares

(1) and Services (1), I find it reasonable to conclude that there could also be an overlap in the parties' channels of trade.

Section 6(5)(e) – the degree of resemblance between the marks in appearance or sound or in the ideas suggested by them

[46] Recently, in *Masterpiece*, the Supreme Court of Canada discussed the importance of the section 6(5)(e) factor in conducting an analysis of the likelihood of confusion between the parties' marks in accordance with section 6 of the Act (see para 49):

...the degree of resemblance, although the last factor listed in s. 6(5), is the statutory factor that is often likely to have the greatest effect on the confusion analysis ... if the marks or names do not resemble one another, it is unlikely that even a strong finding on the remaining factors would lead to a likelihood of confusion. The other factors become significant only once the marks are found to be identical or very similar. [...]

[47] The parties' marks differ in appearance and sound. Specifically, the Mark includes the word "ladybugs" which, while having the same meaning as "ladybird" is different in appearance and in sound. However, the parties' marks share similarities in ideas suggested in that the word ladybird in the Opponent's mark means the same thing as the word ladybug in the Mark. Furthermore, the design element in the Opponent's Ladybird & Design mark is that of a ladybug which creates further similarities in the ideas suggested by the parties' marks.

Conclusion

[48] In applying the test for confusion, I have considered it as a matter of first impression and imperfect recollection. Having regard to the above, I find that the balance of probabilities is evenly balanced between a finding of confusion between the marks in issue and a finding of no confusion with respect to Wares (1) and Services (1) and (2). As the onus is on the Applicant to establish on a balance of probabilities that the Mark is not confusing with one or more of the Opponent's Ladybird Marks, including the Ladybird & Design mark, I must decide against the Applicant with respect to Wares (1) and Services (1) and (2).

[49] With respect to Wares (2) and (3), I find that the difference in the nature of the parties' wares and services is sufficient to shift the balance of probabilities in the Applicant's favour. As a result, I dismiss the section 12(1)(d) ground of opposition with respect to Wares (2) and (3).

Non-entitlement Ground of Opposition

Section 16(1)(b) of the Act

[50] Despite the burden of proof on the Applicant to establish, on a balance of probabilities, that there is no reasonable likelihood of confusion between the Mark and the Opponent's claimed LADYBUG trade-mark, the Opponent has the initial onus of proving that the application for the trade-mark alleged in support of the section 16(1)(b) ground was pending at the claimed date of first use for the Mark (April 9, 2007), and remained pending at the date of advertisement of the application for the Mark, September 2, 2009 [section 16(5) of the Act].

[51] As part of its evidence, the Opponent provided a certified copy of the application for the trade-mark LADYBUG subject to application No. 1,260,824. The application was filed on June 10, 2005 based on proposed use and remained pending as of the advertisement date for the application for the Mark (September 2, 2009). As a result, the Opponent has met its evidential burden.

[52] The considerations are similar to those discussed under section 12(1)(d) of the Act which are set out above. I make the same findings with respect to the section 6(5)(a) and (b) factors, however, I wish to make the following additional comments with respect to the section 6(5)(c), (d) and (e) factors.

[53] With respect to the considerations under sections 6(5)(c) and (d), I note that the wares associated with the pending application for LADYBUG are not as similar to the Wares as those associated with the Opponent's registration for Ladybird & Design, however, the pending application includes services which are more similar. The wares associated with the pending application for LADYBUG share similarity with Wares (1) and Services (1) and (2) by virtue of the inclusion of the wares "headgear namely hats, caps, visors and headbands" and the services "retail services in the field of children's clothing and accessories".

[54] With respect to section 6(5)(e) of the Act I find that this factor favours the Opponent even more than with respect to the Ladybird & Design mark in terms of appearance and sound as it features the word ladybug instead of ladybird.

[55] Despite these differences, I make the same findings as under section 12(1)(d) ground of opposition. Specifically, I find the probabilities to be evenly balanced between a finding of a likelihood of confusion and no likelihood of confusion with respect to Wares (1) and Services (1) and (2). As the onus is on the Applicant to establish on a balance of probabilities that the Mark is not confusing with the Opponent's LADYBUG mark, I must decide against the Applicant with respect to Wares (1) and Services (1) and (2). As with the section 12(1)(d) ground of opposition, I find the difference in the nature of the parties' wares and services with respect to Wares (2) and (3) is sufficient to shift the balance of probabilities in the Applicant's favour.

Non-distinctiveness Ground of Opposition – Section 38(2)(d) of the Act

[56] While there is a legal onus on the Applicant to show that the Mark is adapted to distinguish or actually distinguishes its Wares and Services from those of others throughout Canada [see *Muffin Houses Incorporated v The Muffin House Bakery Ltd.* (1985), 4 CPR (3d) 272 (TMOB)], there is an initial evidential burden on the Opponent to establish the facts relied upon in support of the ground of non-distinctiveness.

[57] Pursuant to its evidential burden, the Opponent is under an obligation to show that, as of the filing date of the statement of opposition, one or more of its Ladybird Marks had become known sufficiently to negate the distinctiveness of the Mark [see *Bojangles' International, LLC v Bojangles Café Ltd* (2004), 40 CPR (4th) 553, affirmed (2006), 48 CPR (4th) 427 (FC)].

[58] The third party website evidence (attached to the Potter affidavit) and certified copies of the Opponent's registrations and application are not sufficient to enable the Opponent to meet its evidential burden for this ground. The Opponent has not filed any evidence of use of the claimed marks. I note that the mere existence of a registration can establish no more than *de minimis* use and cannot give rise to an inference of significant and continuous use of a trade-mark [see *Entre Computer*].

[59] Accordingly, I dismiss the non-distinctiveness ground for the Opponent's failure to meet its evidentiary burden.

Disposition

[60] Pursuant to the authority delegated to me under section 63(3) of the Act, I refuse the application for the Mark with respect to “baby, toddler, childrens [sic] fashion accessories, namely, bows, ribbons, headbands, pacifier clips, bib clips, mitten clips, hats, alligator clips, snap clips, french clips, barrettes, pony tail holders and hair clip holders” and “wholesale, retail and online sale of Baby, toddler, childrens [sic] fashion accessories, namely, bows, ribbons, headbands, pacifier clips, bib clips, mitten clips, hats, alligator clips, snap clips, french clips, barrettes, pony tail holders and hair clip holders” and “operating a website and blog providing information in the field of baby, toddler and childrens [sic] fashion and fashion accessories” and I reject the opposition with respect to “printed matter, namely, newsletters, bulletins, brochures, pamphlets, posters, signs, calendars, postcards and directories; stationery, namely, letterhead, paper, note pads, labels, business cards, binders and folders; promotional items, namely, caps, stickers, bumper stickers, mouse pads, key chains, flags, banners, balloons, buttons, greeting cards, note cards, pencils, pens and coffee mugs; magnets, namely fridge magnets” pursuant to section 38(8) of the Act [see *Produits Menagers Coronet Inc v Coronet-Werke Heinrich Schlerf GmbH* (1986), 10 CPR (3d) 492 (FCTD) as authority for a split decision].

Andrea Flewelling
Member
Trade-marks Opposition Board
Canadian Intellectual Property Office

SCHEDULE A

Trade-mark	Appl'n/Reg'n No.	Wares/Services
LADYBUG	1,260,824	<p><u>Wares:</u> Bleaching preparations and other substances for laundry use namely, detergents, washing powder, liquids, soaps, starch, fabric brighteners, fabric conditioners, fabric softeners; cleaning, preparations namely, bathroom cleansers, carpet cleansers, cleansers for footwear, cleansers for dentures, cleansers for dishes, cleansers for floors, cleansers for household use, cleansers for laundry use, cleansers for personal use, cleansers for sanitary purposes, cleansers for the hands, skin, teeth and body, cleansers impregnated on to cloth, pads and tissues, domestic cleansers, hair cleansers, hand cleansers, impregnated cloths containing cleansers for use on the person, non-medicated liquid cleansers for the hands; abrasive granules, abrasive pads, abrasive powder all for cleaning purposes; polish for furniture and flooring all for cleaning purposes; scouring powders, scouring solutions for cleaning purposes; soaps for the hands, body and hair; perfumery; essential oils, cosmetics namely, eye makeup, facial makeup, eye makeup remover, foundation, powder, mascara, eye shadow, eyeliner, blusher, lip liner, lipstick, lip balm, lip gloss, lip cream, bronzing powder, nail polish, nail polish removers, powder compact refills, powder compacts, moisturizers, cleansers, toners, glitter in spray form for use as a cosmetic; hair lotions; dentifrices; wipes impregnated with moisturizing and makeup removal lotions; paper wipes impregnated with sanitizing chemicals and moisturizers; baby bath and baby wash namely foaming mousse, lotions, soaps and oils for use when bathing and washing babies; baby shampoo; baby oil; baby lotion; talcum powder; soap; baby eau de toilette; cotton wool; cotton wool pads; cotton wool balls; cotton wool buds; sanitary preparations namely sterilizing equipment, sterilizing solutions and substances; dietetic substances adapted for medical use namely dietetic beverages, dietetic canned fruits, dietetic confectionery, dietetic drinks, dietetic food supplements, dietetic foods, dietetic sugar substances, dietetic sweeteners all adapted for medical purposes; food for babies; plasters and materials for dressings namely adhesive bandages, dressings for</p>

		<p>wounds and skin traumas, bandages; material for stopping teeth, dental wax; disinfectants; preparations for destroying vermin; fungicides, herbicides; medicated shampoo; medicated soap; medicated wash; medicated bath preparations; food for babies; impregnated wipes for cosmetic and medical use namely paper wipes impregnated with cleansing and moisturizing lotions, paper wipes impregnated with sanitizing chemicals and medicated preparations; spectacles, glasses, sunglasses; artificial limbs, eyes and teeth; babies bottles; dummies; teething rings; soothers; teats; jewellery; horological instruments namely watches and clocks, jewellery boxes; disposable napkins; diapers of cellulose or paper; disposable liners for napkins; bibs of paper or cellulose; paper wipes for removing cosmetics; bathroom and facial tissue, paper wipes; paper make-up removal wipes; toilet paper; toilet tissues; pads for removing make-up disposable training pants; disposable underpants for babies; household or kitchen utensils and containers namely bake ware, cookware, moulds, bakers' brushes, bakers' tinware, baking cases, baking containers, baking dishes, baking sheets, baking tins, baking trays, basting spoons, non-electric beaters for kitchen use, blenders for food (non-electric), bottle openers, cafetleres, cake moulds, cake separators, cake servers, cake stands, cake tins, cake trays, casserole pans, chopping boards, non-electric devices for chipping, chopping, cutting dicing, extruding, grating, grinding, mashing, mincing, paring, peeling, pressing, scraping, shelling, shredding and slicing, food storage containers, non-electric food whisks, frying pans, garlic presses, griddles, grills, ice buckets, ice cream scoops, ice cube moulds, ice cube trays, ice packs, ironing boards, jugs, juice extractors, non-electric kettles, ladles, potato mashers, serving spoons, oven dishes, pastry brushes, pastry cutters, peelers, pepper mills, pepper pots, salad drainers, salt cellars, salt mills, salt shakers, saucepans, sieves, spatulas, table cutlery, tea canisters, non-electric tea makers, tea strainers, teapots, tenderizers; combs and sponges; brushes (except paint brushes); brush-making materials; articles for cleaning purposes namely abrasive discs, instruments, pads and sponges for kitchen cleaning purposes, absorbent pads for cleaning purposes, brooms, brushes for cleaning babies' feeding bottles, washing up brushes, cleaning cloths, cleaning wipes, cloths impregnated with a</p>
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		<p>detergent for cleaning, implements for cleaning cosmetics, dish cloths for cleaning, dusters for cleaning, mops for cleaning; steelwool; unworked or semi-worked glass (except glass used in building); glassware, porcelain and earthenware; baby bowls; feeding equipment for babies namely, bottles, teats, plastic bowls, plastic plates, plastic spoons, plastic cups; textiles and textile goods namely fabric, fabrics for textile use, linen namely, bath towels, face cloths, mats, linen namely bed sheets, blankets, mattress covers, duvets, household linens namely, bed sheets, blankets, mattress covers, duvets, household linen namely table cloths, dish towels, oven mitts, table linen namely coasters, napkins, placemats and table covers; bed and table covers; clothing namely vests, knickers, briefs, pants, trunks, socks, stockings, tights, pyjamas, sleepers, t-shirts, sports shirts, jackets, jumpers, cardigans, sweaters, swim suits, jeans, kilts, shirts, pinafores, dresses, hoods, swimming trunks, playsuits, rompers, shawls, skirts, shorts, slacks, trousers and blouses; footwear namely, casual shoes, athletic shoes, beach shoes, dress shoes, boots, sandals; headgear namely hats, caps, visors and headbands.</p> <p><u>Services:</u> Retail services in the field of children's clothing and accessories.</p>