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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

JJI International, Inc.

Serial No. 78679228

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Richard F. White, Trademark Examining Attorney, Law Office 109 (Dan Vavonese, Managing Attorney).

Before Zervas, Cataldo and Taylor, Administrative Trademark Judges.

Opinion by Taylor, Administrative Trademark Judge:

JJI International, Inc. has filed an application to register the mark SPLASHES & SPARKLES (in standard character form) for "[w]holesale distributorships featuring collectibles, novelties, totes, jewelry and gift items."[1]

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when applied to the

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[1] Application Serial No. 78679228, filed July 27, 2005, based on use of the mark in commerce, and alleging first use anywhere and in commerce as of September 20, 2004.

identified services, so resembles the mark SPLASH N SPARKLE (in typed form), previously registered for "paint kits comprised of umbrellas with preprinted line art panels, screen printed ponchos, waterproof glitter paints and brushes,"[2] as to be likely to cause confusion, mistake, or deception.

Applicant has appealed. Applicant and the examining attorney filed briefs. We affirm the refusal to register.

Our determination of the issue of likelihood of confusion is based on an analysis of all the probative facts in evidence that are relevant to the factors set forth in In re E. I. DuPont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, In re Majestic Distilling Company, Inc., 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, 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). See also, In re Dixie Restaurants Inc., 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

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[2] Registration No. 2777256 issued October 28, 2003.

Similarity of the Marks

We consider first whether applicant's mark SPLASHES & SPARKLES and registrant's mark SPLASH N SPARKLE are similar or dissimilar when compared in their entireties in terms of sound, appearance, connotation and commercial impression. The test 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 impressions that confusion as to the source of the goods and/or 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).

Applicant contends that the parties' respective marks have a different sound and commercial impression.

By contrast, the examining attorney contends that the parties' marks are highly similar in appearance, sound and connotation because applicant's mark is merely a variation of the wording "splash and sparkle."

We agree with the examining attorney. The parties' respective marks are substantially similar in appearance and sound and any differences between the two are of little or no

consequence. Specifically, the fact that the registered mark contains the letter "N" and applicant's mark contains an ampersand constitutes a very minor difference, as they are pronounced in nearly the same way. Likewise, the addition of the letters "es" to the word "splash" and the letter "s" to the word sparkle" in registrant's mark does not significantly distinguish the appearance or pronunciation of the marks. While admittedly, the difference between the singular and plural forms creates a slight dissimilarity in appearance and sound, this difference is not significant enough that consumers, with their fallible memories, would be expected to remember these distinctions. See Wilson v. Delauney, 243 F.2d 877, 114 USPQ 339, 341; In re Belgrade Shoe, 411 F.2d 1352, 162 USPQ 227, 227 (CCPA 1969); and In re Pix of America, Inc. 225 USPQ 691, 695 (TTAB 1985).

We are also not persuaded by applicant's contention that registrant's "active" wording evokes a different commercial impression than its "descriptive" wording. Specifically, applicant contends that "[t]he wording SPLASH N SPARKLE in Registrant's mark are active words that imply that a user will have something that sparkles when they are splashing" (ostensibly, when the purchaser is "splashing" paint from the paint kit or "splashing" in the rain with the painted umbrella); whereas applicant's mark SPLASHES & SPARKLES

"appears to be two distinctive and separate descriptive words," and "appears to imply that the various items will make a splash (ie [sic] be a big hit or draw attention) or the items will sparkle." Applicant's brief at 2. It is unlikely that potential consumers will make such a distinction. While some consumers may perceive slight differences in meaning, there is nothing in the record to suggest that consumers upon seeing the registered mark would think "something that sparkles when they are splashing," as opposed to something that sparkles, draws attention or is a big hit. Indeed, the advertising copy associated with registrant's paint kits suggests all of these meanings. The copy states, in relevant part, that "[k]ids can make a splash outside with this colorful kid-sized umbrella." Office Action No. 1, Attachment 8 (reproduced at page 8 of this decision).

Thus, the factor of the similarity of the marks favors a finding of likelihood of confusion.

Similarity of Goods and Services

We now consider the services identified in the application and the goods identified in the cited registration. It is well settled that the question of likelihood of confusion must be determined based on an analysis of the services recited in applicant's application

vis-à-vis the goods recited in the registration. Canadian Imperial Bank v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1783 (Fed. Cir. 1992); and The Chicago Corp. v. North American Chicago Corp., 20 USPQ 2d 1715 (TTAB 1991). Further, it is a general rule that goods or services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that the goods or services are related in some manner or that some circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which would give rise, because of the marks used therewith, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each parties' goods or services. In re Melville Corp., 18 USPQ2d 1386 (TTAB 1991), and the cases cited therein.

The examining attorney contends that the goods are related because

> "applicant's 'wholesale distributorships' which feature 'collectibles, novelties, totes, jewelry and gift items' could feature the goods such as the registrant's 'paint kits comprised of umbrellas with preprinted line art panels, screen printed ponchos, waterproof glitter paints and brushes.' This is because goods such as the registrant's could fit within the

> definition of 'collectibles, novelties or gift items' and sold by applicant.

Examining attorney's brief at (unnumbered) p. 7.

In support of his position that "paint kits" are commonly considered "collectibles," "novelties" and "gift items," the examining attorney has submitted the following definition, in relevant part of "collectible";

> … an item that some people want to collect as a hobby;[3]

the following definitions, in relevant parts, of "novelty":

> 3. an article of trade whose value is chiefly decorative, comic, or the like and whose appeal is often transitory[4]
>
> 3. [a] small mass-produced article, such as a toy or trinket[5];

and the following definition, in relevant part, of "gift":

> [s]omething that it given, esp. to show your affection; a present ….[6]

The examining attorney also submitted printouts from Internet websites to show that retailers consider paint kits as gifts. Relevant portions of wording on these websites are as follows:

> Marine Life Gifts
>
> We have an extensive selection of gifts for the whole family. Items include plush marine life animals, paint kits, Pewter, Sea

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[3] Cambridge Dictionaries Online.
[4] Random House Unabridged Dictionary (Random House, Inc., 2006).
[5] American Heritage Dictionary (4th ed).
[6] Cambridge Dictionaries Online.

life displays, night lights, magnets and much more.

(www.oceantreasures.com);

Umbrella Painting Kit
by Alex

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I bought 2 more! One for my 6 year old[']s birthday and her friend.

(www.amazon.com);

Decorate Your Own Umbrella

Splash n Sparkle
Umbrella Painting Kit

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Please complete the information below if this is a gift:

What should the Gift Card Say?
Should the Gift Card be signed?

(www.MailJust4me.com);[7] and

Cameo Fabric/Craft Paint
KITS/SETS

These make awesome gifts!

(www.cameopaints.com).

Applicant, on the other hand, disputes the examining attorney's assertion that applicant's services are related to registrant's paint kits based on evidence consisting of a few web pages where umbrellas were considered gift items

[7] The copy describes registrant's goods.

because "there are literally thousands of websites where widely diverging goods are offered for sale side by side." Applicant's brief at p. 3. Even if many websites offer a myriad of goods for sale "side by side," the evidence of record sufficiently shows that retailers offer paint kits, such as registrant's, as gift items. Indeed, as shown on the website featuring registrant's goods, www.MailJust4me.com, registrant's paint kits clearly are offered as gift items.

Moreover, in the absence of any exclusions in applicant's application, we must presume that applicant's wholesale distributorship services featuring, among other things, gift items, could feature registrant's paint kits comprising umbrellas with preprinted line art panels, screen printed ponchos, waterproof glitter paints and brushes. Therefore, at the very least, applicant's wholesale distributorship services featuring, in particular, gift items, are related to registrant's paint kits. See e.g., In re United Service Distributors, Inc., 229 USPQ 237 (TTAB 1986)[design for distributorship services in the field of health and beauty aids held likely to be confused with design for skin cream].

Thus, the factor of similarity of the goods and services favors a finding of likelihood of confusion.

Similarity of Trade Channels and Sophistication of Purchasers

Applicant argues that the examining attorney's "comparison" of the goods and services is problematic because registrant's goods and applicant's services do not travel in the same trade channels. Specifically, applicant asserts that registrant's paint kits "clearly would be sold in retail channels that provide craft items as they are clearly intended as a craft activity for children." Applicant's brief at p. 3. Applicant further argues that "… a likely consumer of the Registrant's paint kits would never encounter the Applicant's wholesale merchandise catalog. Similarly, a chain store buyer who was browsing the available wholesale merchandise catalogs would not be confronted with Applicant's retail paint kits." Applicant's brief at p. 4.

We find these arguments unavailing. Although applicant's identification of services is restricted to the wholesale market, registrant's identification contains no restrictions. We therefore must assume that registrant sells its goods in all of the usual trade channels for such goods and to all normal classes of customers therefor. Canadian Imperial Bank of Commerce v. Wells Fargo Bank, supra; Hewlett-Packard Co. v. Packard Press Inc., 281 F.3d

1261, 62 USPQ2d 1001, 1005 (Fed. Cir. 2002); and Toys R Us v. Lamps R Us, 219 USPQ 340 (TTAB 1983). Registrant's trade channels therefore include the same wholesale trade channels as applicant's trade channels and registrant's goods are sold to the same retailers as applicant's services are provided to. That is, the same retailers purchasing gift items from applicant's wholesale distributorships for resale would purchase applicant's paint kits for resale.

All of such overlapping purchasers, particularly those who purchase for "Mom and Pop" operations, are not careful or sophisticated purchasers. However, even if they are sophisticated in their purchasing decisions, they may still be confused because their care or sophistication "does not necessarily preclude their mistaking one trademark for another" and they are not entirely immune from confusion as to source or sponsorship. Wincharger Corp. v. Rinco, Inc. 297 F.2d 261, 132 USPQ 289, 292 (CCPA 1962). See also In re Decombe, 9 USPQ2d 1812, 1814-1815 (TTAB 1988); and In re Pellerin Milnor Corp., 221 USPQ 558, 560 (TTAB 1983).

Because of the overlapping purchasers for similar goods and services, i.e., retailers purchasing gift items, the factor of similarity of trade channels favors a finding

of likelihood of confusion. However, the factor of the sophistication of purchasers is neutral.

Last, to the extent that we have any doubt on the issue of likelihood of confusion, we resolve such doubt in favor of the prior registrant. See TBC Corp. v. Holsa Inc., 126 F.3d 1470, 44USPQ2d 1315 (Fed. Cir. 1997); and In re Hyper Shoppes (Ohio) Inc., 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988).

In view of the foregoing, we conclude that purchasers familiar with registrant's paint kits comprised of umbrellas with preprinted line art panels, screen printed ponchos, waterproof glitter paints and brushes offered under the mark SPLASH N SPARKLE could reasonably assume, upon encountering applicant's substantially similar mark SPLASHES & SPARKLES for related wholesale distributorship services featuring, in particular, gift items, that such services emanate from, or are sponsored by or affiliated with the same source.

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