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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Manhattan Group, LLC
v.
RMI Bratz, Inc.

Opposition No. 91125296
to application Serial No. 75676054
filed on April 6, 1999

J. Thomas Vitt and Heather D. Redmond of Dorsey & Whitney
LLP for Manhattan Group, LLC.

Patrick N. Burkhardt of Burkhardt & Burkhardt for RMI Bratz,
Inc.

Before Seeherman, Hairston and Chapman, Administrative
Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

RMI Bratz, Inc. has filed an application to register
the mark MISTER SKWISH for "toys, namely plush toys for
children constructed from rectangular bed pillows."¹

Manhattan Group, LLC, d/b/a Manhattan Toy Co. has

¹ Serial No. 75676054, filed on April 6, 1999, which alleges a
date of first use anywhere and a date of first use in commerce
of December 1998.

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opposed registration on the ground that it is the owner of a family of SKWISH marks for toys; that it is the owner of Registration No. 1,7333,286 issued November 17, 1992 (renewed) for the mark SKWISH for "children's multiple activity toys also used by special needs adults," Registration No. 2,271,570 issued August 24, 1999 for the mark SKWISH BUNGEEBALL for "children's multiple activity toy," and Registration No. 2,326,640 issued March 7, 2000 for the mark GROOVEY SKWISH for a "toy, namely a series of grooved wooden rods anchored to each other by elastic cord from end-to-end"; that opposer adopted and used these marks prior to applicant's date of first use; that opposer has expended substantial amounts of money and time advertising and promoting its marks; and that applicant's mark, when used on or in connection with applicant's goods, so resembles opposer's previously used and registered marks SKIWSH, SKWISH BUNGEEBALL and GROOVEY SKWISH, as to be likely to cause confusion.

Applicant, in its answer, has denied the salient allegations of the notice of opposition.

The record consists of the pleadings; the file of the opposed application; the trial testimony, with related exhibits, of opposer's Director of Product Development and Marketing, Kiki Foget; and opposer's

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notice of reliance on portions of the discovery deposition of applicant's president, Susan Strauser, with related exhibits, and applicant's responses to opposer's interrogatories.

Applicant did not take testimony or offer other evidence. Only opposer filed a brief on the case.

The record shows that opposer is in the business of designing and marketing a wide range of children's toys, including nursery collections, activity toys, plush toys, and children's books. Opposer wholesales its products to specialty stores, gift stores, and department stores who sell the products to the end consumer. Most of opposer's retailers are small independent book, toy, and gift shops. Opposer's products are sold in all fifty states.

According to the testimony of opposer's witness, Kiki Foget, in 1998, opposer acquired the company Pappa Geppetto, including its line of activity toys marketed under the marks SKWISH, SKWISH BUNGEEBALL, and GROOVEY SKWISH. Pappa Geppetto first used the SKWISH mark in 1988, the GROOVEY SKWISH mark in 1993, and the SKWISH BUNGEEBALL mark in 1997. Ms. Foget testified that opposer and its predecessor have continuously used the respective marks.

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Opposer advertises and promotes its products by way of product catalogs, sales promotions, and at opposer's website.

The information we have about applicant comes from the discovery deposition of applicant's president, Susan Strauser. According to Ms. Strauser, in November 1999 she wrote and published a children's book entitled Mister Skwish, The Magic Dream Pillow. Along with the book, applicant sells an audiotape of the story. Prior to publishing the book, applicant began selling in November 1998, MISTER SKWISH pillows. The pillow is a plush toy depicting the MISTER SKWISH character from the book. Applicant sells its MISTER SKWISH books, audiotapes and plush toys through specialty gift stores, toy stores and book stores. The MISTER SKWISH plush toys have also been advertised on and sold through at least one retailer's website. Applicant has marketed MISTER SKWISH products by way of letters to retailers, and radio and television advertising.

Opposer introduced status and title copies of its pleaded registrations for the marks SKWISH, SWISH BUNGEEBALL and GROOVEY SKWISH through the testimony of its witness, Kiki Foget. Thus, there is no issue with respect to opposer's priority. King Candy Co., Inc. v.

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Eunice King Candy Co., Inc. v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

We turn then to the issue of likelihood of confusion, including whether opposer has a family of marks characterized by the term SKWISH.

The "family of marks" doctrine has applicability in those situations where, prior to a defendant's first use of its challenged mark containing a particular feature, the plaintiff had established a family of marks characterized by that feature, so that the defendant's subsequent use of its mark containing the feature for goods or services which are similar or related to plaintiff's will cause the relevant purchasing public to assume that defendant's mark is yet another member of the plaintiff's family. See *Blansett Pharmaceutical Co. Inc. v. Carmrick Laboratories Inc.*, 25 USPQ2d 1473 (TTAB 1992); *Econo-Travel Motor Hotel Corp. v. Econ-O-tel of America, Inc.*, 199 USPQ 307 (TTAB 1978); and *Porta-Tool, Inc. v. DND Corp.*, 196 USPQ 643 (TTAB 1977).

It is well settled that merely adopting, using and registering a group of marks having a feature in common for similar or related goods or services is insufficient to establish, as against a defendant, ownership of a family of marks characterized by the feature. Rather, it

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must be demonstrated that prior to the defendant's first use of its challenged mark, the various marks said to constitute the plaintiff's family, or at least a good number of them, were used and promoted together in such a manner as to create among purchasers an association of common ownership based upon the family characteristic. See *J & J Snack Foods Corp. v. McDonald's Corp.*, 932 F.2d 1460, 18 USPQ2d 1889 (Fed. Cir. 1991); *Hester Industries, Inc. v. Tyson Foods Inc.*, 2 USPQ2d 1646 (TTAB 1987); and *Cambridge Filter Corp. v. Servodyne Corp.*, 189 USPQ 99 (TTAB 1975).

In the present case, opposer has made of record a copy of its 2002 product catalog and several advertisements for its SKWISH activity toys. However, the advertisements are undated and the catalog was issued subsequent to applicant's date of first use. Moreover, the evidence hardly shows that opposer has used and promoted the marks SKWISH, SKWISH BUNGEEBALL and GROOVEY SKWISH in such a manner as to create among purchasers an association of common ownership based upon the term SKWISH. These advertisements are for opposer's SKWISH activity toys only; they make no mention of opposer's SKWISH BUNGEEBALL or GROOVEY SKWISH activity toys. As a

result, we find that opposer has not established a family of SKWISH marks.

Thus, the issue of likelihood of confusion must be determined by comparing applicant's mark with each of opposer's registered marks considered individually. Because opposer's SKWISH mark is the most similar to applicant's MISTER SKWISH mark, we turn to a determination of the issue of likelihood of confusion with respect to these marks.

Our determination of likelihood of confusion under Section 2(d) of the Trademark Act 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. In re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). As indicated in Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976), in any likelihood of confusion analysis, two key considerations are the similarity of the goods and the similarity of the marks.

We find that because of the similar commercial impressions of opposer's mark SKWISH and applicant's mark MISTER SKWISH and the close relationship between the respective goods, applicant's use of its mark is likely to cause confusion with opposer's mark.

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With respect to the parties' goods, we note that they are both children's toys. Such goods may be sold in toy stores, gift shops and mass merchandisers and may be purchased by the general public. In fact, the record shows that both parties' goods are sold in gift stores, toy stores and book stores. Also, the children's toys involved herein, namely, activity toys and plush toys, are not very expensive items and may be purchased on impulse, or at least without careful consideration. Under the circumstances, we find that children's activity toys and children's plush toys are closely related, and if sold under the same or similar marks, confusion would be likely to result.

Our consideration of the marks is based on whether applicant's mark MISTER SKWISH and opposer's mark SKWISH, when viewed in their entirety, 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 offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally

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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 entirety, 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 1057, 224 USPQ 749 (Fed. Cir. 1985).

We find that when the marks SKWISH and MISTER SKWISH are considered in their entirety, they are similar in sound, appearance, connotation and commercial impression due to the shared term SKWISH. Obviously, applicant's mark incorporates opposer's SKWISH mark in its entirety and merely adds the title MISTER. Because MISTER is a title, it has less source-indicating significance than the term SKWISH which is the dominant portion of applicant's mark. Consumers are likely to believe that MISTER SKWISH is a variant of opposer's mark SKWISH, and that both marks identify children's toys emanating from a single source.

Accordingly, we conclude that applicant's mark MISTER SKWISH, when applied to children's plush toys, so

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resembles opposer's previously used and registered mark SKWISH for activity toys, as to be likely to cause confusion, or to cause mistake, or to deceive.

In view of our finding, we need not reach the issue of likelihood of confusion between applicant's mark MISTER SKWISH and opposer's marks SWISH BUNGEEBALL and GROOVEY SKWISH.

Decision: The opposition is sustained.