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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Plásticos y Tecnología, S.A. de C.V.

Serial No. 78897006

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Before Walters, Kuhlke and Ritchie de Larena Administrative
Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

Plásticos y Tecnología, S.A. de C.V. has filed an
application to register the standard character mark BUBBLE
FUN BRUSH on the Principal Register for "tooth brushes," in
International Class 21.¹ The application includes a
disclaimer of BRUSH apart from the mark as a whole.

¹ Serial No. 78897006, filed May 31, 2006, based on an allegation of a
bona fide intention to use the mark in commerce, asserting a claim of
priority under Section 44(d), and based on a Mexican registration under
Section 44(e).

The examining attorney has issued a final refusal to register under Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the mark FUNBRUSH, previously registered for "toothbrushes,"² that, if used on or in connection with applicant's goods, it would be likely to cause confusion or mistake or to deceive.

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

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. See *In re E. I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); and *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in

² Registration No. 2462540 issued June 19, 2001, to Marc Warsowe. [Sections 8 and 15 affidavits accepted and acknowledged, respectively.]

the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); and *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein.

Turning to consider the goods or services involved in this case, we note that the question of likelihood of confusion must be determined based on an analysis of the goods or services recited in applicant's application vis-à-vis the goods or services recited in the registration, rather than what the evidence shows the goods or services actually are. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). See also, *Octocom Systems, Inc. v. Houston Computer Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1992); and *The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ2d 1715 (TTAB 1991). In this case, the goods as identified are identical, i.e., "toothbrushes." Thus, this factor weighs against applicant.

Additionally, inasmuch as the identifications of goods in both the involved application and the cited registrations are not limited to any specific channels of trade, we presume that the goods would be offered in all ordinary trade channels for these goods and to all normal classes of purchasers. See *In re Linkvest S.A.*, 24 USPQ2d 1716 (TTAB

1992). In other words, in view of the identity in the identified goods, we presume that the trade channels and classes of purchasers are also identical. These factors also weigh against applicant.

As we turn to consider the marks, we note the well established principle that "when marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines." *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

The question before us is whether applicant's mark and the registered mark, when viewed in their entireties, are similar in terms of appearance, sound, 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 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). Furthermore, although the marks at issue must be considered in their entireties, it is well

settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

Applicant contends that the marks are not similar because the term BRUSH is descriptive of the goods and FUN is highly suggestive of the nature of the goods and, thus, the registered mark is "not particularly distinctive," while its mark is distinctive (brief, p. 2).³ Applicant also argues that its mark has a different commercial impression because the term BUBBLE is dominant and applicant has disclaimed the term BRUSH.

The registered mark consists of the compound word FUNBRUSH. Applicant's mark consists of the registered mark in its entirety preceded by the word BUBBLE. The fact that applicant has not merged the individual terms FUN and BRUSH to form a compound word is immaterial, as is applicant's disclaimer of the term BRUSH. This portion of applicant's mark is essentially identical to the registered mark. The word BUBBLE modifies the phrase FUN BRUSH and suggests the type of FUN BRUSH, i.e., a fun brush that produces bubbles.

³ While the registered mark may be suggestive, it is entitled to protection. Applicant cannot attack the validity of the registered mark in the absence of a petition to cancel that registration. *In re Calgon Corp.*, 435 F.2d 596, 168 USPQ 278, 280 (CCPA 1971); *In re Peebles, Inc.*, 23 USPQ2d 1795 (TTAB 1992).

As such, the overall commercial impressions of the marks, considered in their entireties, are more similar than dissimilar. When the marks are used in connection with toothbrushes, consumers are likely to believe that applicant's BUBBLE FUN BRUSH is a specific type of registrant's FUN BRUSH. Therefore, we find that the similarities in the marks also weigh against applicant.

When we consider the record and the relevant likelihood of confusion factors, and all of applicant's arguments relating thereto, including those arguments not specifically addressed herein, we conclude that in view of the similarity in the commercial impressions of applicant's mark, BUBBLE FUN BRUSH, and registrant's mark, FUNBRUSH, their contemporaneous use on the identical goods involved in this case is likely to cause confusion as to the source or sponsorship of such goods.

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