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**THIS DISPOSITION  
IS NOT CITABLE AS PRECEDENT  
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Paper No. 20  
HWR

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Wiesner Products, Inc.

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Serial No. 75/348,071

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**Ezra Sutton, P. A.** for Wiesner Products, Inc.

**Michael W. Baird**, Trademark Examining Attorney, Law Office  
109 (Ronald R. Sussman, Managing Attorney).

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Before Cissel, Wendel and Holtzman, Administrative  
Trademark Judges.

Opinion by Wendel, Administrative Trademark Judge:

Wiesner Products, Inc. has filed an application to  
register the mark SPLASH 2000 and design, as depicted  
below, for "footwear."<sup>1</sup>

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<sup>1</sup> Serial No. 75/348,071, filed August 27, 1997, based on an  
allegation of a bona fide intention to use the mark in commerce.

Registration has been refused under Section 2(d) of the Trademark Act on the ground of likelihood of confusion with the following registered marks, the registrations for which are presently all owned by the same entity:

SPLASH for women's apparel - namely sweaters, blouses, pants, shirts, warm-up suits, shorts, tops, and jeans;<sup>2</sup>

for bathing suits;<sup>3</sup>

for purses (Class 18), belts, and hats and visors to be worn on head (Class 25), and earrings of non-precious material (Class 26);<sup>4</sup>

for clothing-namely, T-shirts, shorts, pants and sweatshirts;<sup>5</sup>

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<sup>2</sup> Registration No. 1,163,868, issued August 4, 1981; Section 8 & 15 affidavits accepted and acknowledged, respectively.

<sup>3</sup> Registration No. 1,309,101, issued December 11, 1984; Section 8 & 15 affidavits accepted and acknowledged, respectively. A disclaimer is made of the word SUITS.

<sup>4</sup> Registration No. 1,364,490, issued October 8, 1985; Section 8 & 15 affidavits accepted and acknowledged, respectively. A disclaimer has been made of the letters U.S.A.

<sup>5</sup> Registration No. 1,472,357, issued January 12, 1988; Section 8 & 15 affidavits accepted and acknowledged, respectively. A disclaimer has been made of the word SPORT.

for clothing-namely, T-shirts; tank tops; sweatshirts; children's shorts, pants, skirts, and shirts for children.<sup>6</sup>

The refusal has been appealed and both applicant and the Examining Attorney have filed briefs. An oral hearing was not requested.

We make our determination of likelihood of confusion on the basis of those of the *du Pont* factors<sup>7</sup> which are relevant under the circumstances at hand. Two key considerations in any analysis are the similarity or dissimilarity of the respective marks and the similarity or dissimilarity of the goods with which the marks are being used, or are intended to be used. See *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ 1209 (TTAB 1999) and the cases cited therein.

As for the present goods, the Examining Attorney maintains that the wide variety of clothing covered by the cited registrations and the footwear of applicant are closely related items. In addition, he argues that because the goods of both applicant and registrant are wearing

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<sup>6</sup> Registration No. 1,489,410, issued May 24, 1988; Section 8 & 15 affidavits accepted and acknowledged, respectively. A disclaimer has been made of the word KIDS.

<sup>7</sup> See *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

**Ser No.** 75/348.071

apparel, the goods are likely to travel in the same channels of trade to the same class of purchasers. Applicant has made no argument denying a relationship between the respective goods.

In the past, both our reviewing court and the Board have found a sufficient relationship to exist between shoes and various other items of clothing to support a likelihood of confusion when the same or similar marks are used therewith. See *General Shoe Corp. v. Hollywood-Maxwell Co.*, 277 F.2d 169, 125 USPQ 443 (CCPA 1960)(INGENUE for women's shoes and brassieres); *In re Melville Corp.*, 18 USPQ2d 1387 (TTAB 1991)(ESSENTIALS for women's shoes and for women's pants, blouses, shorts and jackets); *In re Pix of America Inc.*, 225 USPQ 691 (TTAB 1985)(NEWPORTS for women's shoes and NEWPORT for outer shirts); *In re Kangaroos U.S.A.*, 223 USPQ 1025 (TTAB 1984)(BOOMERANG for athletic shoes and BOOMERANG and design for men's shirts).

As previously noted, applicant does not even contend that such a relationship does not also exist here. Furthermore, in the absence of any limitations in the identification of goods in either the application or the cited registrations, we must assume that the goods of both applicant and registrant would travel in all the normal channels of trade and be sold to the normal purchasers for

such goods. See *In re Melville Corp.*, *supra*, and the cases cited therein. Thus, we go forward on the assumption that not only are the goods closely related, but also that the same purchasers would be likely to encounter the goods of both applicant and registrant in the same retail outlets.

Turning to the respective marks, the Examining Attorney's position is that in the cited marks not only is SPLASH the entire mark in one case but also SPLASH is the dominant feature of each of the four other marks, and that SPLASH is also the dominant feature of applicant's mark. Insofar as the registration for the mark SPLASH alone is concerned, the Examining Attorney argues that applicant's mere addition of the number "2000" and a design element to the registered mark SPLASH is insufficient to avoid likelihood of confusion. Although there are additional elements in the remaining marks of registrant, either design features or descriptive, disclaimed wording, the Examining Attorney asserts that these elements play less significant roles in the overall commercial impressions created by the marks than the term SPLASH does.

While marks must be considered in their entireties in determining likelihood of confusion, it is well established that there is nothing improper in giving more or less weight to a particular portion of a mark. See *In re*

**Ser No.** 75/348.071

National Data Corp., 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). Although disclaimed matter cannot be ignored, the fact remains that consumers are more likely to rely on the non-descriptive portion of the mark as an indication of source. See *Hilson Research Inc. v. Society for Human Resource Management*, 27 USPQ2d 1423 (TTAB 1993). Moreover, if the word portion of a mark, rather than the design feature, is more likely to be remembered and relied upon by purchasers in referring to the goods, it is the word portion which will be accorded more weight. See *Ceccato v. Manifattura Lane Gaetano Marzotto & Figli S.p.A.*, 32 USPQ2d 1192 (TTAB 1994).

We agree with the Examining Attorney that the term SPLASH dominates each of the cited marks. Not only is it the entire mark in one instance, it is the only term in the remaining marks which is not disclaimed as descriptive matter. The design features of the marks are not so distinctive as to detract from the primary significance of the term SPLASH in each mark.

We similarly find SPLASH to be the dominant feature in applicant's mark. Although not disclaimed matter, the number "2000" is of minimal significance as an indication of origin, in view of the publicity attached to the millennium. The design features tend to reinforce the

import of the term SPLASH, rather than create any separate distinctive impression. Thus, we consider it highly likely that purchasers would view applicant's SPLASH mark as yet another variation of registrant's SPLASH marks being used for additional clothing items. The overall commercial impressions of the marks are highly similar.

Applicant rests its arguments for registration on the assertion that the term SPLASH has frequently been used in marks in the clothing field. As a result of this dilution, according to applicant, purchasers have become "conditioned" to distinguishing SPLASH- marks on the basis of the second part of the particular mark. To support this contention of third-party use, applicant referred in its brief to a list of nine marks, and the registration numbers therefor, which it had previously submitted.

In response, the Examining Attorney refused to consider these marks, noting, as had earlier been pointed out in the final refusal, that applicant had failed to properly make the registrations of record. Applicant then filed a request for remand in order to make of record copies of the previously listed registrations. On remand, the Examining Attorney again refused to consider the registrations, stating that the "copies" which applicant

had now submitted were also not actual copies of the registrations, but rather "yet another list."

Upon review of the material attached to applicant's request to "insert into record copies of trademark registrations listed in appeal brief and prior amendment," we find the "copies" to be a listing of the registrations from what appears to be a trademark search report, rather than actual copies thereof. In order to make the registrations of record, soft copies of the registrations, or the electronic equivalents thereof, namely, printouts of the registrations from the electronic records of the PTO's data base, must have been submitted. See *In re Smith and Mehaffey*, 31 USPQ2d 1531 (TTAB 1994). Accordingly, the Examining Attorney properly refused to consider the registrations as evidence on applicant's behalf. Any argument of applicant with respect to the weakness of registrant's SPLASH marks in the clothing field is without support.

Furthermore, even if we considered these third-party registrations, they would not constitute evidence of use of the marks shown therein, or that the public is familiar therewith. See *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992). Thus, applicant's argument concerning the public's ability to

**Ser No.** 75/348.071

distinguish between various SPLASH- marks is to no avail.  
In addition, we note that of the nine registrations listed  
by applicant, the list indicates that at least one is  
presently owned by registrant.

Accordingly, in view of the similar commercial  
impressions created by the SPLASH-based marks of registrant  
and applicant and the closely related nature of the  
clothing items of registrant and the footwear upon which  
applicant intends to use its mark, we find that confusion  
would be likely if applicant were to use its mark on the  
goods set forth in the application.

Decision: The refusal to register under Section 2(d)  
is affirmed.

R. F. Cissel

H. R. Wendel

T. E. Holtzman

Administrative Trademark Judges,  
Trademark Trial and Appeal Board

**Ser No.** 75/348.071