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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re IQ Hong Kong, Ltd.

Serial No. 77195403

Mark D. Schneider of Gifford, Krass, Sprinkle, Anderson & Citkowski for IQ Hong Kong, Ltd.

Ingrid Eulin, Trademark Examining Attorney, Law Office 111 (Craig D. Taylor, Managing Attorney).

Before Quinn, Rogers and Mermelstein, Administrative Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

IQ Hong Kong, Ltd. filed an application to register the mark SEE for "dynamo powered toys, namely, electronic toy vehicles, insects and animals" in International Class 28.<sup>1</sup>

The trademark examining attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C.

<sup>1</sup> Application Serial No. 77195403, filed June 1, 2007, alleging first use anywhere and first use in commerce on February 1, 2007.

§1052(d), on the ground that applicant's mark, when used in connection with applicant's goods, so resembles the previously registered mark SEE'S for "children's multiple activity toys, and party favors in the nature of small toys"<sup>2</sup> as to be likely to cause confusion.

When the refusal was made final, applicant appealed. Applicant and the examining attorney filed briefs.<sup>3</sup>

We first turn our attention to an evidentiary matter. Applicant submitted with its appeal brief evidence identified as Exhibits A, B, C and D. The examining attorney, in her brief, notes that applicant "has provided copies of new and previously provided evidence." The examining attorney specifically objects to the untimely submission of the new evidence identified as document B2 of Exhibit C, and the documents comprising Exhibit D. Applicant did not respond to the objection in its reply brief.

The objection is well taken in part. Trademark Rule 2.142(d) provides that the record in the application should be complete prior to the filing of an appeal. The Board will ordinarily not consider additional evidence after the

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<sup>2</sup> Registration No. 1549260, issued July 25, 1989; Section 8 affidavit accepted, Section 15 affidavit acknowledged.

<sup>3</sup> The examining attorney's request in her brief to take judicial notice of the dictionary definitions of the term "see" is granted.

appeal is filed. See TBMP §1207.01 (2d ed. rev. 2004). Document B2 of Exhibit C, a photo of packaging for one of applicant's toys, was submitted for the first time with the appeal brief and, thus, is untimely. Exhibit D comprises a TESS printout of several registrations owned by registrant, together with photocopies of some of the registrations. The TESS printout was submitted for the first time with applicant's request for reconsideration; at the time of this earlier submission, the photocopies of the registrations did not accompany the TESS search summary. Inasmuch as the TESS printout was timely introduced, it properly forms part of the record. The photocopies of the registrations, however, do not form part of the record.

Accordingly, the examining attorney's objection to document B2 of Exhibit C and the photocopies of the registrations included in Exhibit D is sustained. We hasten to add, however, that even if this evidence were considered, we would reach the same result on the merits of this appeal.

With respect to the likelihood of confusion issue, applicant asserts that its mark SEE is an acronym for "Safety, Ecology and Economy" inasmuch as its goods do not require batteries. The registered mark SEE'S, according to applicant, is the possessive surname of Mary See, a candy

maker in the early twentieth century. Thus, applicant contends, the marks convey significantly different commercial impressions. Applicant also argues that punctuation is important in distinguishing the marks in terms of appearance, with an apostrophe "S" included in the registered mark. In support of its position applicant submitted excerpts from registrant's website, a TESS printout of certain registered marks of registrant, and an example of applicant's packaging. As to the goods, applicant claims that its goods are not small toys and that the reasonably sophisticated nature of its toys would exclude them from consideration as a party favor.

The examining attorney maintains that the marks are "highly similar" in that the only difference between them is the possessive apostrophe "S" in the registered mark, which does not distinguish them. As to the goods, the examining attorney contends that applicant and registrant both are providing small novelty-type toy items, and that applicant's toys are capable of being used as party favors. In support of the refusal the examining attorney introduced dictionary definitions of the terms "see" and "party favor," and excerpts of applicant's website.

Our determination of likelihood of confusion is based on an analysis of all of the probative facts in evidence

that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

With respect to the marks, we must compare the marks in their entireties as to appearance, sound, connotation and commercial impression to determine the similarity or dissimilarity between them. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). The test, under the first *du Pont* factor, is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods and services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of

trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

The marks SEE and SEE'S look and sound alike. We acknowledge that the marks may convey different connotations in that "see" is a commonly understood and recognized word meaning, among other things, "to perceive with the eye,"<sup>4</sup> whereas the term "See's," given the apostrophe and subsequent "s," may be perceived as the possessive form of the surname "See." We find, however, that any difference is clearly outweighed by the similarities in sound and appearance. The marks engender very similar overall commercial impressions. The possessive form of the registered mark has little, if any, significance for consumers in distinguishing the two marks. See, e.g., *Wilson v. Delaunay*, 245 F.2d 877, 114 USPQ 339, 341 (CCPA 1957); and *Georgia-Southern Oil Inc. v. Richardson*, 16 USPQ2d 1723, 1725 (TTAB 1990).

The similarity between the marks SEE and SEE'S weighs in favor of finding a likelihood of confusion.

Insofar as the goods are concerned, if the marks are the same or almost so as in the present case, it is only

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<sup>4</sup> Consumers are far more likely to ascribe the common meaning to "see" than its acronym meaning invented by applicant. Unless one is looking at the packaging for applicant's toys, a consumer is not likely to even be aware of the acronym meaning suggested by applicant.

necessary that there is a viable relation between the goods and/or services to support a holding of likelihood of confusion. See *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993); and *In re Opus Wine Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001). The issue, of course, is not whether purchasers would confuse the goods, but rather whether there is a likelihood of confusion as to the source of the goods. *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984).

In comparing the goods, we also note that the question of likelihood of confusion must be determined based on an analysis of the goods recited in applicant's application vis-à-vis the goods identified in the cited registration. *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 n. 4 (Fed. Cir. 1993); and *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1783 (Fed. Cir. 1992). Where the goods in the application at issue and/or in the cited registration are broadly identified as to their nature and type, such that there is an absence of any restrictions as to the channels of trade and no limitation as to the classes of purchasers, it is presumed that in scope the identification of goods encompasses not only all the goods of the nature and type described therein, but that the identified goods are offered in all channels of

trade which would be normal therefore, and that they would be purchased by all potential buyers thereof. *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981).

Both the involved application and cited registration include goods that may be broadly characterized as toys. Registrant's toys include small toys used as party favors,<sup>5</sup> while applicant's toys, contrary to the gist of its remarks, likewise include small toys (albeit dynamo-powered) as shown by the specimen of record. Although applicant argues that its toys would not be used as party favors, there is nothing in the record to support this proposition.

As identified, the goods are likely to travel in similar trade channels such as toy stores and the toy departments of mass merchandisers.<sup>6</sup> Further, the same

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<sup>5</sup> The dictionary definitions of record uniformly define "party favor" as "a small gift given to a guest at a party, as a souvenir." See, e.g., [www.dictionary.com](http://www.dictionary.com).

<sup>6</sup> In referencing registrant's web page, applicant contends that registrant is a candy manufacturer, and that registrant's goods would be sold only in registrant's candy stores. The problem with this argument is that there is no such restriction in registrant's identification of goods, and we must presume that registrant's toys would travel in all of the normal trade channels for such goods. Further, applicant may not restrict the scope of registrant's goods through the use of extrinsic evidence. *In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986). "While we are sympathetic to applicant's concern about the scope of protection being given to the cited registrations, applicant is not without remedies...Applicant may, of course, seek a consent from the owner of the cited registrations, or applicant may seek a restriction under Section

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classes of purchasers, including ordinary consumers, would buy the respective goods. Given that the goods include small toys, nothing more than ordinary care would likely be utilized in purchasing decisions.

We conclude that consumers familiar with "children's multiple activity toys, and party favors in the nature of small toys" of registrant, sold under the mark SEE'S, upon encountering applicant's mark SEE for "dynamo powered toys, namely, electronic toy vehicles, insects and animals," are likely to believe that the respective toys originate from or are associated with or sponsored by the same entity.

Lastly, to the extent that any of the points raised by applicant raise a doubt about likelihood of confusion, that doubt is required to be resolved in favor of the prior registrant. *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984).

**Decision:** The refusal to register is affirmed.

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18 of the Trademark Act, 15 USC §1068." See *In re N.A.D. Inc.*, 57 USPQ2d 1872, 1874 (TTAB 2000).