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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re *Victory Craft, Inc.*

Serial No. 75/270,441

D. Peter Hochberg, Esq. for Victory Craft, Inc.

Andrew N. Spivak, Trademark Examining Attorney, Law Office
112 (Janice O'Lear, Managing Attorney)

Before *Wendel, Holtzman and Rogers,*
Administrative Trademark Judges.

Opinion by *Rogers,* Administrative Trademark Judge:

Victory Craft, Inc. has filed an application to register VICTORY CRAFT as a trademark in international class 16 for goods identified, following amendment, as "painting sets for painting aircraft models, watercraft models, landcraft novels, models of houses, and models of animals, all made from plastic sheeting."¹

¹ Serial No. 75/270,441, filed April 7, 1997, based on applicant's allegation of a bona fide intention to use the mark in commerce.

The Trademark Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that applicant's mark, if used in connection with the identified goods, will create a likelihood of confusion or mistake among consumers, or will deceive consumers, in view of the prior registration of the mark set forth below for, among other items, "paint sets."²



The Examining Attorney also refused registration on the ground that CRAFT is descriptive in connection with applicant's goods and applicant must insert in the application a disclaimer of exclusive rights in the term. See Sections 2(e)(1) and 6 of the Trademark Act, 15 U.S.C. §§ 1052(e)(1) and 1056.

When the refusal was made final on both grounds, applicant appealed. Both applicant and the Examining

² Registration No. 2,069,527, in international class 16, for various goods, issued June 10, 1997.

Attorney have filed briefs, but an oral hearing was not requested. We affirm the refusal on both grounds.

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). In the analysis of likelihood of confusion presented by this case, key considerations are the similarities of the marks, the virtually identical nature of the goods, and the presumptively similar classes of consumers for these goods. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We begin with the goods, and note that registrant's goods include "paint sets" without restriction as to type or use. Accordingly, we consider this to include paint sets for the specific use that is recited in applicant's identification. Also, in the absence of any restrictions on channels of trade or classes of consumers, we presume that the respective goods move in all normal channels of trade and to all usual classes of consumers therefor. See *CBS Inc. v. Morrow*, 218 USPQ 198, 199 (Fed. Cir. 1983). In short, for our analysis, the goods and their channels of trade are virtually identical.

Turning to the marks, we first consider the registrant's. We acknowledge applicant's argument that the diamond design and alternating large and small letters create "a major overall impression on a purchaser quite different than just the term 'victory'." We, however, agree with the Examining Attorney's argument that words tend to dominate over designs and are used by consumers to call for goods. See *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987). Moreover, a common, geometric shape, particularly one serving as a carrier or background design element--in this case, the diamond carrier employed by registrant--are not usually considered distinctive. See *Guess ? Inc. v. Nationwide Time Inc.*, 16 USPQ2d 1804, 1805 (TTAB 1990). Thus, we find that consumers familiar with registrant's mark are more likely to recall, and to use, the term "VICTORY" than the design elements of the mark. We are not persuaded otherwise by applicant's argument that consumers will be more likely to remember the letters V, T and Y, because of their larger size when compared to the other letters in "VICTORY."

Considering applicant's mark, we find the term "VICTORY" to be the dominant element. By applicant's own admission, it intends the term "CRAFT" to be taken as meaning a vehicle in the sense of an aircraft, watercraft

or spacecraft. Applicant's identification of goods specifies that its paint sets will be used to paint, among other items, models of these types of "crafts." If the term "CRAFT" is perceived as applicant intends it to be perceived, it will be less distinctive than the term "VICTORY." Further, applicant acknowledges that a normal channel of trade for its goods may be handicraft stores, and other stores that sell handicrafts. We agree with the Examining Attorney's argument that consumers encountering applicant's goods in a handicraft store or a handicraft section of a toy store, discount store or department store, may conclude that "CRAFT" means "handicraft." Under either view of the potential import of "CRAFT" for consumers, it will be less distinctive than the term "VICTORY."

Applicant argues that its mark will not be set forth in the particular form of stylization that characterizes registrant's mark. It is well settled, however, that since applicant seeks to register its mark in typed form, without claim to a particular form of lettering, the Board must consider the potential for the mark to be depicted in any common form of lettering, including one similar to registrant's. See *Squirtco v. Tomy Corporation*, 216 USPQ 937, 939 (Fed. Cir. 1983).

In sum, the goods are legally identical and the marks are very similar in their commercial impressions. Where the goods are directly competitive, the degree of similarity between the marks necessary to support a finding of likelihood of confusion is not as great as when the goods are dissimilar. *See Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1773 (TTAB 1992). In view thereof, we find a likelihood of confusion to exist.

We acknowledge applicant's submission, with its brief, of a printout from a search company's database listing numerous "victory" marks in international class 16. Applicant argues that this printout establishes that the term "victory" is weak as a mark in class 16 and, therefore, entitled only to a narrow scope of protection. We note, however, that the Examining Attorney objected to consideration of this list, and the objection is well taken. *See In re Hub Distributing, Inc.*, 218 USPQ 284 (TTAB 1983) (printout of results of a trademark search do not make the registrations themselves of record); see also Trademark Rule 2.142(d) (the record on appeal should be complete prior to filing the notice of appeal). In any event, even if the registrations had been timely and properly made of record, they would not change our decision, for the reasons noted by the Examining Attorney.

Turning to the examining attorney's requirement that applicant enter a disclaimer of "CRAFT," the Examining Attorney's argument is that consumers who see applicant's mark in conjunction with its goods will, without need for surmise or conjecture, immediately recognize that "CRAFT" refers to the fact that applicant's goods are a craft or handicraft item.

Applicant contends otherwise, and argues that consumers will view the term as indicative of the model aircraft, spacecraft, and watercraft that will be painted with applicant's paint sets. Applicant also argues that the dual potential meanings for "CRAFT" indicate that its mark contains a double entendre and is therefore unitary so that a disclaimer should not be required.

We agree with the Examining Attorney that applicant misapplies the double entendre exception to the general requirement that a descriptive term in a mark be disclaimed. That is, the exception only applies when the mark as a whole creates or presents a double entendre, so that individual terms in the mark become unitary and no individual component need be disclaimed. In this case, by contrast, the complete mark does not create a double entendre, and either meaning which could, without need for

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much thought or speculation, be attributed to applicant's use of the term "CRAFT" is descriptive.

The requirement for a disclaimer of "CRAFT" is appropriate and we affirm the refusal of registration in the absence of entry of a disclaimer.

Decision: The refusal of registration is affirmed on both grounds.

H. R. Wendel

T. E. Holtzman

G. F. Rogers

Administrative Trademark
Judges, Trademark Trial
and Appeal Board