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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 Dr. Mitchell Swartz

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Serial No. 75/679,267

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Dr. Mitchell Swartz, pro se.

Brian A. Rupp, Trademark Examining Attorney, Law Office 105  
(Thomas G. Howell, Managing Attorney).

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Before Quinn, Bottorff and Drost, Administrative Trademark  
Judges.

Opinion by Drost, Administrative Trademark Judge:

On April 12, 1999, Dr. Mitchell Swartz (applicant)  
filed an application to register the mark SUN-BUG (in typed  
form) for goods ultimately identified as "sun screen  
containing insect repellent" in International Class 3.<sup>1</sup> The  
application, as amended, alleges a date of first use of  
July 20, 1975, and a date of first use in commerce of July  
1975.

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<sup>1</sup> Serial No. 75/679,267.

The Examining Attorney finally refused to register the mark under Section 2(d) of the Trademark Act because of a registration of the mark SUN & BUG STUFF (in typed form) for "insect repellent containing sunscreen" in International Class 5.<sup>2</sup> 15 U.S.C. § 1052(d). The Examining Attorney determined that there would be a likelihood of confusion when the marks SUN-BUG and SUN & BUG STUFF are used on the identified goods.

After the Examining Attorney made the refusal final, this appeal followed. Both applicant and the Examining Attorney filed briefs. An oral hearing was held on February 5, 2002.

The Examining Attorney's position is that the "marks of the applicant and the registrant are nearly identical and the goods are closely related such that there exists a likelihood of confusion." Examining Attorney's Br. at 2. The Examining Attorney found that SUN-BUG and SUN & BUG are nearly identical in sound, appearance and meaning and that they are the dominant portions of the marks. Furthermore, the term "stuff" in the registrant's mark was determined to be a common term that would not serve to convey a different

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<sup>2</sup> Registration No. 1,726,983 issued on October 27, 1992. Section 8 and 15 affidavits have been accepted and acknowledged, respectively.

commercial impression when it was combined with the SUN and BUG term. The Examining Attorney determined that "sunscreen containing insect repellent" and "insect repellent containing sunscreen" "are extremely similar." Examining Attorney's Br. at 4. The Examining Attorney also provided evidence that the goods are inexpensive and noted that the identified goods are not limited as "to their nature, type, channels of trade or classes of purchasers."

Id.

Applicant presents numerous arguments to support his position that there is no likelihood of confusion. Arguing that the marks are different in sound, appearance, and meaning, applicant emphasizes the presence of a hyphen in its mark and the ampersand with a space on each side of it and the additional word "stuff" in registrant's mark. Applicant relies on an acoustic signal diagram and a fast fourier transform (spectrogram) to show that the marks do not sound alike. Applicant submits that:

SUN-BUG has an ultra-short pronunciation and swift cadence - characteristic of the mark. Thus, the Applicant's mark is short, precise, accurate, clear, and unambiguous - exactly like the piercing insect-sting and lancing solar irradiation from which the product protects. By contrast, the registered mark is more complicated, having a "beat" and ending in involvement of a "stuff" which has its own disparate connotations.

Applicant's Br. at 6.

Applicant also argues that the common elements are weak, descriptive and generic; the purchasers are sophisticated and careful; and that the products are expensive.

Considering the record and the arguments of the Examining Attorney, we agree with the Examining Attorney that confusion is likely and we, therefore, affirm the refusal to register under Section 2(d) of the Trademark Act. 15 U.S.C. § 1052(d).

Determining whether there is a likelihood of confusion requires application of the factors set forth in In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 1361, 177 USPQ 563, 567 (CCPA 1973). In considering the evidence of record on these factors, we must keep in mind that "[t]he fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences 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).

Starting with the goods of the application and registration, we must consider the goods as they are identified in the application and registration.

"Likelihood of confusion must be determined based on an analysis of the mark applied to the ... services [or goods]

recited in applicant's application vis-à-vis the ... services [or goods] recited in [a] ... registration, rather than what the evidence shows the ... services [or goods] to be.'" In re Dixie Restaurants, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997) (punctuation in original), quoting, Canadian Imperial Bank of Commerce v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1816 (Fed. Cir. 1987). See Octocom Systems, Inc. v. Houston Computers Services Inc., 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed"). See also Paula Payne Products v. Johnson Publishing Co., 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) ("Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods").

We must presume that the goods move through all normal channels of trade for such products. Applicant's goods are "sun screen containing insect repellent" while registrant's goods are "insect repellent containing sunscreen." While

the goods are not identified identically, it is clear that the goods would be used for the same purpose: to prevent insect bites and sunburn. We agree with the Examining Attorney that the goods are highly related. They are likely to be sold in the same stores to the same purchasers, i.e. a purchaser who needed protection from insect bites and sunburn.

While applicant and the Examining Attorney do not agree on whether the goods are expensive, this appears to be a semantic argument. The evidence submitted by the Examining Attorney certainly supports the finding that the goods as identified in the application and registration are common consumer items that would not be considered major purchases by most consumers. See, e.g., Drugstore.com (Off Skintastic "Insect Repellant with Sunscreen, SPF 30 Lotion" 3 oz. \$5.99); (California Baby "Citronella Bug Blend Sunscreen, SPF 30+" 2.9 oz. \$11.99). See Houston Chronicle, July 3, 1997, p. 3 ("Do not buy expensive sunscreens; they are no more effective than inexpensive ones"); *Dallas Morning News*, May 5, 1997, p. 3C ("Don't base your decision on price or brand - inexpensive sunscreens will do the job if they have the right ingredients"); *Boston Globe*, October 14, 1993, p. 3 ("The malignancy is skin cancer, and the inexpensive preventative

is sunscreen with a skin protection factor (SPF) of at least 17"). The evidence shows that insect repellent with sunscreen, bug blend sunscreen, sun block, and sunscreen all retail in the \$5.99 to \$11.99 price range. While some sunscreen containing insect repellent is more expensive than others, there is no evidence to suggest that sunscreen as a class is a major purchase for consumers. In re Oy Wilh. Schauman Ab, 189 USPQ 245 (TTAB 1975) (Yachts are expensive purchases).

Applicant also argues that the consumers are sophisticated purchasers. Applicant relies heavily on an article that says that: "The average beachgoer is far more sophisticated about sunscreens now than that day in 1957 when Jacksonville Beach lifeguard George Patrinely convinced those three women that beer's the best tanning agent." Jacksonville.com. The fact that modern purchasers of sunscreen are conscious of the SPF factor of sunscreen hardly establishes that they are sophisticated purchasers to the extent that they can distinguish very similar trademarks. See In re Bercut-Vandervoort & Co., 229 USPQ 763, 765 (TTAB 1986) (When both parties sell wine, confusion is measured by purchasers of "not only expensive wines sold to careful, discriminating wine connoisseurs through fine wine and spirits stores but also less

expensive wine sold to ordinary consumers through liquor stores, grocery stores, supermarkets, drug stores and the like"); In re Graphics Technology Corp., 222 USPQ 179, 181 (TTAB 1984) ("[W]hatever the situation may have been a decade or a generation ago, today's computer buyers cannot be uniformly classified as a technically adept or highly discriminating purchaser group"). We have no basis to find that purchasers of sunscreen with insect repellent are any more sophisticated than the purchasers of wine or personal computers.

As we discussed earlier, we must consider the goods as they are described in the registration and application. There are no restrictions on the goods in these identifications of goods. Nothing in these identifications of goods limits the goods to any specific channels of trade, purchasers, or type of sunscreen or insect repellent.<sup>3</sup> Therefore, insect repellent containing sunscreen and sunscreen containing insect repellent would move through the same channels to the same purchasers.

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<sup>3</sup> Applicant's argument that the "cited mark uses general horizontal commercial outlets arising from the mid and Western USA. The mark of Applicant, involving a health product to combat encephalitis [sic] and cancer, is directed to medical channels and pharmaceutical companies along the Eastern portion of the USA" is not persuasive "evidence" on the question of whether there is a likelihood of confusion. Reply Br. at 10. These restrictions do not appear in goods identified in the registration or the application.



Next, we turn to the similarity of the marks. "If the services [or goods] are identical, 'the degree of similarity necessary to support a conclusion of likelihood of confusion declines.'" Dixie Restaurants, 41 USPQ2d at 1534, quoting, Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 877, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). The question here is whether the marks create the same commercial impression. The test is not whether the marks can be distinguished in a side-by-side comparison, but whether they are sufficiently similar in their overall commercial impression so that confusion as to the source of the goods marketed under the respective marks is likely to result. "[T]here is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of the mark, provided [that] the ultimate conclusion rests on consideration of the marks in their entirety." In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). Here, goods as similar as insect repellent containing sunscreen and sunscreen containing insect repellent are so closely related that confusion is more likely to occur when similar marks are used on these goods.

Applicant has made much of the fact that the Examining Attorney has admitted that "it is apparent that the marks

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do have differences." Reply Br. at 6. However, marks do not have to be identical for there to be a likelihood of confusion. Canadian Imperial Bank, 1 USPQ2d at 1816-17 (Marks "Commcash" and "Communicash" not identical but strikingly similar). See also Wella Corp. v. California Concept Corp., 558 F.2d 1019, 1022, 194 USPQ 419, 422 (CCPA 1977)(CALIFORNIA CONCEPT and design held likely to be confused with CONCEPT for hair care products); Paula Payne Products, 177 USPQ at 77 (Very close similarity in overall visual and aural impression of the marks SPRAY 'N STAY and SPRAY 'N GLOW).

Here both marks contain the terms "sun" and "bug." The presence or absence of an ampersand or hyphen does not change the commercial impression of the marks. The CCPA held that the addition of a hyphen and another digit did not eliminate the similarity of the marks. See Phillips Petroleum Co. v. C.J. Webb, Inc., 442 F.2d 1376, 170 USPQ 35, 36 (CCPA 1971) ("The addition of the extra 6 and the hyphen has already been held not to avoid likelihood of confusion, and in the absence of some other apparent significance for the term 6-66 we find this conclusion inescapable"). Punctuation often does not significantly change the commercial impression of marks. In re Burlington Industries, Inc., 196 USPQ 718, 719 (TTAB 1977)

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("[A]n exclamation point does not serve to identify the source of the goods").

Even if the overlapping terms in the marks consisted of descriptive and generic terms as applicant suggests, it does not mean that these words would not be the dominant part of the mark. In re National Data Corporation, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985) ("Assuming CASH MANAGEMENT is generic or at least highly descriptive in both marks, as urged by National, does not, however, lead to a reversal in this case." CASH MANAGEMENT EXCHANGE held confusingly similar to CASH MANAGEMENT ACCOUNT).

Also, we note that, even assuming that purchasers of sunscreen with insect repellent and insect repellent with sunscreen are sophisticated purchasers, they nonetheless would likely be confused when marks as similar as applicant's and registrant's are used on very closely related goods. Octocom Systems, 16 USPQ2d at 1787.

The only substantial difference between applicant's and registrant's mark is the presence of the word "stuff." The addition of this term does not result in the marks being significantly different in sound, appearance, or meaning. In a similar case, the Board held that the marks KIDWIPES and KID STUFF for pre-moistened disposable towelettes were confusingly similar. Presto Products Inc.

v. Nice-Pak Products Inc., 9 USPQ2d 1895 (TTAB 1988). When we view the marks in their entirety, SUN-BUG and SUN & BUG STUFF, the similarities outweigh the differences. The presence of the ampersand and the word "stuff" does not significantly change the commercial impression in a way that would avoid a likelihood of confusion when very similar marks are used on very similar goods.

We conclude by addressing several other issues that applicant has raised in support of his argument that there is no likelihood of confusion. First, applicant argues that there has been no actual confusion in this case. It is unnecessary, however, to show actual confusion in establishing likelihood of confusion. Giant Food, Inc. v. Nation's Foodservice, Inc., 710 F.2d 1565, 218 USPQ 390, 396 (Fed. Cir. 1983); J & J Snack Foods Corp. v. McDonald's Corp., 932 F.2d 1460, 18 USPQ2d 1889, 1892 (Fed. Cir. 1991). Moreover, an ex parte proceeding provides no opportunity for the registrant to show instances of actual confusion. Thus, the applicant's assertion of a lack of evidence of actual confusion does not significantly demonstrate that there is no likelihood of confusion in this case.

Applicant also refers to the market as a crowded field. Response dated November 12, 2000, p. 5. Applicant

never attaches registrations or evidence of use of the third-party marks. This statement in applicant's response is entitled to little, if any, weight because it lacks any specificity. We note that most of the marks that applicant lists only use one of the two terms ("sun" or "bug") and thus do not provide much evidence that the terms "sun" and "bug" when used together in the marks SUN & BUG STUFF and SUN-BUG are not confusingly similar. Applicant has also included additional evidence with its appeal brief and its reply brief. The Examining Attorney has objected to this new evidence. Applicant's Exhibits 4, 5, and 6 were not in the record and therefore will not be considered.<sup>4</sup>

Applicant's list of registrations by mark and registration number is again new evidence and it will not be considered. Applicant cannot introduce new evidence on appeal. 37 CFR § 2.142(d). In addition, we do not take judicial notice of

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<sup>4</sup> Even if we did consider this evidence, which relates to the middle class in Brazil, lighting in stores, and applicant's domain name registration, our conclusion that there is a likelihood of confusion would not change. Evidence of Brazilian middle class purchasers is not relevant to likelihood of confusion in the United States. In re Societe Generale des Minerales de Vittel S.A., 824 F.2d 957, 3 USPQ2d 1450, 1452 (Fed. Cir. 1987) (Board "properly ignored an article cited by the Examining Attorney from the *Manchester Guardian Weekly* saying, 'this British publication is not evidence of the perception of the term (Vittel) by people in the United States'"). A general reference to sophisticated shoppers does not mean that the purchasers of applicant's and registrant's products are sophisticated in a trademark sense. Finally, the fact that applicant has a domain name granted under different legal

registrations and applications in the Office nor, even if timely submitted, is it sufficient to simply include a list of marks with registration and application numbers to prove that a mark is weak. In re Hub Distributing, Inc., 218 USPQ 284, 285 (TTAB 1983) (“[W]e do not consider a copy of a search report to be credible evidence of the existence of the registrations and the uses listed therein”); See also In re Smith and Mehaffey, 31 USPQ2d 1531, 1532 (TTAB 1994); In re Duofold, Inc., 184 USPQ 638, 640 (TTAB 1974).<sup>5</sup>

Even if applicant properly submitted evidence that registrant’s mark were weak, that would not mean that applicant’s very similar mark, which is used on the very closely related goods, would be registrable. Applicant has presented no evidence that these marks have actually been used and third-party registrations, even if properly of record, do not support the registration of other marks when the marks in this case are very similar and the goods are very closely related. Helene Curtis Industries Inc. v. Suave Shoe Corp., 13 USPQ2d 1618, 1622 (TTAB 1989) (“Third-party registrations are of little weight in determining likelihood of confusion. They are not evidence of use of

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requirements does not indicate that confusion is not likely in this case.

<sup>5</sup> By listing simply the marks and the registration numbers, applicant’s evidence does not prove anything other than that

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the marks shown therein and they are not proof that consumers are familiar with them so as to be accustomed to the existence of similar marks in the market place").

Also, even a weak mark is entitled to protection. In re Colonial Stores, 216 USPQ 793, 795 (TTAB 1982). The Court of Customs and Patent Appeals rejected the argument that marks on the Supplemental Register can only be used to refuse registration for identical marks. In re The Clorox Co., 578 F.2d 305, 198 USPQ 337, 341 (CCPA 1978).

Inasmuch as the goods are very closely related and the marks create similar commercial impressions, there is a likelihood of confusion.

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

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similar and even identical marks can co-exist if the goods and/or services are not related.