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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re b. Dazzle, Inc.

Serial No. 76624697

Jonathan E. Grant of Grant Patent Services for b. Dazzle, Inc.

Nora Buchanan Will, Trademark Examining Attorney, Law Office 116
(Michael W. Baird, Managing Attorney).

Before Holtzman, Zervas and Cataldo, Administrative Trademark
Judges.

Opinion by Holtzman, Administrative Trademark Judge:

An application has been filed by b. Dazzle, Inc. to register
the mark SCRAMBLE SQUARES/LITTLE GENIUS ("Squares" disclaimed) in
standard character form for goods ultimately identified as
"puzzles for children" in Class 28.¹

The trademark examining attorney has refused registration
under Section 2(d) of the Trademark Act on the ground that

¹ Application Serial No. 76624697, filed December 17, 2004 based on an
allegation of a bona fide intention to use the mark in commerce.
The application includes a claim of ownership of Registration No.
2808349 for the mark SCRAMBLE SQUARES for "jigsaw puzzles."

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applicant's mark, when applied to applicant's goods, so resembles the mark LITTLE GENIUS (in typed form) shown in the following two registrations for the goods identified therein, as to be likely to cause confusion.

Registration No. 2372130:²

Musical sound recordings and musical video recordings
(in class 9).

Children's books, baby books, children's activity books, calendars, sheet music, song books, picture books, decals, bumper stickers, paper cake decorations, greeting cards, flash cards, playing cards, trading cards, disposable diapers, children's encyclopedias, printed teaching materials for teaching youth development skills, life skills, and problem solving, stickers, temporary tattoos, and wrapping paper (in Class 16).

Registration No. 2344760:³

Clothing, namely, dresses, jumpers, cardigans, suits, overcoats, trousers, jackets, singlets, socks, belts, knit shirts, sport shirts, sweat shirts, turtle necks, T shirts, pants, sweaters, socks, ties, bow ties, shorts, beach visors, beachwear, swimsuits, hats, caps, beanies, blouses, underwear, jackets, pull

² Issued August 1, 2000. We note that a Section 8 affidavit was due to be filed in connection with this registration by August 1, 2006 and that the 6-month grace period of February 1, 2007 for filing the affidavit has passed. However, because Office records do not indicate that the registration has been cancelled, the cited registration must be treated as existing and valid. Ordinarily, under these circumstances, we would suspend action on the appeal pending a determination as to whether the cited registration has been cancelled, which in this case should occur in May 2007. However, because Office records show that a Section 8 affidavit has been filed in connection with Registration No. 2344760, we see no reason to suspend in this case. Instead, the appeal will go forward, but solely on the basis of the refusal as it pertains to Registration No. 2344760.

³ Issued April 25, 2000; Sections 8 and 15 affidavits accepted and acknowledged.

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overs, overalls, sporting shirts, jerseys, and pajamas (in Class 25).

Toys, namely, action toys, bathtub toys, construction toys, pet toys, plush toys, ride-on toys, sandbox toys, squeeze toys, wind-up toys, musical toys, crib toys, crib mobiles, stuffed toy animals, children's multiple activity toys, adults' and children's party games, all types of dolls, doll accessories, climbing units, children's play cosmetics, card games, role playing games, board games and card games for teaching of alphabet, math, music, and language, and, adult and children's sporting goods, namely, playground balls, beach balls, basketballs, baseballs, baseball bats, baseball mitts, ball hoops and fishing rods (in Class 28).

When the refusal was made final, applicant appealed. Briefs have been filed.

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. In re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, however, two key considerations are the similarities or dissimilarities between the marks and the similarities or dissimilarities between the goods. See Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

We turn first to the goods. In our analysis we will focus on a comparison of those of registrant's goods which can be considered closest to applicant's "puzzles for children," namely the toys in Class 28 as identified in Registration No. 2344760.

Applicant argues that its goods, which applicant describes as complex, nine-piece puzzles, "greatly differ" from the "musical toys" in the cited registrations. We are not persuaded by this argument. It is well settled that goods need not be similar or competitive in nature to support a finding of likelihood of confusion. See *Helene Curtis Industries Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618 (TTAB 1989). 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 goods are identified as "puzzles for children." Registrant's goods in Class 28 are not limited to "musical" toys as applicant contends. Rather they include a variety of toys, such as children's multiple activity toys, board games and card games for teaching of alphabet, math, etc., action toys, dolls and stuffed animals. In any event, registrant's various toys, which consist of or encompass toys for children, and applicant's puzzles for children are interrelated products. We note that the examining attorney has submitted a number of use-based third-party registrations showing a mark in each instance that is

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registered for puzzles on the one hand and one or more items in Class 28 of the cited registration. For example, Registration No. 2984266 for the mark CHILD OF MINE lists manipulative puzzles, as well as multiple activity toys, card games and board games; Registration No. 2789687 for the mark FRY FRIENDS lists "educational toys" in the nature of cube, manipulative and jigsaw puzzles, as well as action toys, baby multiple activity toys, board games and card games; Registration No. 2799073 for the mark BONGANTE GARDENS lists puzzles, as well as board games and card games; Registration No. 2974656 for the mark SECRET VINEYARD lists puzzles, as well as plush toys, and board and card games. Although third-party registrations are not evidence that the marks shown therein are in use or that the public is familiar with them, they nevertheless have some probative value to the extent that they serve to suggest that the goods listed therein may emanate from a single source. See *In re Albert Trostel & Sons Co.*, *supra*, and *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467 (TTAB 1988).

Applicant argues that the goods are marketed "in different locales," and that its product is "a complex puzzle for high[ly] intelligent children" which is found in puzzle shops and very high end novelty and gift stores. However, the authority is legion that the question of likelihood of confusion in a Board proceeding must be decided on the basis of the goods set forth in

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the application and registration, without limitations as to the actual nature of the goods, their channels of trade and/or classes of purchasers that are not reflected therein. See *J & J Snack Foods Corp. v. McDonald's Corp.*, 932 F.2d 1460, 1464, 18 USPQ2d 1889 (Fed. Cir. 1991); *Octocom Systems Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 942, 16 USPQ2d 1783 (Fed. Cir. 1990); and *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198 (Fed. Cir. 1983).

Because there are no limitations in either the application or the registration, we must assume that registrant's toys as well as applicant's puzzles would be sold in all the normal channels of trade, including all the usual retail outlets for toys, and that registrant's toys would be directed to all the usual purchasers and users, including the children that would use applicant's puzzles. Purchasers encountering these closely related goods, if offered under similar marks, would naturally assume the goods originated with or are in some way associated or connected with the same company.

We turn then to the marks. Applicant argues that merely because the two marks share a common term does not necessarily render the marks confusingly similar. Applicant points to a number of infringement cases including *McGregor-Doniger Inc. v. Drizzle Inc.*, 599 F.2d 1126, 202 USPQ 81 (2d Cir. 1979); *Vitarroz Corp. v. Borden, Inc.*, 644 F.2d 960, 209 USPQ 969 (2d Cir. 1981);

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E.S. Originals Inc. v. Stride Rite Corp., 656 F.Supp. 484, 2 USPQ2d 1934 (S.D.N.Y. 1987); and Uniroyal, Inc. v. Kinney Shoe Corp., 453 F.Supp. 1352, 202 USPQ 273 (S.D.N.Y. 1978), where in each case, according to applicant, the addition of the manufacturer's name to otherwise similar marks was sufficient to distinguish the marks as a whole. Based on these and other cases, applicant reasons that "the purchasing public recognizes Scramble Squares to be nine squared puzzles emanating from b. Dazzle, Inc."; and that in view of the prominence of the mark SCRAMBLE SQUARES, and the fact that mark "has become synonymous with 'Be Dazzle' [sic] and thus stands in the place of the manufacturer's name," and because "the packaging, lettering, and trade dress for b. Dazzle, Inc.'s [mark and the cited mark] differ so greatly from each other," there can be no likelihood of confusion.

We first need to clarify the proper focus of the analysis. It is well established that, in contrast to an infringement action where the court examines the visual appearance of the marks in the context of actual use, in proceedings before the Board, actual use is not relevant. *Jim Beam Brands Co. v. Beamish & Crawford, Ltd.*, 937 F.2d 729, 19 USPQ2d 1352 (2d Cir. 1991). Thus, none of the infringement cases cited by applicant is particularly helpful to our determination. Moreover, applicant's arguments regarding matter, such as the company name

"b. Dazzle" or trade dress appearing on applicant's packaging, which is not part of the mark applicant seeks to register, are not relevant to the analysis.⁴ The right to register a mark must be determined on the basis of applicant's mark "exactly as shown in the application" regardless of the manner of actual use. *Jim Beam Brands Co. v. Beamish & Crawford Ltd.*, supra.

(distinguishing infringement proceedings from Board proceedings). See also *Bellbrook Dairies, Inc. v. Hawthorn-Mellody Farms Dairy, Inc.*, 117 USPQ 213, 214 (CCPA 1958); and *Blue Cross and Blue Shield Association v. Harvard Community Health Plan Inc.*, 17 USPQ2d 1075, 1077 (TTAB 1990). Consequently, applicant's additional contention that purchasers would somehow associate SCRAMBLED SQUARES with applicant's company name "b. Dazzle" is not only speculative, but it is also irrelevant.

We turn then to a comparison of the marks before us, applicant's mark SCRAMBLED SQUARES/LITTLE GENIUS and registrant's mark LITTLE GENIUS. In determining the similarity or dissimilarity of marks, we must consider the marks in their entireties in terms of sound, appearance, meaning and commercial impression. See *du Pont*, supra. See also *Palm Bay Imports, Inc.*

⁴ Notwithstanding applicant's argument to the contrary in its reply brief at p. 3, applicant has clearly taken the position in its main brief that the actual use and appearance of its SCRAMBLED SQUARES mark as well as its company name on its packaging are factors to consider in determining whether the marks in this case are distinguishable.

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v. *Veuve Clicquot Ponsardin*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005).

The marks SCRAMBLE SQUARES/LITTLE GENIUS and LITTLE GENIUS are similar in sound. The phrase LITTLE GENIUS is registrant's entire mark, and that identical phrase is a major component of applicant's mark. LITTLE GENIUS is also a visually significant component of applicant's mark. The terms SCRAMBLED SQUARES and LITTLE GENIUS do not blend together as a single phrase. The slash line in applicant's mark physically separates the two phrases, giving the term LITTLE GENIUS separate visual prominence in the mark.

In addition, the marks as a whole are substantially similar in meaning and commercial impression. Both marks suggest challenging toys or toys for a highly intelligent child, and that meaning and impression in both marks is conveyed by the term LITTLE GENIUS. The combination of SCRAMBLED SQUARES and LITTLE GENIUS simply suggests one particular type of LITTLE GENIUS toy. Contrary to applicant's contention, this situation is not similar to cases such as *In re Sydel Lingerie Co., Inc.*, 197 USPQ 629 (TTAB 1977) and *In re British Bulldog, Ltd.*, 224 USPQ 854 (TTAB 1984), where the marks created different commercial impressions when applied to the respective goods. For example, in *Sydel*, the Board found that BOTTOM'S UP for men's clothing suggested an association with the drinking phrase, "drink up!" which was

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"hardly the connotation" as applied to underwear. *Sydel*, at 630. There is no such double entendre here. Indeed, there is no meaningful difference in either the connotation or commercial impression.

Furthermore, the overall similarity in the marks is not overcome despite any asserted claim by applicant of long use of SCRAMBLED SQUARES,⁵ or that the term may be distinctive and unique or even the subject of a prior registration. The additional term SCRAMBLED SQUARES would do nothing to prevent consumers from mistakenly assuming that applicant's puzzle is a new or special toy within the line of registrant's LITTLE GENIUS toys, or that applicant's product is licensed or sponsored by, or is otherwise associated with registrant.

In making our determination that the marks as a whole are similar, we note the line of cases holding that the addition of other matter, such as a house mark, primary mark or other material, to one of two otherwise similar marks, will not necessarily be sufficient to distinguish the marks as a whole. See, generally, *First International Services Corp. v. Chuckles Inc.*, 5 USPQ2d 1628 (TTAB 1988); *In re Champion Oil Company*, 1 USPQ2d 1920 (TTAB 1986); *In re Christian Dior, S.A.*, 225 USPQ 533

⁵ Applicant's list of trade shows, which was submitted for the first time with applicant's appeal brief, is untimely evidence and it has not been considered. See Trademark Rule 2.142(d). However, even if this evidence had been considered it would not affect our decision herein.

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(TTAB 1985); and *In re C. F. Hathaway Company*, 190 USPQ 343 (TTAB 1976). The additional matter has been found sufficient to distinguish the marks under circumstances where:

(i) there are recognizable differences in the common term. See, for example, *Rockwood Chocolate Co., Inc. v. Hoffman Candy Co.*, 372 F.2d 552, 152 USPQ 599 (CCPA, 1967) (ROCKWOOD BAG-O-GOLD for candy not confusingly similar to CUP-O-GOLD for candy); or

(ii) the appropriated matter is highly suggestive or merely descriptive or has been frequently used or registered by others in the field for the same or related goods or services. See, for example, *Knight Textile Corp. v. Jones Investment Co.*, 75 USPQ2d 1313 (TTAB 2005); and *In re Merchandising Motivation, Inc.*, 184 USPQ 364 (TTAB 1974) (MEN'S WEAR for a semi-monthly magazine not confusingly similar to MMI MENSWEAR for fashion consulting for men because "MENSWEAR" is merely descriptive of such services); or

(iii) the marks in their entirety convey significantly different meanings or commercial impressions. See, for example, *Lever Brothers Company v. The Barcolene Company*, 463 F.2d 1107, 174 USPQ 392 (CCPA 1972) ("ALL CLEAR!" a play on an expression popularized in connection with air raid drills, not confusingly similar to ALL, both for household cleaning products); or

(iv) the incorporated matter has been so merged with the other matter that it "loses its separate identity." See *In re*

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Champion International Corporation, 196 USPQ 48, 49 (TTAB 1977). See also, for example, Castle & Cooke, Inc. v. Oulevay, S. A., 370 F.2d 359, 152 USPQ 115, 115 (CCPA 1967) (FARENDOLE not confusingly similar to DOLE for related food products; DOLE "is so merged into" FARANDOLE "that it loses its individual identity therein"); and B. Kuppenheimer & Co., Inc. v. Kayser-Roth Corporation, 326 F.2d 820, 140 USPQ 262, 263 (CCPA 1964) (the

mark  for pants is not confusingly similar to SUPP-HOSE for hosiery; stating that the house mark "is completely integrated with the other portion of the mark" and noting that the result might be different where the house mark word is "divisible from the other word or words in the mark.")

None of these circumstances exists here. In this case, there are no differences in the common portions of the marks. They are identical. While LITTLE GENIUS may be suggestive of toys, there is no evidence that the term is highly suggestive of the identified goods or that it has been commonly used or registered by others for similar goods. The commercial impressions created by the two marks are not distinctly different, as we noted above. Nor is LITTLE GENIUS indivisible from SCRAMBLED SQUARES or so merged with SCRAMBLED SQUARES that it loses its identity. In fact, LITTLE GENIUS still remains a

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conspicuous and separately recognizable portion of applicant's mark.

Finally, none of the cases cited by applicant is factually analogous to the present case. For example, in *Vitarroz Corp.* both parties prefaced their marks (BRAVOS for crackers v. BRAVO'S for tortilla chips) with their house marks, whereas in the present case, there are no other portions in registrant's mark to distinguish it from applicant's mark. In *McGregor-Doniger*, the finding of dissimilarity did not turn merely on the presence of the manufacturer's name, but also on the fact that the manufacturer's name was prominently featured and set apart from the product mark, as described by the Court, "in striking plaid letters." Unlike In *E.S. Originals* (ZIPS BY STRIDE RITE v. ZIP 'N GO) and *Uniroyal, Inc.* (KEDS v. KINNEY KIDS), the appropriated term in the present case is identical. Neither these cases nor any of the other cases cited by applicant compel a finding in this case that the addition of matter to these otherwise identical marks is sufficient to avoid a likelihood of confusion.

In view of the foregoing, and because very similar marks are used in connection with closely related goods that are sold in the same channels of trade to the same purchasers, likelihood of confusion exists.

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