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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Elegant Headwear Co., Inc.

Serial No. 76586067

Myron Amer of Myron Amer, P.C., for Elegant Headwear Co., Inc.

Tonia M. Fisher, Trademark Examining Attorney, Law Office 113
(Odette Bonnet, Managing Attorney).

Before Holtzman, Walsh and Cataldo, Administrative Trademark
Judges.

Opinion by Holtzman, Administrative Trademark Judge:

Elegant Headwear Co., Inc. filed an application to register
the mark SPA BABY (in standard character form) for the following
goods, as amended: "cloth bibs, and baby outfits, namely,
rompers and jumpsuits" in International Class 25.¹ The word BABY
is disclaimed.

¹ Application Serial No. 76586067, filed April 8, 2004, based on
applicant's assertion of a bona fide intention to use the mark in
commerce.

The trademark examining attorney has refused registration under Section 2(d) of the Trademark Act on the ground that applicant's mark, when applied to applicant's goods, so resembles the registered mark, shown below, for "infant personal care products, namely, baby soap, baby shampoo, baby lotion, baby oil, and baby powder" in International class 3; and "infant care products, namely, baby washcloths and baby towels" in International class 24, as to be likely to cause confusion.² The word BABY is disclaimed, and the registration states, "The drawing is lined for the color blue."



When the refusal was made final, applicant appealed. Applicant and the examining attorney filed briefs. An oral hearing was not requested.

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, including the similarities or dissimilarities between the marks

² Registration No. 2422700, issued January 23, 2001. In addition, the examining attorney also initially referenced a prior application (Serial No. 78347867) as a potential cite against the present application. That application was subsequently abandoned and the reference was withdrawn.

and the similarities or dissimilarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

Turning first to the marks, the examining attorney argues that applicant's mark is "essentially a transposition of registrant's mark"; that the dominant feature of registrant's mark is the wording "BABY SPA"; that the marks are nearly identical in appearance and sound as both marks share the words BABY and SPA; and that the marks are highly similar in meaning and commercial impression as registrant's mark suggests "a bathing facility for babies" and applicant's mark similarly suggests "a baby that frequents spas for babies."

Applicant maintains that the examining attorney has improperly dissected the marks in determining they are similar instead of considering them as a whole. Applicant argues that the marks are different in sound, appearance, meaning and commercial impression and, in particular, that the transposition of the two words changes the connotation of the mark. Pointing to the definition of "spa," as "a hot tub or similar bathing facility," applicant argues that a spa is a facility for adults and "in actuality does not exist for babies." Applicant concludes that while SPA BABY "is clearly creative and suggestive" since "a baby with parent cannot 'frequent' what doesn't exist," the registered term BABY SPA in contrast is, in

applicant's words, "descriptive to a much greater extent" and "connotes...a non-existent facility, but what the public...might believe is a facility which does exist, because of the existence of spas for adults."³

While marks must be considered in their entirety, it is well settled that "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entirety." See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). When applicant's mark SPA BABY and registrant's mark BABY SPA and design are compared in their entirety, giving appropriate weight to the features thereof, we find that the overall similarities in the marks far outweigh their differences.

Registrant's mark consists in significant part of the wording BABY SPA. It is appropriate to give greater weight to the word portion of the mark because it would be used by purchasers to request the goods and it will therefore make a greater impression on them. See *Ceccato v. Manifattura Lane Gaetano Marzotto & Figli S.p.A.*, 32 USPQ2d 1192 (TTAB 1994); and *In re Appetito Provisions Co.*, 3 USPQ2d 1553, 1554 (TTAB 1987).

³ Applicant also appears to argue that the prior application referenced by the examining attorney in the first Office action was more similar to applicant's mark than the cited registration. That application, now abandoned, has no effect on the question of whether the marks herein are likely to cause confusion.

In addition, the design in the mark, consisting of a simple background carrier and a representation of a small hand print which merely reinforces the meaning of the word "BABY," is far overshadowed by the words BABY SPA.

Applicant has taken this significant element of registrant's mark and simply reversed the order of the words. Transposition of marks may serve to distinguish them if the reversed combination creates a distinctly different connotation and/or is readily distinguishable in sound and appearance. See *In re Wine Society of America Inc.*, 12 USPQ2d 1139 (TTAB 1989); and *In re Wm. E. Wright Co.*, 185 USPQ 445 (TTAB 1975) and cases cited therein.

Here, the words in the marks are identical, and thus, in their reverse order are very similar in sound. The marks are also similar in appearance. The large, "puffy" style lettering of SPA BABY in the registered mark adds to the visual prominence of the words. In addition, applicant's mark, presented in typed form, could reasonably be displayed in the same "puffy" style of lettering thereby increasing the visual similarity of the two marks. See *Phillips Petroleum Co. v. C. J. Webb Inc.*, 442 F.2d 1376, 170 USPQ 35 (CCPA 1971); and *INB National Bank v. Metrohost Inc.*, 22 USPQ2d 1585 (TTAB 1992).

The marks SPA BABY and BABY SPA and design are also substantially similar in meaning and commercial impression. They

both suggest the unusual concept of a "spa" for babies. Although applicant's mark in its transposed form conveys this meaning in a slightly less direct way, it must be remembered that the average purchaser is not infallible in his recollection of trademarks and retains only a general overall impression of marks that he may previously have seen in the marketplace and is prone to transpose marks. See *In re Wm. E. Wright Co.*, supra. It is this unusual image of a "spa" for babies that purchasers are likely to remember when seeing these marks at separate times on similar goods, not the exact order of the words or any slight difference in meaning.

We turn then to a comparison of applicant's goods with the goods in Class 24 of the registration. The examining attorney argues that the respective goods are highly related in that both are used in the care and maintenance of babies; and that these goods are marketed in the same channels of trade to the same consumers. In support of her position, the examining attorney has introduced at least ten use-based, third-party registrations showing a mark which is registered by the same entity for both products and excerpts from seven retail websites that sell both types of products.

In an attempt to distinguish the goods, applicant argues that registrant's goods are "earmarked for 'infants'" whereas applicant's goods are designated for babies and moreover that

registrant's goods are used during bathing of the infant whereas applicant's goods are used for "after-bathing needs" for sleeping, keeping warm and other baby-caring needs. Applicant also argues, relying on *In re Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 828 F.2d 1567, 4 USPQ2d 1141 (Fed. Cir. 1987) and related cases, that the examining attorney bears the burden of proving the facts through "clear evidence," and that the "selected five registrations...fall far short of 'clear evidence' of the public's perception of the source of the goods".

It is well settled that the goods of the applicant and registrant need not be similar or even competitive to support a finding of likelihood of confusion. It is sufficient if the respective goods are related in some manner and/or that the conditions surrounding their marketing are such that they would be encountered by the same persons under circumstances that could, because of the similarity of the marks used thereon, give rise to the mistaken belief that they emanate from or are associated with the same source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993).

Applicant's cloth bibs and baby clothes, and registrant's baby washcloths and baby towels are closely related, everyday baby care products. The third-party registrations submitted by the examining attorney show that the same mark has been registered for towels and/or washcloths, on the one hand, and

cloth bibs, often along with baby clothing such as rompers, on the other. Although the third-party registrations are not evidence of use of the marks in commerce, the registrations serve to suggest that the respective goods are of a type which may emanate from the same source. In re Albert Trostel & Sons Co., supra; and In re Mucky Duck Mustard Co. Inc., 6 USPQ2d 1467 (TTAB 1988). Applicant's distinction between "infants" and "babies" is not a meaningful one and moreover, the respective identifications clearly indicate that both applicant's and registrant's products are intended for babies. Nor is it significant that the respective products are different in kind and used for different purposes. The point is that they are all closely related baby care items which, when offered under similar marks, would be perceived by consumers as emanating from the same source.

In addition, because there are no restrictions or limitations in applicant's or registrant's identifications of goods, we must assume that these closely related baby care products would be sold in the same retail channels of trade to the same ordinary purchasers. The examining attorney's Internet evidence shows that assorted baby care items including cloth bibs, baby towels and baby washcloths, are in fact offered for sale at the same retail websites, sometimes even under the same mark and/or as part of the same set. See, e.g., *www.babygenie.com* ("This Osh Kosh B Gosh assortment...contains a

2 pack bib...a 2 pack hooded towel, and a 6 pack washcloth..."); www.seemorestitches.com ("Personalized Bib/Washcloth Set"); and www.babyant.com (offering "BUMPKINS" "Terry Cloth Bib and Washcloth Set").

Applicant's contention regarding the asserted lack of "clear evidence" regarding the goods is meritless. First, the cases relied on by applicant involved the issue of genericness and the standard of proof required to make that showing, not the issue of likelihood of confusion as we have here. Further, the evidence in this case, which consists of far more than "five registrations" as applicant claims, is sufficient to meet the examining attorney's burden of showing prima facie that the goods are related and sold in the same channels of trade.

In view of the foregoing, we find that a likelihood of confusion exists between applicant's mark SPA BABY and registrant's mark BABY SPA and design for the closely related goods in Class 24 of the registration.

Although registration has also been refused on the basis of Class 3 of the cited registration, as applicant points out, the examining attorney has presented neither evidence nor argument relating to the Class 3 goods. Therefore, we consider the refusal on the basis of Class 3 of the cited registration to be waived.

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Decision: The refusal to register under Section 2(d) based on Class 3 of the cited registration is reversed, and the refusal to register based on Class 24 of the registration is affirmed.