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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Toy Concepts

Serial No. 76326801

Myron Amer of Myron Amer, P.C. for Toy Concepts

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(Tomas V. Vlcek, Managing Attorney).

Before Seeherman, Bucher and Holtzman, Administrative Trademark
Judges.

Opinion by Holtzman, Administrative Trademark Judge:

An application has been filed by Toy Concepts (applicant) to register the mark SPLASHER-BLASTER for "water toys, namely, water guns" in International Class 28.¹

The trademark examining attorney has refused registration under Section 2(d) of the Trademark Act on the ground that applicant's mark, when applied to applicant's goods, so resembles

¹ Application Serial No. 76569020, filed March 14, 2005, based on an allegation of a bona fide intention to use the mark in commerce.

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the registered mark SPLASH N' BLAST! for "toys, namely inflatable toys for use in the water" in International Class 28 as to be likely to cause confusion.²

When the refusal was made final, applicant appealed. Briefs have been filed. An oral hearing was not requested.

Our determination 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 likelihood of confusion issue, including the similarities of the marks and the similarities of the goods. In re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

We turn first to the goods. Relying on a definition of "inflate" as meaning "to expand or distend with air," applicant argues that its water guns would typically be made of metal or rigid plastic and as such would not be an inflatable toy. Applicant maintains that although applicant's and registrant's toys may be sold in the same stores, purchasers would be aware by the diverse nature of the goods that a different manufacturer makes each, and they would not believe that these diverse goods emanate from the same source.

Applicant's and registrant's toys may be specifically different. However, the question is not whether purchasers can differentiate the goods, but rather whether purchasers are likely

² Registration No. 2480633, issued August 21, 2001.

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to confuse the source of the goods. See *Helene Curtis Industries Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618 (TTAB 1989). Thus, it is sufficient if the respective goods are related in some manner and/or that the conditions surrounding their marketing are such that they would be encountered by the same persons under circumstances that could, because of the similarity of the marks used thereon, give rise to the mistaken belief that they emanate from or are associated with, the same source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993).

Applicant's "water toys, namely, water guns" and registrant's "toys, namely inflatable toys for use in the water" are, on their face, related goods. Both products are toys that are intended for use in a swimming pool or other water environment. Moreover, as the examining attorney's evidence shows, these toys may be, and often are, used together for the same play activity in the water. The examining attorney has submitted printouts from online stores (e.g., *pooltoy.com* and *matteroffun.com*) located on the eBay website, showing that water toys, such as inflatable rafts and tubes, are sold together with toy guns that squirt water.³ In addition, and as applicant

³ Applicant's objections to the examining attorney's evidence are noted. While it certainly would have been the better practice for the examining attorney to have highlighted or marked the relevant information in these Internet printouts, we will not, as applicant requests, refuse to consider the evidence on this basis. Applicant's contention that the examining attorney's evidence is untimely because it was submitted for the first time with her final refusal is utterly

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recognizes, these toys would be sold in the same channels of trade, including all the usual retail outlets for toys, to the same ordinary consumers. Furthermore, such purchasers, particularly considering the inexpensive nature of these toys, would not be expected to exercise a high degree of care and thus would be more prone to confusion.

Applicant argues that it is not specified in the identification of goods that its water guns would necessarily be used in a swimming pool or other water environment. However, applicant has described its goods as "water toys" and, in any event, it is entirely reasonable to assume that toy water guns could be used in the water as well as on land. In addition, the Internet evidence submitted by the examining attorney shows that these types of toys are indeed used in water.

It is clear that despite the differences in the goods, these toys, if sold under similar marks, would be perceived by consumers as emanating from the same source.

We turn then to the marks. Applicant essentially argues that the differences in the marks, in particular, the addition of the suffix ER and "deletion" of the N' in applicant's mark are sufficient to distinguish one mark from the other. Noting that

meritless. At any time during the six month period between the final refusal and the time for appeal, applicant could have responded to the examining attorney's evidence with arguments and/or evidence of its own. See TMEP section 715.03. Applicant chose not to do so.

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the N' in registrant's mark is short for the word "and," applicant argues that registrant's mark "connotes two activities, namely to splash and to blast" whereas in applicant's mark, the dash "joins the two words into one occurrence" that would be associated with a water gun, not an inflatable toy. Reply Brief, p. 2.

When the marks are examined in detail on a side-by-side basis, the differences in the marks may be discerned. However, a side-by-side comparison is not the test. In the normal marketing environment, purchasers would not usually have an opportunity to examine the details of the respective marks. Furthermore, the average purchaser is not infallible in his recollection of trademarks and often retains only a general overall impression of marks that he may previously have seen in the marketplace. In re Mucky Duck Mustard Co., 6 USPQ2d 1467 (TTAB 1988). Thus, it is the overall impression of the marks derived from viewing the marks in their entireties that is controlling. See *Dan Robbins & Associates, Inc. v. Questor Corporation*, 599 F.2d 1009, 202 USPQ 100 (CCPA 1979). See also *E.I. Du Pont de Nemours & Co. v. Yoshida Int'l, Inc.*, 393 F.Supp. 502, 185 USPQ 597, 603 (EDNY 1975) (overly analytical approach with close attention to specific differences is less important than the overall impression of general similarity.)

We find that when applicant's mark SPLASHER-BLASTER and registrant's mark SPLASH N' BLAST! are properly considered in their entireties and as they would be encountered in the marketplace, the similarities in sound, appearance, meaning and overall commercial impression far outweigh their differences.⁴

The core elements of applicant's and registrant's marks are the same. Both marks consist essentially of two words SPLASH and BLAST. Furthermore, the two words appear in the same order in both marks. As a result, applicant's and registrant's marks look similar and sound similar, with insufficient differences to distinguish them. The N' in registrant's mark would not be given any emphasis, and the exclamation point and hyphen are not in themselves visually memorable. Moreover, there is nothing unusual about adding "er" to the end of a word, and this suffix added to SPLASH and BLAST does not significantly alter the appearance of the basic words or the sound of those words when they are spoken.

Further, in relation to the respective goods, the two marks have similar meanings and create similar overall impressions.

Both marks suggest the play activity of "splashing" and

⁴ Contrary to applicant's contention, there has been no change in the examining attorney's "legal position" regarding the similarities of the marks. Her position was, and still is, that the marks are similar. The examining attorney is not precluded from raising, during prosecution or on appeal, new or different arguments for her position that the marks are similar. What is more, the Board is not bound by the examining attorney's rationale for the refusal but may affirm based on a different rationale. See TBMP §1217.

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"blasting" others with water. While applicant's mark may relate more directly to the device itself, a toy water gun, it is the general nature of the activity suggested by these marks that purchasers are likely to remember when seeing the marks at separate times on these closely related goods, not the specific differences in meaning.

We find that purchasers who are familiar with registrant's SPLASH N' BLAST! inflatable water toys would be likely to believe, upon encountering applicant's mark SPLASHER-BLASTER for closely related toy water guns, that both toys originated with or are somehow associated with or sponsored by the same entity.

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