

THIS DISPOSITION IS NOT
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THE TTAB

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PTH

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Circle of Friends, LLC

Serial No. 76430511

Jeffrey K. Joyner of Keats, McFarland & Wilson LLP for
Circle of Friends, LLC.

Fred Mandir, Trademark Examining Attorney, Law Office 105
(Thomas G. Howell, Managing Attorney).

Before Hairston, Rogers and Drost, Administrative Trademark
Judges.

Opinion by Hairston, Administrative Trademark Judge:

Circle of Friends, LLC has filed a trademark
application to register the mark shown below,

**Splish Splash
Swimmers**

for "hair care preparations, namely, shampoo."¹

¹ Serial No. 76430511, filed on July 15, 2002, which alleges
dates of first use of March 1997. The word "SWIMMERS" has been
disclaimed apart from the mark as shown.

The Trademark Examining Attorney has refused registration 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 identified goods, so resembles the mark shown below,



which is registered for "body fragrances,"² as to be likely to cause confusion, mistake, or deception.

When the refusal was made final, applicant appealed. Both applicant and the Examining Attorney have filed briefs, but no oral hearing was requested. 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). 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

² Registration No. 2,239,475 issued April 13, 1999.

in 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).

Considering first the goods, applicant argues that its shampoo and registrant's body fragrances are very different in nature; and that its shampoo is sold in professional salons and is for use on children.

It is well settled that goods need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is sufficient that the goods are related in some manner and/or that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons in situations that would give rise, because of the marks used thereon, to the mistaken belief that they originate from or are in some way associated with the same producer or provider. See *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991); and *In re International Telephone & Telegraph Corp.*, 197 USPQ 910 (TTAB 1978).

Moreover, it has been repeatedly held that in determining the registrability of a mark, this Board is constrained to compare the goods as identified in the application with the goods as identified in the

registration, and not in light of what such goods are shown or asserted to actually be. See *In re Dixie Restaurants Inc.*, 105 F.2d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997); and *Canadian Imperial Bank of Commerce, National Association v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987).

Applying the above principles to the present case, we find that applicant's shampoo and registrant's body fragrances are complementary, related goods. Notwithstanding the different product characteristics, they both are preparations which are typically used as part of a personal grooming regimen. In addition, the Examining Attorney submitted copies of two third-party registrations, which issued on the basis of use of the marks therein in commerce, to demonstrate the relationship between the involved goods, by showing in each instance that a single entity has adopted one mark for shampoo and body fragrances.

Although these registrations are not evidence that the marks shown therein are in commercial use, or that the public is familiar with them, they nevertheless are probative evidence to the extent that they suggest that the goods identified therein are of a type which may emanate from a single source under a single mark. See *In re Albert*

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Trostel & Sons Co., 29 USPQ2d 1783, 1785 (TTAB 1993); and In re Mucky Duck Mustard Co., Inc., 6 USPQ2d 1467, 1470, n.6 (TTAB 1988).

Further, both shampoo and body fragrances are relatively inexpensive and therefore are likely to be purchased on impulse, thus increasing the risk of confusion. See Kimberly-Clark Corp. v. H. Douglas Enter., Ltd., 774 F.2d 1144, 227 USPQ 541, 542 (Fed. Cir. 1985).

With respect to applicant's contention that its shampoo is sold only in professional salons and is intended for use on children, there are no limitations in applicant's identification of goods with respect to channels of trade and type. Thus, for purposes of our likelihood of confusion analysis, we must assume that applicant's shampoo is sold in all channels of trade that would be normal for such goods, including drug stores and mass merchandisers, and that the shampoo would be purchased by all normal purchasers for such goods, namely, ordinary consumers. Further, we must assume that applicant's shampoo is of a type that would be used on adults. In short, the distinctions urged by applicant are immaterial to our determination of the likelihood of confusion issue.

We turn next to a consideration of the respective marks. Applicant argues that the marks are not at all

alike due to the differences in the "unique styles" of the involved marks and the word SWIMMERS in applicant's mark. Further, applicant argues that marks that consist of SPLISH SPLASH are weak.

We agree with the Examining Attorney, however, that when applicant's mark and registrant's mark are each considered as a whole, they are highly similar in sound, appearance, connotation, and overall commercial impression since the dominant literal and source-signifying element of each mark is the distinctive term SPLISH SPLASH.

While applicant's and registrant's marks must be considered in their entireties, including any disclaimed or otherwise descriptive matter, since that is how the marks appear when they are used in the marketplace, it is nevertheless appropriate, for rational reasons, to regard certain features of the marks as being more dominant or otherwise significant, and therefore to give those features greater force and effect. Disclaimed or otherwise descriptive matter, by contrast, is generally viewed as a less dominant feature of a mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751-52 (Fed. Cir. 1985).

In this case, the distinctive term SPLISH SPLASH is the dominant element in each of the respective marks. The

disclaimed word "SWIMMERS" in applicant's mark is descriptive of the intended users of applicant's goods and has little impact on the overall commercial impression created by the mark. Further, the stylized letters in applicant's mark do not make the marks dissimilar.

Also, it is the words SPLISH SPLASH in registrant's mark, rather than the swirl and flower designs, which would be regarded by customers as the principal source-signifying portion of the mark. In a composite mark comprising a design and words, it is the words which are most likely to indicate origin because they would be used to call for the goods. See *In re Appetito Provisions Co., Inc.*, 3 USPQ2d 1553, 1554 (TTAB 1987).

While differences admittedly exist between the respective marks when viewed on the basis of a side-by-side comparison, such a comparison is not the proper test to be used in determining the issue of likelihood of confusion since it is not the ordinary way that customers will be exposed to the marks. Instead, due to the fallibility of memory, it is the similarity of the general overall commercial impression engendered by the marks which must determine whether confusion as to source or sponsorship is likely. The proper emphasis is accordingly on the recollection of the average purchaser, who normally retains

a general rather than a specific impression of trademarks. See e.g., *Envirotech Corp. v. Solaron Corp.*, 211 USPQ 724, 733 (TTAB 1981); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975); and *Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller*, 477 F.2d 586, 177 USPQ 573, 574 (CCPA 1973).

Applicant contends that marks consisting of or containing the words SPLISH SPLASH are weak marks which are therefore entitled to only a limited scope of protection. In its brief on appeal, applicant lists five applications and three registrations for marks consisting of or containing SPLISH SPLASH.

A mere listing of third-party applications and registrations is insufficient to make such evidence of record. Rather, copies of the applications and registrations ordinarily must be submitted to make them properly of record. See *In re Duofold Inc.*, 184 USPQ 638, 640 (TTAB 1974). Moreover, Trademark Rule 2.142(d) provides that the record in an application should be complete prior to the filing of an appeal. Thus, applicant should have submitted copies of the third-party applications and registrations prior to filing its appeal. In view thereof, we have given no consideration to these

applications and registrations in reaching our decision herein.³

In view of the foregoing, we find that purchasers familiar with registrant's body fragrances sold under the registered mark SPLISH SPLASH and design would be likely to believe, upon encountering applicant's mark SPLISH SPLASH SWIMMERS and design on shampoo, that applicant's goods originate from the same source as registrant's goods.

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

³ We should add that even if copies of the applications and registrations had been timely submitted, they would have little probative value on the issue of whether confusion is likely in this case. In re Hub Distributing, Inc., 218 USPQ 284 (TTAB 1993). Third-party applications and registrations are not evidence of use of the marks in such applications and registrations.