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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Plaid Enterprises, Inc.

Serial No. 76978625

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

Tarah Hardy Ludlow, Trademark Examining Attorney, Law Office 110 (Chris A.F. Pedersen, Managing Attorney).

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 "laminated painting teaching guides, rub-on decals, and books in the field of arts and crafts painting," in Class 16 (Serial No. 76978625).[1] Applicant claimed June 15, 1996 as its date of first use anywhere and first use in commerce.

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[1] In response to the likelihood of confusion refusal discussed below, applicant filed a request to divide. The application involved in this appeal is the child application of Serial No. 76283018.

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 laminated painting teaching guides, rub-on decals, and books in the field of arts and crafts painting is likely to cause confusion with the mark ONE STROKE for "paint brushes and paint applicator rollers," in Class 16.[2]

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

[2] Registration No. 2682319, issued February 4, 2003.

characteristics of the goods and differences in the marks").

A. The similarity or dissimilarity of the marks in their entireties 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 entireties as to appearance, sound, 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. *Hewlett-Packard Co. v. Packard Press Inc.,* 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002); *In re Elbaum,* 211 USPQ 639, 640 (TTAB 1981); *In re William Hodges & Co., Inc.,* 190 USPQ 47, 48 (TTAB 1976). Moreover, the greater the degree of similarity between the applicant's mark and the mark in the cited registration, the lesser the degree of similarity between the goods in the application and the cited registration that is required to support a finding of likelihood of confusion. *In re Opus One, Inc.,* 60 USPQ2d

1812, 1815 (TTAB 2001); *In re Concordia International Forwarding Corp.*, 222 USPQ 355, 356 (TTAB 1983).

It is well settled that the goods of the applicant and the registrant do not have to be identical or directly competitive to support a finding that there is a likelihood of confusion. 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 in connection therewith, give rise to the mistaken belief that they emanate from or are associated with a single source. *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785 (TTAB 1993); *In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978).

In this case, applicant's goods are "laminated painting teaching guides, rub-on decals, and books in the field of arts and crafts painting," and the registrant's goods are "paint brushes and paint applicator rollers." The Examining Attorney argued that the goods of the applicant and registrant are related because they "[b]oth involve painting related products."[3]

[3] Examining Attorney's Brief, p. 3.

The Examining Attorney's refusal is based on the well-settled proposition that 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 used in arts and crafts painting. *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 at 640. Thus, the Examining Attorney concluded that paint brushes, including artists' paint brushes used in arts and crafts painting, are related to "laminated painting teaching guides, rub-on decals, and books in the field of arts and crafts painting."

In support of her argument that the paint brushes and paint applicator rollers in the cited registration are related to applicant's "laminated painting teaching guides, rub-on decals, and books in the field of arts and crafts painting," applicant submitted four (4) use-based, third-party registrations comprising paint brushes or applicators

and other arts and crafts equipment.[4] Third-party registrations which individually cover a number of different items and which are based on use in commerce serve to suggest that the listed goods are of a type that may emanate from a single source. *In re Albert Trostel & Sons Co.*, 29 USPQ2d at 1785-1786; *In re Mucky Duck Mustard Co., Inc.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988).

The Examining Attorney also submitted excerpts from six (6) web sites from retailers selling paint brushes as part of an arts and crafts product line.[5] This evidence has limited probative value, however, because we cannot tell whether the products are sold under the same trademark.

Applicant argued, in essence, that applicant's goods and registrant's goods are not related because registrant does not market applicant's goods and that applicant's goods are arts and crafts products while registrant's goods are for interior and exterior house painting. The problem with applicant's argument is that because the registrant's description of goods is not limited to house painting, it comprises all types of paint brushes and paint applicator rollers, including those in the field of arts and crafts.

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[4] We did not consider Registration No. 3236777 for the mark HYDE because it did not include any arts and crafts equipment in the description of goods.

[5] We did not consider the TeachingStuff.com or the A.C. Moore web sites because they did not display the sale of paint brushes.

Without a restriction to the field of house painting, we may not consider applicant's evidence and arguments so restricting the registrant's description of goods. *Squirtco v. Tomy Corp.,* 216 USPQ at 940; *In re Linkvest S.A.,* 24 USPQ2d at 1716; *In re Elbaum,* 211 USPQ at 640.

In view of the foregoing, we find that applicant's "laminated painting teaching guides, rub-on decals, and books in the field of arts and crafts painting" and registrant's "paint brushes and paint applicator rollers" are related products because registrant's paint brushes encompass paint brushes that may used in connection with arts and crafts.

C. <u>The similarity or dissimilarity of likely-to-continue trade channels</u>.

Because there are no restrictions as to trade channels and classes of consumers in the cited registration, we presume that registrant's paint brushes and paint applicator roller move in all normal trade channels for such goods and to all normal classes of purchasers for such goods, including the field of arts and crafts. *In re Elbaum,* 211 USPQ at 640. In addition, the above-noted websites submitted by the Examining Attorney demonstrate that the same online retailers sell paint brushes and other arts and crafts related products. 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.[6] 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 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 actual confusion any probative value: (1) a

[6] Applicant's Brief, pp. 14-15.

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 applicant's products are related to registrant's products, 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 "laminated painting teaching guides, rub-on decals, and books in the field of arts and crafts painting" is likely to cause confusion with the mark ONE STROKE for paint brushes and paint applicator rollers.

Decision: The refusal to register is affirmed.