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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Tier One Brands, L.L.C.

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Serial No. 75/702,467

Serial No. 75/980,456

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James W. Armstrong of Sacks Tierney, P.A. for Tier One Brands, L.L.C.

Teresa Rupp, Senior Trademark Attorney, Law Office 106 (Mary I. Sparrow, Managing Attorney).

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Before Hohein, Bucher and Bottorff, Administrative Trademark Judges.

Opinion by Hohein, Administrative Trademark Judge:

Tier One Brands, L.L.C. has filed applications to register the mark "CRAYONS" for "hair conditioners, body lotions, baby oils, suntan lotions, sunscreen, sun block preparations, non-medicated lip balms and liquid soaps for the hands, face and body"<sup>1</sup> and "hair shampoo, [and] bubble bath."<sup>2</sup>

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<sup>1</sup> Ser. No. 75/702,467, filed on May 11, 1999, which is based on an allegation of a bona fide intention to use the mark in commerce.

Registration has been finally refused in each case under Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1), on the ground that, when used in connection with applicant's goods, the mark "CRAYONS" is merely descriptive of them. Specifically, the Senior Trademark Attorney (hereinafter referred to as the Examining Attorney) contends in her brief that such mark "immediately describes a feature of the goods, i.e. the crayon shaped containers in which the goods will be sold."

Applicant, in each case, has appealed. Briefs have been filed, but an oral hearing was not requested. Because the issue of mere descriptiveness is essentially the same in each instance, the appeals are being treated in a single opinion. We reverse the refusal to register in each case.

It is well settled that a term is considered to be merely descriptive of goods or services, within the meaning of Section 2(e)(1) of the Trademark Act, if it forthwith conveys an immediate idea of any ingredient, quality, characteristic, feature, function, purpose or use of the goods or services.

See, e.g., In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir.

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<sup>2</sup> Ser. No. 75/980,456, filed on May 11, 1999, which was created from application Ser. No. 75/702,467 following applicant's submission, on November 7, 2000, of a request to divide such application together with an amendment to allege use of the mark which claims a date of first use anywhere and in commerce, with respect to the above goods, of September 14, 2000.

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1987) and *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). It is not necessary that a term describe all of the properties or functions of the goods or services in order for it to be considered to be merely descriptive thereof; rather, it is sufficient if the term describes a significant attribute or idea about them. Moreover, whether a term is merely descriptive is determined not in the abstract but in relation to the goods or services for which registration is sought, the context in which it is being used on or in connection with those goods or services and the possible significance that the term would have to the average purchaser of the goods or services because of the manner of its use. See *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979). Thus, "[w]hether consumers could guess what the product [or service] is from consideration of the mark alone is not the test." *In re American Greetings Corp.*, 226 USPQ 365, 366 (TTAB 1985).

The Examining Attorney, as support for her position, relies upon the following excerpts from her searches of the "NEXIS" electronic database (emphasis added):

**"Crayons Bubble Bath** from 24/7, Inc. of Scottsdale, AZ, is available in an Apple scented No Tears Formula. **Packaged in a 12 fl. oz. (355ml) crayon-shaped plastic bottle**, the bubble bath may also be used as a liquid soap ... according to labels." -- Product Alert, July 12, 1999;

"Minnetonka also taps one of the other primary sales generators in the segment: play value. The company's Bathtime Playables line features such items as finger paint bubble bath and **soap crayons** with characters from 'Sesame Street' and 'Looney Tunes.'" -- Chain Drug Review, March 15, 1999;

"Crayola has come out with a new set of four **bath crayons** (about \$3.50). They come in red, green, blue and yellow for coloring bathtubs, walls and little bodies - and they wash off in a flash." -- The Gazette (Montreal), December 1, 1994;

"SHAMPOO Creayted [sic] for Kids, new from DeVere Corp., ... is **packaged in an eight-ounce plastic container shaped and decorated like a crayon.**" -- ASAP, March 1987 (article headlined: "The '**Crayon**' Shampoo Targets 3-10 Year Olds");

"Nefertede Sterling, 7, quietly brought in all the money from her **crayon-shaped piggy bank** ...." -- N.Y. Times, November 11, 1995;

"Enlisting the help of teacher Jami Robbins, ... Dyer brought her first offering to school: two goldfish inside a **crayon-shaped aquarium.**" -- Daily Oklahoman; August 23, 1995;

"[T]heir short stop at the 5-foot tall **crayon-shaped container** filled to the brim with jelly beans paid off big time." -- St. Petersburg Times, August 14, 1995; and

"In addition to the clothes, there are shoes, baseball caps, barrettes and bows, watches, suspenders, rain boots, jewelry, backpacks and a wonderful **crayon-shaped purse** that can be worn as a pendant." -- Atlanta Journal & Constitution, September 1, 1991.

According to the Examining Attorney, such evidence "shows that the term 'crayon' is often used to describe goods or containers shaped like crayons" and, thus, "the applicant's mark is not arbitrary as applied to the goods" involved herein but is, instead, merely descriptive thereof.

In particular, the Examining Attorney maintains that applicant is incorrect in arguing that the mark "CRAYONS" does not describe any feature of the applicant's goods, pointing out that:

[W]hen a product is sold in liquid form, as is the case herein, the container for the goods is not separable from the physical product and therefore should be included when deciding whether the mark describes "the goods." Because of the liquid nature of the applicant's goods it would be impossible to use the goods without also seeing and using the container for the goods. This is not a situation where the packaging is discarded shortly after purchase. In the consumer's mind, the container for the goods, and the liquid inside the container, are one in [sic] the same. Therefore, descriptiveness must be determined in relation to the product as a whole.

As authority for her position, the Examining Attorney relies on *In re Serv-A-Portion Inc.*, 1 USPQ2d 1915, 1916 at n. 4 (TTAB 1986), in which the Board, in upholding a requirement for a disclaimer of the term "SQUEEZE N' SERV" as being merely descriptive of goods identified as "ketchup," noted that "whether it is the package itself, or the ketchup, or both which

is (are) squeezed, is immaterial" inasmuch as "it is understood that this kind of food is necessarily sold in packages" and "hence the package is as much a part of the goods as the ketchup." She further contends, in consequence thereof, that:

Likewise, in the present application, the applicant's [goods] ... are necessarily sold in packages. Therefore, the packaging becomes as much a part of the goods as the physical product. There is no reason to separate, for purposes of descriptiveness, the product from the container or packaging. .... Therefore, it is proper under Section 2(e)(1) to consider whether a mark describes any feature of the packaging for the goods.

The Examining Attorney, in view thereof and in light of the evidence set forth above, accordingly asserts that:

[T]he use of "crayon" to describe a package is not unique to the applicant. When confronted with the word "crayons," the public would immediately know the shape of the goods (or packaging for the goods).

As a result, she concludes that "applicant's mark CRAYONS is merely descriptive under Section 2(e)(1) because it immediately describes a feature of the goods, i.e., the crayon shaped containers in which the goods will be sold."

Applicant, on the other hand, while admitting that it intends to package its goods "in containers shaped as crayons," insists that none of the items contemplated in its line of "CRAYONS" products involves "any actual crayons or other implements designed for drawing, writing upon or coloring

bathtubs, walls, children's bodies, or any other surfaces" and that it does not intend to market any of its goods in such a manner. Applicant also urges that the evidence furnished by the Examining Attorney is insufficient to demonstrate that it is a common practice, especially with toiletry items, to market products in containers which are shaped like crayons.

In support thereof, applicant notes that, in response to the initial Office Action, it submitted a declaration by its one of its managers, David Barrick. With respect to the first four of the eight "NEXIS" excerpts set forth previously in this opinion, Mr. Barrick states among other things that he has carefully reviewed such excerpts and has independently investigated the products and companies discussed therein; that the excerpt which refers to "Crayons Bubble Bath from 24/7, Inc. of Scottsdale, AZ" involves the entity which was the predecessor to applicant; that the excerpt which relates to the "Bathtime Playables" line of products from Minnetonka does not involve any products which are sold in crayon-shaped containers; that while such product line "does include a set of three small, unwrapped soap crayons marketed in a rectangular box, that box is clearly labeled as a 'SESAME STREET' product with depictions of Sesame Street characters"; that "[n]one of the goods" identified in applicant's applications "are soap crayons or any other type of crayons"; that the excerpt which pertains to a set of four bath

crayons from Crayola involves goods which were "discontinued in 1995"; that none of the items in applicant's proposed line of "CRAYONS" products includes "any actual crayons or other implements designed for drawing, writing upon or coloring bathtubs, walls, children's bodies, or any other surfaces," nor does applicant intend to market its products in such a fashion; that the excerpt which concerns a shampoo from DeVere Corp. which is packaged in an eight-ounce plastic container shaped and decorated like a crayon involves a company which not only "was dissolved ... on April 20, 1992, and is therefore no longer in business," but such company "actually ceased business in 1987 (prior to its dissolution)"; and that "[w]hile it is true that [applicant] ... currently intends to package its ... products in containers shaped as crayons," to the best of Mr. Barrick's knowledge no other entity "is currently marketing or intending to market children's shampoo, soap, bubble bath and any similar or related products in crayon-shaped containers."

As to the remaining "NEXIS" excerpts, which involve such diverse products as a piggy bank, an aquarium, jelly beans and a purse which can be worn as a pendant, applicant argues that the evidentiary value thereof is lacking inasmuch as none of the products discussed therein "is remotely related to the shampoo, bubble bath, and other goods" identified in applicant's applications and that none of those excerpts indicates that the

products mentioned therein are actually sold in crayon-shaped containers. Applicant maintains, therefore, that there is no evidence in the record that any person, other than applicant, sells or intends to sell shampoo, liquid soaps, bubble baths or similar toiletries in crayon-shaped packaging or containers, or that the use of such packaging or trade dress is common or widespread with regard to any other goods.

Applicant also asserts that the Examining Attorney has utilized a "novel approach" to determining whether the mark "CRAYONS" is merely descriptive by focusing on the packaging for its goods, rather than the goods. Such an approach, applicant contends, "has no support in the case law and otherwise disregards the plainly 'arbitrary' nature of the 'CRAYONS' designation as applied to [applicant's] ... bath, hair and skin care products." Applicant emphasizes, in this respect, that while it concededly intends to market its products in what it characterizes as "fanciful crayon shaped containers," it does not seek registration of a package design or other trade dress. Instead, applicant stresses, it seeks to register "only the unstylized word mark, 'CRAYONS,' as used in connection with those goods" (underlining in original). Citing Webster's New World Dictionary of American English (3rd coll. ed. 1994) at 324, which defines "crayon" as meaning "either (1) 'a small stick of chalk, charcoal, or colored wax, used for drawing,

coloring, or writing,' or (2) 'a drawing made with crayons,'" applicant argues that none of the bath and skin care products set forth in its applications "have any association with these generic meanings of the word 'crayons,' nor are any of those products intended to be used as an implement for drawing, writing upon or coloring bathtubs, walls, children's bodies or any other surfaces." Applicant thus insists that its use of the word "crayons" in the marketing of its products "clearly qualifies as 'arbitrary'" rather than merely descriptive use.

Even more importantly, according to applicant, the Examining Attorney did not cite any authority and, "despite a diligent search," applicant asserts that it was unable to find any cases, to "support the proposition that a word mark may be found 'merely descriptive' simply because that mark may describe the shape of the packaging for the referenced goods, but not the goods themselves" (underlining in original). Applicant asserts that the finding of mere descriptiveness in *In re Serv-A-Portion Inc.*, supra, "was not based upon the shape or any other non-functional design elements of the ... [ketchup's] packaging, but instead upon the fact that 'SQUEEZE N' SERV' directly described how the product in question was used." According to applicant:

To extend trademark protection to such a designation would therefore have foreclosed competitors from also informing potential purchasers how their similar products were used--the central policy reason for denying

such protection to truly descriptive marks (absent proof of secondary meaning). .... In stark contrast, the shape of [applicant's] ... "CRAYONS" packaging does not, to any extent, prevent competitors from describing their bath, hair and skin care products to consumers, nor is the shape of that packaging necessary for the function of [applicant's] ... products. In other words, while those products do require a container to hold them (as do most, if not all commercially distributed goods), the use of [applicant's] ... products does not require them to be dispensed from a crayon-shaped container, as opposed to any other shape.

Applicant concludes that, "far from disqualifying a trademark on descriptiveness grounds due to the owner's use of clever and suggestive packaging, ... such [inherently] distinctive packaging 'serves the public purpose' by 'reinforcing' the basic source-identifying purpose of trademark protection." Applicant insists, therefore, that the mark "CRAYONS" is arbitrary, and hence is registrable for its goods without a showing of acquired distinctiveness pursuant to Section 2(f) of the Trademark Act, 15 U.S.C. §1052(f), notwithstanding that it intends to market its products in packaging or containers which resemble crayons.<sup>3</sup>

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<sup>3</sup> Applicant also argues in its brief that it "cited a number of Federal trademark registrations in its response to the Examiner's initial refusal to register 'CRAYONS' as examples of designations that have been granted trademark protection even though they clearly describe the shape of the containers used for the registrant's [sic] goods," but that "[t]he Examiner ... failed to address any of these citations in her final refusal of registration." While the Examining Attorney, in her brief, asserts that "merely listing the Registration Numbers for third[-]party registrations does not make these registrations part of the record" and that the "minimum acceptable evidence of third[-]party registrations would be soft copies of these registrations," we

Upon consideration of the evidence and arguments, we agree with applicant that the mark "CRAYONS" is not merely descriptive of its various goods, even if such goods are packaged in containers designed to resemble the appearance of crayons. Literally, as applicant has noted, none of its toiletry products, nor any of the containers for such items, is a crayon. As is plain from the previously indicated definition

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note that such objections were never raised previously (at a stage where applicant procedurally could have rectified any deficiencies in its proffered evidence by properly submitting either copies of the actual registrations or the electronic equivalents thereof, i.e., printouts of the registrations which have been taken from the U.S. Patent and Trademark Office's own computerized database, see, e.g., In re JT Tobacconists, 59 USPQ2d 1080, 1081 at n. 2 (TTAB 2001)) and thus are considered to have been waived. Moreover, although the Examining Attorney goes on in her brief to state that "these registrations, even if properly made of record, are not persuasive" because, *inter alia*, some of the third-party registrations referred to by applicant either issued on the Supplemental Register or registered on the Principal Register pursuant to the provisions of Section 2(f) of the statute, the copies of such registrations, which the Examining Attorney attached to her brief as support for her assertions, cannot be considered inasmuch as such evidence is untimely under Trademark Rule 2.142(d). In any event, we find that applicant's list of third-party registrations is of no probative value. This is because there is no indication that the marks which are the subjects thereof issued solely on the Principal Register, without resort to the provisions of Section 2(f), and hence were not regarded as merely descriptive. In addition, there is no evidentiary support for applicant's assertions that the associated goods have in fact been marketed in containers or other packaging which is shaped like the marks would respectively seem to indicate (e.g., "MRS. BUTTERWORTH'S" for "table syrup, sold in bottles shaped like 'Mrs. Butterworth'"; "BARREL OF MONKEYS" for "parlor game of skill and balance, sold in barrel-shaped containers"; "THE ONE IN THE WIDE MOUTH JUG" for "mounting and framing adhesives, sold in wide-mouth jugs"; "BILLY BEE" for "honey, sold in bee-shaped bottles"; "GARBAGE PAIL KIDS" for "candy and chewing gum, sold in garbage pail-shaped containers"; "BUBBLE TAPE" for "chewing gum, sold in package shaped like a carpenter's measuring tape"; and "TOILET DUCK" for "toilet cleaning preparations, sold in bottles with duck-shaped necks").

of the word, a crayon is a solid object consisting of "a small stick of chalk, charcoal, or colored wax, used for drawing, coloring, or writing." Applicant's word mark "CRAYONS," therefore, clearly is an arbitrary mark with respect to its goods, none of which is a "soap crayon" or other solid object, and we find that such mark is likewise arbitrary, on this record, when applicant's goods are packaged in containers which resemble crayons.

In particular, while we do not disagree with the Examining Attorney that a term which immediately and specifically describes the container or other trade dress in which a product is packaged (or the theme or motif utilized in providing a service) may indeed be merely descriptive of the goods (or services), see, e.g., J. Kohnstam, Ltd. v. Louis Marx & Co., Inc., 280 F.2d 437, 126 USPQ 363, 364 (CCPA 1960)<sup>4</sup> and In

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<sup>4</sup> Interestingly, neither the Examining Attorney nor applicant appears to be aware of (and hence has not discussed) such case, which holds among other things that because the word "matchbox" is descriptive of a box which is made to look as much like a matchbox as is practicable, the mark "MATCHBOX SERIES" is merely descriptive of a series of toys sold in simulated matchboxes. Specifically, in finding that "[t]he merchandise in the form in which appellant puts it on the market is aptly described as a series of matchbox toys," id., the Court reasoned that:

"Matchbox" is, of course, a common English word defined by Webster's Dictionary as "A box for holding matches." A matchbox is still a matchbox if the matches are removed and a toy is put in their place. We think the word is just as descriptive of a box which is made to look as much like a matchbox as is feasible so that the toys packaged in it can appropriately be designated as a "Matchbox Series" of toys.

re Ruffin Gaming, LLC, \_\_\_ USPQ2d \_\_\_, \_\_\_, 2002 TTAB Lexis 542 at 18-25, 2002 WL 1941140 at 12-17 (TTAB 2002),<sup>5</sup> this record does

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Id. While, at first glance, such case might therefore seem to support the Examining Attorney's position that a mark which describes the shape of a product's container is merely descriptive of a feature of the product, we find that it is distinguishable from the appeals herein. This is because the word "matchbox," unlike the term "crayons," denotes a specific kind of container or receptacle used as packaging. As such, the mark "MATCHBOX SERIES" merely describes a series of toys (or, for that matter, any other goods) packaged in a container which is commonly known as a matchbox or one which is made to look as much like a matchbox as is possible. The word "crayon," in stark contrast, does not connote a receptacle or container of any type; instead, as previously pointed out, it designates a type of solid object consisting of "a small stick of chalk, charcoal, or colored wax, used for drawing, coloring, or writing." Thus, as noted above, the mark "CRAYONS" is arbitrary when used in connection with applicant's toiletry products (none of which, to reiterate, is any kind of a crayon). Such a word mark does not lose its arbitrary nature simply because applicant has chosen to play up or reinforce its "CRAYONS" mark by packaging its goods in containers which outwardly resemble crayons.

<sup>5</sup> We recognize that such case, in which the term "FISHERMAN'S WHARF" was held to be merely descriptive of "entertainment services, namely, live performances by a musical band, amusement arcades, casino services, theatrical performances, vaudevilles and comedy performances as well as hotel services, restaurant services, nightclub services café services and providing convention facilities," was not decided until after the Examining Attorney submitted her appeal brief in each of these appeals. It is instructive, nonetheless, to note that the Board therein, rather than laying down a *per se* rule that any term which arguably could be used to designate thematically the trade dress of a product or the décor of an entertainment facility is therefore merely descriptive, announced the following as the test for whether such a term should be considered merely descriptive (footnotes omitted):

As a general proposition, we note that a term which otherwise would be considered an arbitrary, fanciful or suggestive mark, when used in connection with goods or services to identify and distinguish the source thereof, does not lose such characterization or status, and become merely descriptive of the goods or services, simply because the term could literally designate a theme of the goods or services, e.g., the trade dress of a product or the decor of an entertainment facility, when so used. That is, just

not support such a finding as to the word mark "CRAYONS." As the Barrick declaration furnished by applicant makes clear, essentially the only users of crayon-shaped containers in connection with toiletry products have been applicant and its predecessor, 24/7, Inc. The single other reported user of a

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because such a term could thematically describe a trade dress or decor, that does not make the term merely descriptive if the trade dress or decor is arbitrary, fanciful or suggestive, but if the trade dress or decor is descriptive, then a term which describes such thematic manner of use is merely descriptive. [Citations omitted.]

Each of the foregoing cases, of course, was determined on its own facts and, in particular, the significance which each of the subject marks had to the relevant public encountering the terms at issue in connection with the respective services. This appeal, however, is most analogous to [In re Busch Entertainment Corp., 60 USPQ2d 1130, 1133-34 (TTAB 2000),] the ... case cited by the Examining Attorney and from which, for present purposes, the proposition may be extracted that, where the record reveals that it is the intent of an applicant and a practice or trend in the trade or industry to replicate or otherwise simulate the ambiance or experience of a place (in whole or meaningful part), then a term which names the place, when used as a theme of the goods or services, is generally considered to be merely descriptive of a significant feature or characteristic of the goods or services. See In re Busch Entertainment Corp., supra [in view of evidence demonstrating a trend in theme park industry of recreating the culture or history of foreign lands and showing that "EGYPT" is the name of the ninth land in the applicant's African-themed amusement park, "EGYPT" found merely descriptive of amusement park services inasmuch as term indicates subject matter or country being imitated, at least in part, and would be so recognized by consumers; as such, term identifies only an Egyptian theme or motif rather than the source or origin of the services].

In re Ruffin Gaming, LLC, supra. Although *Ruffin Gaming* involved the issue of the mere descriptiveness of a term which named a place rather than an object, the same rationale should apply herein.

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crayon-like container for a toiletry product, DeVere Corp., at one time apparently did market shampoo but is no longer in business. According to Mr. Barrick, such firm not only was formally dissolved on April 20, 1992, but it actually ceased business some five years prior thereto in 1987. Furthermore, as applicant correctly points out, with the exception of a third party's soap crayons, none of the remaining product references in the record involves goods such as shampoo, bubble bath or other toiletry items, and none of the diverse goods mentioned, ranging from soap crayons and bath crayons to a piggy bank, an aquarium, jelly beans and a purse which can be worn as a pendant, are actually sold in crayon-shaped containers. While, as to the last four of the goods just noted, three of those products were described as crayon-shaped, the fourth product, namely, jelly beans, was simply reported to have been displayed in a crayon-shaped container. All of such relatively few references, in any event, are to single and sporadic accounts or reports in the press.

Consequently, while the Examining Attorney, citing *In re National Shooting Sports Foundation, Inc.*, 219 USPQ 1018, 1020 (TTAB 1983), properly notes that, even if applicant is or intends to be the first to use the term "CRAYONS" in connection with its goods, that fact does not justify registration if the term is merely descriptive, applicant is nonetheless correct

that the evidence of record is insufficient to demonstrate that crayon-shaped containers, packaging or other product trade dress is common or widespread. Such evidence, likewise, is inadequate to demonstrate that, as argued by the Examining Attorney, "the term 'crayon' is *often* used to describe goods or containers shaped like crayons" (emphasis added) and, thus, "the applicant's mark is not arbitrary as applied to the goods" involved herein. The evidence of record, simply stated, fails to establish that it is a practice or trend in the toiletries trade to package such goods in crayon-shaped or crayon-like containers or other trade dress resembling crayons, so that consumers of those products would regard the word "CRAYONS" as merely describing a significant characteristic or feature of the goods. Instead, as explained above, such term is an arbitrary mark for applicant's bath, hair and skin care products, with the marketing of its goods in containers which resemble crayons serving to reinforce or underscore the novelty inherent in the use of the word "CRAYONS" as applicant's mark.<sup>6</sup>

In addition, as to the Examining Attorney's contention that because the term "CRAYONS" merely describes the crayon-like containers in which applicant packages or intends to package its

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<sup>6</sup> Clearly, if applicant had applied to register a crayon-shaped or crayon-like container as a mark for its goods, the use of such novel packaging as a mark would be as arbitrary and inherently distinctive with respect to its products as is the use of the word mark "CRAYONS."

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goods, such term merely describes a significant characteristic or feature of applicant's goods, it is important to keep foremost in mind that applicant's goods are various bath, hair and skin care products, none of which is a kind of crayon (e.g., a soap crayon), and that its goods specifically are not containers even though, due to the liquid nature of the goods, they must be packaged in some sort of a container for marketing purposes. We concur with applicant that a careful reading of the case relied upon by the Examining Attorney, *In re Serv-A-Portion Inc.*, supra, indicates that the holding of mere descriptiveness therein "was not based upon the shape or any other non-functional design elements of the ... [ketchup's] packaging, but instead upon the fact that 'SQUEEZE N' SERV' directly described how the product in question was used." As stated by the Board, after noting the immateriality of whether it was the package, the product, or both which is squeezed:

In the case before us, one word (SQUEEZE) merely describes a means of opening the package, by squeezing, and the other (SERV) one of its purposes, to serve the ketchup, and we find nothing incongruous or distinctive about the combination. Accordingly, ... we conclude that SQUEEZE N' SERV is merely descriptive of appellant's goods ....

*In re Serv-A-Portion Inc.*, supra at 1916-17.

The Examining Attorney's attempt to find the mark "CRAYONS" to be merely descriptive of the containers for

applicant's goods simply because applicant intends to market its toiletry products in crayon-like packaging is, in essence, "a variation of the theory that a word, name, symbol, or device which identifies a class of goods is a generic type of identification and a unique product or product design is a class unto itself." In re DC Comics, Inc., 689 F.2d 1042, 215 USPQ 394, 403 (CCPA 1982) (Nies, J., specially concurring). The Examining Attorney's categorizing of applicant's goods under the rubric of toiletry products sold in crayon-shaped or crayon-like containers is consequently analogous to the situation in *DC Comics*, 215 USPQ at 395, in which the Court reversed the Board's affirmance of refusals to register, on the grounds of descriptiveness and functionality, with respect to marks consisting of an applicant's "particular drawings of three characters, [known as] Superman, Batman and Joker," which were sought to be registered as trademarks for "toy dolls."

Specifically, the Court therein, among other things, was careful to point out that (footnote omitted):

Moreover, appellant cannot be considered to have created a new product category, the rubric of which (for example, "Superman dolls") should remain available for all to employ in commerce, simply by having originated and promoted certain unique characters and products, related to them. The registration of appellant's drawings as trademarks for toy dolls would not diminish the store of common words and visual representations which appellant's

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competitors and the general public alike may freely use. Hence, appellant would not be in a position to impair competition in the sale of toy doll figures, nor could it deprive the public of access to imagery associated with toy dolls generally or "super hero" or villain figures in particular.

215 USPQ at 397. The same is likewise true herein with respect to applicant's use of crayon-like containers in connection with the marketing of its "CRAYONS" brand of toiletries. As Judge Nies, specially concurring, additionally observed:

No principle of trademark law requires the imposition of penalties for originality, creativeness, attractiveness, or uniqueness of one's product or requires a holding that the name arbitrarily selected to identify the product, or a unique product design of a product, cannot also function as an identification of source. ....

215 USPQ at 403.

**Decision:** The refusal under Section 2(e)(1) is reversed in each case.