

**THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB**

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**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re Plaid Enterprises, Inc.

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Serial No. 76283018

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Dan R. Musick, Esq. for Plaid Enterprises, Inc.

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Office 110 (Chris A.F. Pedersen, Managing Attorney).

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Before Hairston, Drost and Bergsman, Administrative  
Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Plaid Enterprises, Inc. filed a use based application for the mark ONE STROKE, in standard character format, for goods ultimately identified as "artists' paint brushes," in Class 16 (Serial No. 76283018). Applicant claimed June 15, 1996 as its date of first use anywhere and first use in commerce.

The Trademark Examining Attorney refused registration under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. §1052(d), on the ground that applicant's mark ONE STROKE, when used in connection with artists' paint brushes, is

likely to cause confusion with the mark ONE STROKE for  
"paint brushes and paint applicator rollers," in Class 16.<sup>1</sup>

Our determination of likelihood of confusion under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). *See also, In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities or dissimilarities of the marks and the similarities or dissimilarities of the goods. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks").

A. The similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.

We turn first to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entirety as to appearance, sound,

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<sup>1</sup> Registration No. 2682319, issued February 4, 2003.

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connotation and commercial impression. *In re E. I. du Pont De Nemours & Co., supra.* In this case, the marks are identical.

B. The similarity or dissimilarity and nature of the goods.

In an *ex parte* appeal, likelihood of confusion is determined on the basis of the goods as they are identified in the application and the cited registration. *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981); *In re William Hodges & Co., Inc.*, 190 USPQ 47, 48 (TTAB 1976). See also *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed").

In this case, the cited registration is for "paint brushes and paint applicator rollers." Because there are no restrictions or limitations as to the type of paint brushes described in the cited registration, we must presume that the description of goods in the registration

includes all types of paint brushes, including artists' paint brushes. *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983) ("There is no specific limitation and nothing in the inherent nature of Squirtco's mark or goods that restricts the usage of SQUIRT for balloons to promotion of soft drinks. The Board, thus, improperly read limitations into the registration"); *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). Accordingly, applicant's evidence and arguments that registrant's paint brushes are limited to interior or exterior house painting may not be given any consideration. In view thereof, we find that the goods of the applicant, artists' paint brushes, are included within registrant's paint brushes, and therefore the goods are identical.

C. The similarity or dissimilarity of likely-to-continue trade channels and classes of consumers.

Because we have found that the registrant's paint brushes may encompass artists' paint brushes, and therefore the goods are identical, we must presume that the channels of trade and classes of purchasers are the same. *Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1268 (TTAB 2003) ("Given the in-part (sic) identical and in-part (sic) related nature of the parties' goods, and the lack of any restrictions in the

identifications thereof as to trade channels and purchasers, these clothing items could be offered and sold to the same classes of purchasers through the same channels of trade"); *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994) ("Because the goods are legally identical, they must be presumed to travel in the same channels of trade, and be sold to the same class of purchasers"). Accordingly, we find that the channels of trade and classes of consumers are the same.

D. Instances of actual confusion.

Applicant argued that the parties have coexisted for eight years without any reported instances of confusion, and that such a substantial period of time without any reported instances of confusion is strong evidence that there is no likelihood of confusion.<sup>2</sup> However, the fact that applicant is not aware of any reported instances of actual confusion is not particularly probative in an *ex parte* proceeding because we have no evidence pertaining to the extent of the use by applicant and registrant, and thus no opportunity to assess whether there has been ample opportunity for confusion to occur. In addition, there has been no opportunity to hear from the registrant. *In re*

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<sup>2</sup> Applicant's Brief, pp. 14-15.

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*Kangaroos U.S.A.*, 223 USPQ 1025, 1026-1027 (TTAB 1084); *In re Jeep Corp.*, 222 USPQ 333, 337 TTAB 1984). Only in rare instances will the Board give any probative weight to the lack of reported instances of actual confusion. See *In re General Motors Corp.*, 23 USPQ2d 1465, 1470-1471 (TTAB 1992). In *General Motors*, the Board identified three factors in an *ex parte* setting as a prerequisite to giving the lack of evidence actual confusion any probative value: (1) a long period of marketing success by the applicant; (2) applicant's products are expensive; and, (3) there have been no reported instances of actual confusion. Based on this record, the lack of any reported instances of actual confusion is not probative because the length of the time that applicant has been selling its arts and crafts products is not significant, and there is no evidence of applicant's (or registrant's) marketing success.

E. Balancing the factors.

Having found that the marks are identical, that the applicant's goods are included within registrant's description of goods, and that the goods of the registrant and applicant move in the same channels of trade and are sold to the same classes of consumers, we conclude that applicant's mark ONE STROKE for artists' paint brushes is

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likely to cause confusion with the mark ONE STROKE for paint brushes and paint applicator rollers.

Decision: The refusal to register is affirmed.