

O P I C



C I P O

LE REGISTRAIRE DES MARQUES DE COMMERCE

THE REGISTRAR OF TRADEMARKS

Citation: 2020 TMOB 66

Date of Decision: 2020-05-29

IN THE MATTER OF OPPOSITIONS

Bayer Consumer Care AG

Opponent

and

Water Babies Limited

Applicant

1,623,371 for WATER BABIES DESIGN

Application

1,693,298 for WATER BABIES & Design

OVERVIEW OF APPL. NO. 1,623,371

[1] Water Babies Limited (the Applicant) has applied to register the trademark set out below (the Mark) in association with the Goods and Services at Schedule A.



[2] The application for the Mark is based on the Applicant's proposed use and its use and registration in the United Kingdom with the Goods and Services as indicated in Schedule A.

[3] Bayer Consumer Care AG (the Opponent) alleges that the Mark is confusing with its trademarks WATER BABIES and WATERBABIES and other trademarks including this phrase. The Opponent's evidence shows that it sells over a million dollars of sunscreen and sunblock with the WATER BABIES trademarks in Canada each year.

[4] Notwithstanding the Opponent's longstanding and substantial use, given the differences in the nature of the goods and services and channels of trade, I find that the Applicant has met its legal onus of proving that there is no reasonable likelihood of confusion with respect to the following goods and services. Accordingly, the opposition is rejected with these goods and services.

life-buoys; pre-recorded DVDs, CD-ROMs, compact discs, video and audio tapes, data carriers namely flash drives and downloadable MP3 files, containing swimming classes, swimming routines, swimming techniques and swimming instructions; stationery, namely, sticker books, stickers; stickers for car bodywork; posters; car stickers affixed by suction; printed matter namely, books, leaflets, pamphlets, and manuals containing instruction and coursework in the field of swimming classes, techniques and swimming routines; books namely, children's books; photographs; photographs of babies; photographs of babies for car windscreens; photographs of babies on cards; underwater photographs; teaching apparatus namely, floatation aids used for swimming instructions.

Retail sales and retail internet sales of floatation aids used for swimming instruction, audio and video recording and playback equipment, computers, computer peripheral equipment and hardware, computer programs, and computer accessories, pre-recorded computer flash drives, CD-ROMs, DVDs, CDs, audio and video tapes containing information, instruction and coursework in the field of swimming classes, techniques and/or routines, books, manuals and brochures containing information, instruction and coursework in the field of swimming classes, techniques and/or routines, photographs, photographs of babies, photographs of babies for car windscreens, underwater photographs of babies, stickers, stickers for car bodywork, car stickers affixed by suction, training of photographers namely, workshops and seminars in the field of photography; photographic services; business management consulting services in the field of swimming instructions and fitness classes; business management franchise consulting services in the field of swimming instructions and fitness classes; swimming instruction; provision of swimming classes, instruction and lessons; education, teaching and instructional services in field of swimming classes

and swimming instruction; aerobics, exercise and/or aquanatal instruction; teaching of aerobics, exercise and aquanatal exercises; training of aerobics, exercise and aquanatal teachers and coaches; personal coaching in the field of swimming instruction, swimming training and aquanatal physical fitness; training of teachers and coaches in the fields of swimming, swimming instruction, fitness and aquanatal fitness.

[5] The Applicant has failed to prove that there is no reasonable likelihood of confusion for the remaining goods and services. The trademarks are identical as sounded and nearly identical in appearance, only the Opponent has shown acquired distinctiveness of its trademarks, and the Applicant has failed to adequately differentiate the nature of the goods, services, and trade for the remaining goods and services. Accordingly, the opposition succeeds with the remaining goods and services.

BACKGROUND


[6] On April 22, 2013, the Applicant filed an application to register the Mark based on its proposed use of the Mark in Canada with Goods (1) and Services (1) and its use and registration of the Mark in the United Kingdom with Goods (2) and Services (2) as set out in Schedule A. The application claims priority on United Kingdom application No. 26 39377, filed October 23, 2012.


[7] The application was advertised for opposition purposes in the *Trade-marks Journal* issue dated November 18, 2015.

[8] On February 8, 2016, the Opponent opposed the application on the basis of the grounds of opposition summarized below. The *Trademarks Act*, RSC 1985, c T-13 (the Act) was amended on June 17, 2019. All references in this decision are to the Act as amended, with the exception of references to the grounds of opposition and section 34 of the Act which refer to the Act before it was amended (see section 70 of the Act).

- (a) The application does not comply with the requirements of section 30(d) of the Act. The Applicant had not used the Mark in the United Kingdom in association with all of the Goods and Services.

- (b) The application does not comply with the requirements of section 30(e) of the Act. The Applicant has no intention to use the Mark in Canada with the Goods and Services. In the alternative, the Applicant commenced use of the Mark in Canada prior to the filing date.
- (c) The application does not comply with the requirements of section 30(i) of the Act as the Applicant cannot be satisfied that it is entitled to use the Mark in Canada since the Mark was confusing with the Opponent's WATER BABIES trademarks, which the Applicant must have been aware of in view of the prior registration and use of the same by the Opponent and its predecessors-in-title and/or their licensees.
- (d) The Mark is not registrable pursuant to section 12(1)(d) of the Act as it is confusing with a registered trademark, namely the Opponent's Water Babies Trademarks:

<p>TMA336,212</p> <p>WATER BABIES</p>	<p>Suntan and suncare preparations, namely sunblocking and suncreening preparations</p>
<p>TMA823,068</p> 	<p>Sun tan preparations and sun screen preparations</p>
<p>WATERBABIES</p> <p>TMA823,075</p>	<p>Sun tan preparations and sun screen preparations</p>

	
<p>WATERBABIES (TMA903,773)</p>	<p>Suntan and suncare preparations, namely sunblock and sunscreen preparations</p>

- (e) The Applicant is not the person entitled to register the Mark in view of section 16(2)(a) and 16(3)(a) of the Act since the Mark was confusing with the Opponent's WATER BABIES Trademarks previously used in Canada by the Opponent and the Opponent's predecessors in title and/or their licensees.
- (f) The Mark is not distinctive of the Goods and Services of the Applicant since it does not distinguish the Goods and Services in association with which it is proposed to be used from the goods of the Opponent and/or its licensees in association with the Opponent's WATER BABIES Trademarks.

[9] The Applicant filed and served a counter statement.

[10] The Opponent filed as its evidence the affidavits of Alex Grey and Jane Buckingham. The Applicant filed as its evidence four affidavits of D. Jill Roberts. Ms. Roberts was cross-examined. Both parties filed a written argument. A hearing was not held.

EVIDENTIAL BURDEN AND LEGAL ONUS

[11] Before considering the grounds of opposition, it is necessary to review some of the requirements with regard to (i) the evidential burden on an opponent to support the allegations in the statement of opposition and (ii) the legal onus on an applicant to prove its case.

[12] With respect to (i) above, there is an evidential burden on an opponent to support the facts in its allegations pleaded in the statement of opposition [*John Labatt Limited v The Molson Companies Limited* (1990), 30 CPR (3d) 293 (FCTD) at 298]. An evidential burden on an

opponent with respect to a particular issue means that in order for the issue to be considered at all, there must be sufficient evidence from which it could reasonably be concluded that the facts alleged to support that issue exist. With respect to (ii) above, the legal onus is on an applicant to show that the application does not contravene the provisions of the Act as alleged by an opponent (for those allegations for which the opponent has met its evidential burden). A legal onus on the applicant means that if a determinate conclusion cannot be reached once all the evidence is in, then the issue must be decided against an applicant.

GROUNDS OF OPPOSITION

[13] I will now consider the grounds of opposition beginning with the section 12(1)(d) ground of opposition.

Section 12(1)(d) Ground of Opposition

[14] The material date for a section 12(1)(d) ground of opposition is the date of my decision [*Park Avenue Furniture Corporation v Wickes/Simmons Bedding Ltd and The Registrar of Trade Marks* (1991), 37 CPR (3d) 413 (FCA)].

[15] The Opponent has pleaded that the Mark is not registrable because it is confusing with registration Nos. TMA336,212; TMA823,068; TMA823,075; TMA903,773. I have exercised my discretion and have checked the Register to confirm that these registrations are extant [*Quaker Oats Co of Canada v Menu Foods Ltd* (1986), 11 CPR (3d) 410 (TMOB)]. I now have to determine, on a balance of probabilities, if there is a reasonable likelihood of confusion with one or more of the Opponent's registered trademarks. I consider that the Opponent's best case scenario rests with its trademark registrations for WATER BABIES and WATERBABIES (Nos. TMA336,212 and TMA903,773) and will concentrate my analysis on these registrations. If the Opponent is not successful based on these trademarks, then it will not be successful based on its other registrations. Further, given the small difference between the WATER BABIES and WATERBABIES trademarks, I find that use of one of these trademarks constitutes use of the other.

Test to Determine Confusion

[16] The test to determine the issue of confusion is set out in section 6(2) of the Act where it is stipulated that the use of a trademark causes confusion with another trademark if the use of both trademarks in the same area would likely lead to the inference that the goods and services associated with those trademarks are manufactured, sold or leased by the same person, whether or not the goods and services are of the same general class or Nice Class. In making such an assessment, I must take into consideration all the relevant surrounding circumstances, including those listed in section 6(5): the inherent distinctiveness of the trademarks and the extent to which they have become known; the length of time the trademarks have been in use; the nature of the goods and services or business; the nature of the trade; and the degree of resemblance between the trademarks in appearance, or sound or in the ideas suggested by them. The criteria in section 6(5) are not exhaustive and different weight will be given to each one in a context-specific assessment [*Mattel, Inc v 3894207 Canada Inc*, 2006 SCC 22, [2006] 1 SCR 772 at para 54]. I also refer to *Masterpiece Inc v Alavida Lifestyles Inc* (2011), 92 CPR (4th) 361 (SCC) at para 49, where the Supreme Court of Canada states that section 6(5)(e), the resemblance between the marks, will often have the greatest effect on the confusion analysis.

Analysis of the Section 6(5) Factors

Degree of Resemblance

[17] The Mark is identical in sound and idea suggested to the Opponent's registrations WATER BABIES and WATERBABIES (Nos. TMA336,212 and TMA903,773) as all trademarks suggest babies and young children that love being in the water. There is a high degree of resemblance in all three marks in appearance. The minimal design elements in the Mark do not result in a significant difference in appearance between the Opponent's word mark registrations and the Mark.

Inherent Distinctiveness

[18] While both the Mark and the Opponent's trademarks are inherently distinctive, the inherent distinctiveness of the parties' marks is limited by the fact that WATER BABIES appears to suggest products and services for young children that love water.

Extent Known and Length of Time in Use

[19] The strength of a trademark may be increased by means of it becoming known through promotion or use.

[20] There is no evidence that the Mark has been used in Canada or that it has become known to any extent whatsoever in Canada. The mere fact that Ms. Roberts performed a search of the website *waterbabies.co.uk*, found an entry for Canada, and was redirected to the website *www.waterbabies.ca* which includes a map indicating six locations in Toronto (affidavit of D. Jill Roberts, No. 2, Exhibit 8) is insufficient to prove that the Mark has been used or is known to any extent to Canadians. This is particularly the case as Ms. Roberts confirmed that she has not visited or called any of the sites and does not know if they are operational (Qs 42-45).

[21] Turning to the Opponent's evidence of use of the WATER BABIES word mark in Canada, I will first address the Applicant's argument that the evidence fails to establish that the Opponent is able to rely on the use of the WATER BABIES trademark in the affidavit of Alex Grey, the Senior Brand Manager, Sun Care of Bayer Inc. (Applicant's Written Representations, pages 6-8). For the purposes of this opposition, the change in title on registration No. TMA336,212 is relevant (Grey affidavit, Exhibit A). For ease of reference, I have highlighted the various changes in title at issue:

<p>CHANGE IN TITLE / CHANGEMENT EN TITRE: TYPE OF CHANGE / GENRE DE CHANGEMENT: Name / Nom DATE REGISTERED / DATE DE L'ENREGISTREMENT: 08 mars / Mar 1991 DATE OF CHANGE / DATE DE CHANGEMENT: 03 juil / Jul 1990 COMMENTS / COMMENTAIRES: CHANGED/MODIFIER: FROM/DE: PLOUGH, INC., TO/A: SCHERING-PLOUGH HEALTHCARE PRODUCTS, INC. SEE EVIDENCE ON FILE/VOIR PREUVE AU DOSSIER 059060</p>
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CHANGE IN TITLE / CHANGEMENT EN TITRE:

TYPE OF CHANGE / GENRE DE CHANGEMENT: Name / Nom

DATE REGISTERED / DATE DE L'ENREGISTREMENT: 15 août / Aug 2011

DATE OF CHANGE / DATE DE CHANGEMENT: 01 avr / Apr 2011

COMMENTS / COMMENTAIRES: FROM: SCHERING-PLOUGH
HEALTHCARE PRODUCTS, INC.

TO: MSD Consumer Care, Inc.

Voir Preuve au dossier/See evidence on File No. 231518

CHANGE IN TITLE / CHANGEMENT EN TITRE:

TYPE OF CHANGE / GENRE DE CHANGEMENT: Name / Nom

DATE REGISTERED / DATE DE L'ENREGISTREMENT: 21 janv / Jan 2016

DATE OF CHANGE / DATE DE CHANGEMENT: 12 juin / Jun 2015

COMMENTS / COMMENTAIRES: FROM: MSD Consumer Care, Inc.

TO: Bayer Consumer Care Holdings LLC

Voir Preuve au dossier/See evidence on File No. 1090973

CHANGE IN TITLE / CHANGEMENT EN TITRE:

TYPE OF CHANGE / GENRE DE CHANGEMENT: Assignment / Cession

DATE REGISTERED / DATE DE L'ENREGISTREMENT: 21 jan / Jan 2016

DATE OF CHANGE / DATE DE CHANGEMENT: 12 jan / Jan 2016

COMMENTS / COMMENTAIRES: FROM: Bayer Consumer Care Holdings LLC

TO: Bayer Consumer Care AG

Nunc pro tunc June 15, 2015

Voir Preuve au dossier/See evidence on File No. 1090973

[22] A review of this chain of title shows the only assignment was from Bayer Consumer Care Holdings LLC to Bayer Consumer Care AG on June 15, 2015. The rest of the changes were simply changes in name. The statement in the Grey affidavit that Bayer Inc. was licensed by Bayer Consumer Care AG who controls the quality of the suntan, sunscreen and sun care preparations sold and marketed in Canada in association with the WATERBABIES trademarks (para 6), is sufficient to meet the requirements for section 50(1) of the Act for the evidence concerning the use of the trademarks after the assignment date of June 15, 2015. For Exhibits E-G which are pictures of bottles of COPPERTONE WATERBABIES sunscreen sold in various years, I find that the trademarks notice on the pictured bottles sufficient to meet the requirements of section 50(2) of the Act. Even though the trademarks notice on each bottle often references a previous name of the predecessor to the Opponent rather than the current name of the trademark owner during the year the bottles were sold, I do not consider this to be fatal. In so finding, I am particularly mindful of the fact that the Applicant did not seek cross-examination of the Opponent's affiant.

[23] In its written submissions, the Applicant submitted that there is no evidence that the Opponent had the records of its predecessor-in-title. In paragraph 3, however, the Grey affidavit states:

By virtue of my position, and having reviewed relevant business records that are made and maintained in Bayer Canada's usual and ordinary course of business, I have personal knowledge of the matters set out in this affidavit unless stated to be on information and belief.

[24] While paragraph 3 of the Grey affidavit is not specific in stating that the Opponent acquired business records from its predecessor-in-title at the time of the assignment of the rights in the WATER BABIES trademarks, I am prepared to infer that such was the case in view of the wording of paragraph 3.

[25] I am therefore satisfied from the evidence in the Grey affidavit summarized below that the WATER BABIES trademark has become well known in Canada in association with sunscreen and sunblock.

- (a) From the period of 1988-2008 cumulative sales exceeded CAD \$25 million at the wholesale level (para 9).
- (b) That approximate sales volume in the years 2009 through 2016 exceeded 180,000 units per year. I accept this evidence obtained from Nielsen generated national consumer purchase data, as the affiant indicates that it comes from "data scanned at the cash registers of national retailers across Canada" and Bayer Inc. uses these figures regularly. Finally, the affiant indicates that the figures have been used as Bayer Inc.'s own sales figures are confidential (para 9).
- (c) The WATERBABIES suntan, sunscreen and sun care preparations are and have been sold at retailers across Canada including Shoppers Drug Mart, Loblaws, Sobey's, Dollarama, London Drugs, Canadian Tire, Walmart, Toys R Us, and Procurity (para 10).

- (d) The affiant provides representative examples of advertising (para 15) including that the WATERBABIES trademark has been advertised and promoted through pallet displays across Canada in Walmart and Loblaws (Exhibit J-1); on floor stands at Loblaws and Rexall (Exhibit J-4) and in print advertisements in Canada (Exhibits J-5-J-7).

Given the sales of the Opponent's sunscreen as well as the prominent appearance of the trademark WATER BABIES, following the COPPERTONE trademark, I do not find that the fact that COPPERTONE and WATER BABIES appeared together means that the WATER BABIES trademark has not become well known [see, for example, *Groupe Procycle Inc v DaimlerChrysler Corporation*, 2008 CanLII 88214 (TMOB)].

Nature of Goods and Services and Trade

[26] When considering sections 6(5)(c) and (d) of the Act, it is the statement of goods and services as defined in each of the registrations relied upon by the Opponent and the statement of goods and services in the application for the Mark that governs the assessment of the likelihood of confusion under section 12(1)(d) of the Act [*Henkel Kommanditgesellschaft auf Aktien v Super Dragon Import Export Inc* (1986), 12 CPR (3d) 110 (FCA); *Mr Submarine Ltd v Amandista Investments Ltd* (1987), 19 CPR (3d) 3 (FCA)].

[27] With respect to the nature of most of the parties' goods, services or business, the parties appear to target different consumers and operate in different channels. For the Opponent, it targets consumers wishing to obtain sunscreen and sunblock for their children in drug stores, grocery stores and other general merchandise retailers (Grey affidavit, para 10). For the Applicant, a review of the Goods and Services appears to show that the Applicant offers as its core services swimming instruction classes and underwater photography. I note that the website printouts included in the evidence of Ms. Roberts also note this as a focus (Roberts affidavit (No. 2), Exhibits 1 and 2). However, due to the hearsay issues, I put a very limited weight on these pages as no evidence was provided as to why it was necessary for Ms. Roberts to provide evidence of the Applicant's use of the Mark.

[28] With respect to the Swimming Lesson Goods and Services as defined below, I find that the nature of the parties' goods and services to be different based on the fact that the consumer need targeted by each party is very different.

life-buoys; pre-recorded DVDs, CD-ROMs, compact discs, video and audio tapes, data carriers namely flash drives and downloadable MP3 files, containing swimming classes, swimming routines, swimming techniques and swimming instructions; stationery, namely, sticker books, stickers; stickers for car bodywork; posters; car stickers affixed by suction; printed matter namely, books, leaflets, pamphlets, and manuals containing instruction and coursework in the field of swimming classes, techniques and swimming routines; books namely, children's books; photographs; photographs of babies; photographs of babies for car windscreens; photographs of babies on cards; underwater photographs; teaching apparatus namely, floatation aids used for swimming instructions.

Retail sales and retail internet sales of floatation aids used for swimming instruction, audio and video recording and playback equipment, computers, computer peripheral equipment and hardware, computer programs, and computer accessories, pre-recorded computer flash drives, CD-ROMs, DVDs, CDs, audio and video tapes containing information, instruction and coursework in the field of swimming classes, techniques and/or routines, books, manuals and brochures containing information, instruction and coursework in the field of swimming classes, techniques and/or routines, photographs, photographs of babies, photographs of babies for car windscreens, underwater photographs of babies, stickers, stickers for car bodywork, car stickers affixed by suction, training of photographers namely, workshops and seminars in the field of photography; photographic services; business management consulting services in the field of swimming instructions and fitness classes; business management franchise consulting services in the field of swimming instructions and fitness classes; swimming instruction; provision of swimming classes, instruction and lessons; education, teaching and instructional services in field of swimming classes and swimming instruction; aerobics, exercise and/or aquanatal instruction; teaching of aerobics, exercise and aquanatal exercises; training of aerobics, exercise and aquanatal teachers and coaches; personal coaching in the field of swimming instruction, swimming training and aquanatal physical fitness; training of teachers and coaches in the fields of swimming, swimming instruction, fitness and aquanatal fitness.

[29] Although the following goods are fairly described as being swimming related, I nevertheless find that the Overlapping Goods below overlap in nature or trade with the Opponent's goods.

Clothing namely nappies, nappies made of paper swimming nappies and nappy pants; shirts, tee-shirts, trousers, shorts, jumpers; articles of clothing for swimming

namely, swimsuits, children's, toddler's and infant bathing suits; wetsuits; wetsuits for children, infants and babies; swimming caps; nose clips for divers and swimmers; ear plugs; goggles for sports; swimming goggles; swimming masks; flotation aids for bathing and swimming for children, infants, toddlers and babies for recreational use; swimming flotation aids adapted for incorporation into bathing suits; flotation aids namely, swimming jackets, vests and belts; water wings; swimming boards; swimming rings;

[30] The potential for overlap with the applied-for clothing, bathing suits and wetsuits is emphasized by the fact that the Applicant applied-for “articles of clothing for sun protection”. While this description has been deleted, there is no restriction on the clothing, swimsuits and wetsuits listed above indicating that they will not be used, nor designed or marketed for this purpose. With respect to nappies, these items are sold in proximity to sunscreen in grocery stores as shown in the affidavit of D. Jill Roberts (No. 4) where sunscreen and diapers are sold a couple aisles apart with both aisles including personal care products such as sunscreen, health and beauty products, diapers and bathroom tissue. With respect to the remaining goods for use while swimming, these goods are the type of goods which may be available at general merchandise retailers such as those that sell the Opponent’s goods. Finally, there is no restriction on any of these goods or to their channels of trade to limit them to be sold online by the Applicant. As such, I find that these goods have a somewhat overlapping nature of trade.

[31] With respect to the remaining goods and services including such varied items as hair brushes, cups, piggy banks and retail sale of a large number of items, I do not find that the nature of these goods or services favours either party. I find that these goods and services fall in a number of different fields and may be described broadly as being household related goods and services. With respect to the nature of trade of the goods, it appears that many of them may be found in similar stores as the Opponent’s sunscreen and sunblock such as Loblaws, Walmart, Canadian Tire, and Toy R Us.

Surrounding Circumstance – State of the Register and State of the Marketplace Evidence

[32] The Opponent filed the affidavit of Jane Buckingham, a trademark searcher employed by its agent. Ms. Buckingham performed an online search of CIPO records for all registered or pending trademarks that consist of WATER BABIES for any goods or services. Her searches only located trademarks owned by either the Opponent or the Applicant (Exhibit

A). Ms. Buckingham's evidence does not assist the Opponent. I cannot infer that the Opponent is the only party using a trademark including WATER BABIES because no other parties have applied to register one [see *Ports International Ltd v Dunlop Ltd* (1992), 41 CPR (3d) 432 (TMOB) which discusses that state of the Register evidence is only useful to the extent that one can make an inference about the state of the marketplace].

[33] The Applicant includes as its evidence an affidavit of Ms. Roberts which attaches the Wikipedia entry for WATER BABIES (Exhibit 1) which states that "Water Babies" may refer to:

- *The Water-Babies, A Fairy Tale for a Land Baby*
- *The Water Babies*, a 1978 live action/animated film based on the novel
- *Water Babies*, 1935 film
- *The Water Babies*, a 2003 musical
- *Water Babies* (album), a 1976 album by Miles David
- The Water Babies, a UK band

Ms. Roberts also attaches the Wikipedia entry for the children's novel *The Water-Babies, A Fairy Tale for a Land Baby* (Exhibit 2) and printouts of searches of the *amazon.ca* and *chapters.indigo.ca* websites showing this book for sale along with a book by naturalist William Burt (Exhibits 3 and 4). Ms. Roberts' evidence does not assist the Applicant as it does not show that any of these uses of Water Babies was known to Canadians to a material extent.

Conclusion

[34] Having considered all of the surrounding circumstances and applying the test of confusion as a matter of first impression and imperfect recollection, I find that the Applicant has met its legal onus of proving, on a balance of probabilities, that there is no reasonable likelihood of confusion with respect to the Swimming Lesson Goods and Services based in large part on the differences in the nature of the goods and services and trade of the parties.

[35] In finding this ground of opposition successful for the Overlapping Goods and the remaining goods and services, I have had regard to all of the surrounding circumstances including the potential for overlap in the nature of goods and channel of trade and that: (i) only the Opponent's trademarks have a significant degree of acquired distinctiveness; (ii) there is an

extremely high degree of resemblance between the Mark and the Opponent's trademarks; and (iii) there is no evidence that casual consumers are accustomed to seeing and having to distinguish between trademarks with WATER BABIES. In particular, given that only the Opponent has evidenced use of the Mark in Canada, I find that the Applicant has not proven that there is no reasonable likelihood that a consumer confronted with the Mark on the remaining goods and services, would not assume that they were manufactured, sold or otherwise emanate from or were licensed, approved or sponsored by the Opponent.

Section 16 Grounds of Opposition

[36] The evidence of use of the Opponent's WATER BABIES and WATERBABIES trademarks discussed with respect to the section 12(1)(d) ground of opposition is sufficient to meet the Opponent's evidential burden under the section 16(2) and 16(3) grounds of opposition. The Applicant's position is no stronger as of the priority filing date, October 23, 2012, which is the material date for this ground of opposition [see sections 16 and 34 of the Act]. With respect to the Swimming Lesson Goods and Services, I conclude that the Applicant has met its legal onus for the same reasons as in the section 12(1)(d) ground of opposition. The opposition succeeds, however, with respect to same goods and services as in the section 12(1)(d) ground of opposition.

Section 2 Ground of Opposition

[37] In order to meet its evidentiary burden under this ground of opposition, the Opponent has to show that as of the filing of the statement of opposition one or more of the Opponent's WATER BABIES trademarks had become sufficiently known to negate the distinctiveness of the Mark [*Bojangles' International, LLC v Bojangles Café Ltd* 2006 FC 657 at para 34]. The evidence of use of the Opponent's WATER BABIES and WATERBABIES trademarks discussed with respect to the section 12(1)(d) ground of opposition is sufficient to meet the Opponent's burden under this ground of opposition. The Applicant's position is no stronger as of the statement of opposition filing date, February 8, 2016, which is the material date for this ground of opposition [*Metro-Goldwyn-Mayer Inc v Stargate Connections Inc* 2004 FC 1185, (2004), 34 CPR (4th) 317 at 324].

[38] In its written argument, the Opponent submits that “it is not necessary for the Opposition Board to find that the Opponent’s WATER BABIES® Marks and the [Mark] are likely to be confusing in order to reject the Application on the basis of non-distinctiveness (para 78).” It submits further:

(para 80) (citations omitted)	The jurisprudence regarding the Applicant’s legal burden on the issue of distinctiveness makes it clear that where the Opponent has filed sufficient evidence to allow the Opposition Board to conclude that members of the Canadian public would be aware of the opponent’s WATER BABIES® Marks, such that the mark had acquired a reputation in Canada, and the Applicant files little or no evidence to show that its [Mark] would distinguish its goods or services, the Applicant’s legal burden will not be discharged.
(para 81) (citations omitted)	The Applicant has filed no evidence to show that the [Mark] distinguishes its goods or services or is adapted to distinguish its goods or services. There is no evidence that the [Mark] appears on or in association with the Applicant’s goods, as an indicator of source, at the time of transfer, either in Canada or elsewhere. Further, there is no evidence that the Applicant has ever performed any of the services listed in the Application, in Canada or elsewhere, or that the [Mark] has been displayed in association with such services.

[39] In *Clarco Communications Ltd. v Sassy Publishers Inc.* (1994), 54 CPR (3d) 418 (FCTD). Mr. Justice Denault states at 428:

While distinctiveness is quite often determined as part of an evaluation of whether the proposed trademark is confusing with another trade mark within the meaning of s. 6 of the Act, it is possible to refuse an application for registration on the basis of non-distinctiveness independent of the issue of confusion, provided the ground is raised in opposition [...] The quality of distinctiveness is a fundamental and essential requirement of a trademark and the ground of lack of distinctiveness may be raised in opposition by any person and may be based on a failure to distinguish or to adapt to distinguish the proposed trade mark from the wares of any others.

[40] A trademark actually distinguishes its owner’s goods and services by acquiring distinctiveness through use, resulting in distinctiveness in fact. A proposed trademark must be

one that is adapted so as to distinguish its owner's goods and services [*The Molson Companies Limited v Carling O'Keefe Brewerie of Canada Limited* (1982), 55 CPR (2d) 15 (FCTD)].

[41] I find that the Mark is adapted to distinguish and actually distinguishes the Swimming Lesson Goods and Services from the Opponent's goods due to the differences between the nature and trade of these goods. In this regard, the Opponent's goods are directed at those consumers wishing to use a sunscreen or sunblock on their children. In contrast, the Applicant's Swimming Lesson Goods and Services are directed at a different target audience - those wishing to offer swimming lessons and photography services and those wishing to have swimming lessons or photography services for their children. Therefore, this ground of opposition is rejected with respect to the Swimming Lesson Goods and Services.

[42] With respect to the Overlapping Goods, I do not find that the Mark is adapted to distinguish these goods from the goods of the Opponent due to the connections between the goods outlined in paragraph 29 of this decision. With respect to the remaining goods and services, given the extent of acquired distinctiveness of the Opponent's trademarks, I find that the Mark is not adapted to distinguish these goods and services from the goods of the Opponent. Therefore this ground of opposition succeeds with respect to the same goods and services as in the section 12(1)(d) ground of opposition.

Sections 30(d), 30(e) and 30(i) Grounds of Opposition

[43] The material date for these grounds of opposition is the filing date of the application [*Georgia-Pacific Corp v Scott Paper Ltd* (1984), 3 CPR (3d) 469 (TMOB)] or the priority filing date [*Agrifoods International Cooperative Ltd v Pacific Foods of Oregon* (1996), 70 CPR (3d) 334 (TMOB)]. In this opposition, the difference between the dates would not impact my assessment of the section 30 grounds.

[44] I reject the section 30(i) ground of opposition because the allegation that the Applicant was aware that the Mark was confusing with the Opponent's WATER BABIES trademarks does not raise a proper ground of opposition. Section 30(i) of the Act only requires that an applicant declare itself satisfied that it is entitled to use the applied-for mark. Such a statement is included in the application for the Mark. Further, the mere knowledge of an opponent's rights, at the filing

date of the application, is not sufficient to support a section 30(i) ground of opposition [*Woot, Inc v WootRestaruants Inc Les Restaurants Woot Inc* 2012 TMOB 197]. Section 30(i) of the Act can be the basis of a ground of opposition in exceptional cases, such as where bad faith by the applicant is alleged or if specific statutory provisions prevent the registration of the applied-for mark [see *Sapodilla Co Ltd v Bristol-Myers Co* (1974), 15 CPR (2d) 152 (TMOB) and *Canada Post Corporation v Registrar of Trade-marks* (1991), 40 CPR (3d) 221 (FCTD)]. However, no such facts or allegations are included here.

[45] With respect to the sections 30(d) and 30(e) grounds of opposition, the Opponent did not adduce any evidence that the Applicant did not intend to commence use in Canada in association with the Goods or Services or had commenced use prior to the filing date. Nor did the Opponent adduce any evidence that the Applicant had not used the Mark abroad in the United Kingdom. The Opponent submits that the application should be refused on the basis that the Applicant only filed the hearsay evidence of Ms. Roberts (Opponent's Written Representations, para 39):

... It is therefore obvious that the Applicant filed only hearsay evidence as a result of deliberation and forethought. It was most likely an attempt to prevent the Applicant from actually being bothered with these proceedings or an attempt to insulate the Applicant from cross-examination, or both. Neither reason necessitates filing hearsay evidence. Indeed, no reason whatsoever has been advanced by the Applicant to explain its "strategic" decision to file only hearsay evidence. As a consequence, the Applicant's evidence should be disregarded in its entirety. As the onus rests on the Applicant, this reason alone justifies the refusal of the Application in its entirety.

[46] Ms. Roberts' evidence would not have been sufficient to meet the Applicant's legal onus with respect to the grounds of opposition based on sections 30(d) and 30(e). However, I do not find that the cross-examination and refusals by Ms. Roberts to answer particular questions sufficient to meet the Opponent's evidential burden because Ms. Roberts is not a representative of the Applicant and therefore would not have knowledge of its operations. If I am incorrect in so finding, I would have found that the Opponent met its evidential burden with respect to the section 30(e) ground of opposition by drawing an adverse inference to questions 121-125 namely that the Applicant had used the Mark in advance of filing. I would have found it appropriate to draw an adverse inference because the Applicant purports to rely on the evidence of use by it adduced by Ms. Roberts and yet shields the Applicant from cross-examination on aspects of the Mark's use. In *Coca - Cola Ltd. v Compagnie française de Commerce International COFCI*,

S.A., (1991), 35 CPR (3d) 406, at 412–413, the Registrar explained the scope of cross-examination in opposition decisions:

... Although the scope of cross-examination is certainly not as broad as that allowed in an examination for discovery in a civil action, it may extend beyond the particular issue for which the affidavit in question was submitted. This follows, in my view, from the fact that an opposition is not simply an ‘inter partes’ proceeding but also involves a consideration of the public interest. For example, it is in the public interest to allow an officer of an applicant to be questioned as to the accuracy of a date of first use to ensure the legitimacy of an applicant's claimed basis for registration. The extended scope of cross-examination in opposition proceedings also follows (at least in the case of a ground of non-compliance with s. 30(b) of the Act) from the fact that the facts relating to that ground are, in most cases, only within the knowledge of the applicant. Thus, if the Grivory affidavit is found to be limited solely to the issue of the nature of the applicant's wares and trade, I consider that the opponent was nevertheless entitled to an extended scope to its cross-examination to cover the related issue of the applicant's date of first use of its trademark.

However, even if I had found the opposition succeeded with respect to the section 30(e) ground of opposition, the application could still advance on the basis of use and registration abroad.

APPL. NO. 1,693,298

[47] The Applicant has also applied to register the trademark set out below (the WATER BABIES Mark) in association with the Goods and Services in Application No. 1,693,298 at Schedule B. The WATER BABIES phrase is white and the background blue.



[48] The application for the WATER BABIES Mark is based on the Applicant's proposed use in Canada, use in Canada and use and registration in the United Kingdom as indicated in Schedule B and was filed on September 11, 2014 with a priority filing date of May 19, 2014.

[49] The Opponent raises the same grounds of opposition as in application No. 1,623,371 and the evidence in this proceeding is similar to that filed with respect to that application. The main difference between the cases is that the Goods and Services in Application No. 1,693,298 are smaller in scope than in application No. 1,623,371 and are more limited to the Applicant's core swimming lesson and photography services. The material dates for the grounds of opposition related to confusion are the date of decision (section 12(1)(d) ground of opposition), the priority filing date (sections 16(2) and 16(3) grounds of opposition), the date of first use claimed in the application, April 2014, and the date of filing the statement of opposition, August 16, 2016.

[50] The evidence summarized with respect to the section 12(1)(d) ground of opposition for application No. 1,623,371 is relevant to each of the confusion grounds in this case. Taking into account all of the evidence summarized above, given the difference in the nature of the goods and services and channels of trade, I find that the Applicant has met its legal onus of proving that there is no reasonable likelihood of confusion with respect to the Goods and Services in Application No. 1,693,298 at all material dates. The Opponent targets consumers wishing to obtain sunscreen or sunblock for their children in drug stores, grocery stores and other general merchandise retailers (Grey affidavit, para 10). For the Applicant, the Goods and Services in Application No. 1,693,298 target consumers interested in running a swimming instruction and photography business and consumers interested in obtaining swimming instruction classes and underwater photography, and related goods and services. In rejecting the grounds of opposition based on confusion, I have had regard to all of the surrounding circumstances including the differences in the nature of the goods and services and their channels of trade and that: (i) only the Opponent's WATER BABIES trademarks has a significant degree of acquired distinctiveness; (ii) there is an extremely high degree of resemblance between the WATER BABIES Mark and the Opponent's trademarks; and (iii) there is no evidence that casual consumers are accustomed to seeing and having to distinguish between trademarks with WATER BABIES.

[51] I reject the grounds of opposition based on sections 30(b), 30(d), 30(e), and 30(i) for the same reasons as with respect to application No. 1,623,371.

DISPOSITIONS

[52] I make the following dispositions pursuant to the authority delegated to me under section 63(3) of the Act.

[53] With respect to application No. 1,623,371, I reject the opposition pursuant to section 38(12) of the Act with respect to the following Swimming Lesson Goods and Services and refuse the application with the remaining goods and services.

life-buoys; pre-recorded DVDs, CD-ROMs, compact discs, video and audio tapes, data carriers namely flash drives and downloadable MP3 files, containing swimming classes, swimming routines, swimming techniques and swimming instructions; stationery, namely, sticker books, stickers; stickers for car bodywork; posters; car stickers affixed by suction; printed matter namely, books, leaflets, pamphlets, and manuals containing instruction and coursework in the field of swimming classes, techniques and swimming routines; books namely, children's books; photographs; photographs of babies; photographs of babies for car windscreens; photographs of babies on cards; underwater photographs; teaching apparatus namely, floatation aids used for swimming instructions.

Retail sales and retail internet sales of floatation aids used for swimming instruction, audio and video recording and playback equipment, computers, computer peripheral equipment and hardware, computer programs, and computer accessories, pre-recorded computer flash drives, CD-ROMs, DVDs, CDs, audio and video tapes containing information, instruction and coursework in the field of swimming classes, techniques and/or routines, books, manuals and brochures containing information, instruction and coursework in the field of swimming classes, techniques and/or routines, photographs, photographs of babies, photographs of babies for car windscreens, underwater photographs of babies, stickers, stickers for car bodywork, car stickers affixed by suction, training of photographers namely, workshops and seminars in the field of photography; photographic services; business management consulting services in the field of swimming instructions and fitness classes; business management franchise consulting services in the field of swimming instructions and fitness classes; swimming instruction; provision of swimming classes, instruction and lessons; education, teaching and instructional services in field of swimming classes and swimming instruction; aerobics, exercise and/or aquanatal instruction; teaching of aerobics, exercise and aquanatal exercises; training of aerobics, exercise and aquanatal teachers and coaches; personal coaching in the field of swimming instruction, swimming training and aquanatal physical fitness; training of teachers and coaches in the fields of swimming, swimming instruction, fitness and aquanatal fitness.

[54] With respect to application No. 1,693,298, I reject the opposition pursuant to section 38(12) of the Act.

Natalie de Paulsen
Member
Trademarks Opposition Board
Canadian Intellectual Property Office

**TRADEMARKS OPPOSITION BOARD
CANADIAN INTELLECTUAL PROPERTY OFFICE
APPEARANCES AND AGENTS OF RECORD**

No Hearing Held

Agents of Record

GOWLING WLG (CANADA) LLP

For the Opponent

MOFFAT & CO.

For the Applicant

Schedule A – Application No. 1,623,371

Goods (1) and Services (1) Based on Proposed Use in Canada
Goods (2) and Services (2) Based on Use and Registration Abroad

Goods

(1) Clothing namely nappies, nappies made of paper swimming nappies and nappy pants; clothing namely, underwear; shirts, socks, tee-shirts, trousers, shorts, vests coats, jumpers, pyjamas, gloves and mittens; handkerchiefs; articles of clothing for swimming namely, swimsuits, children's, toddler's and infant bathing suits; swimming caps; headwear namely, baseball caps, golf caps, and toques; footwear namely, sandals, casual shoes, sport shoes, sport training shoes; wetsuits; wetsuits for children, infants and babies; nose clips for divers and swimmers; ear plugs; goggles for sports; swimming goggles; swimming masks; flotation aids for bathing and swimming for children, infants, toddlers and babies for recreational use; swimming flotation aids adapted for incorporation into bathing suits; floatation aids namely, swimming jackets, vests and belts; water wings; swimming boards; life-buoys; apparatus for the recording, transmission or reproduction of sound or images namely tape recorders, digital recorders, digital video recorder, digital cameras; blank optical disks; pre-recorded DVDs, CD-ROMs, compact discs, video and audio tapes, data carriers namely flash drives and downloadable MP3 files, containing swimming classes, swimming routines, swimming techniques and swimming instructions; blank computer recording discs; computers; mouse pads; stationery, namely, sticker books, stickers; stickers for car bodywork; posters; car stickers affixed by suction; printed matter namely, books, leaflets, pamphlets, and manuals containing instruction and coursework in the field of swimming classes, techniques and swimming routines; books namely, children's books; photographs; photographs of babies; photographs of babies for car windscreens; photographs of babies on cards; underwater photographs; banners; portable baby baths; travel bags; rucksacks; sports bags; bags for carrying sports and swimming clothing; household or kitchen utensils and containers; hair brushes, hair combs and sponges; toothbrushes; heat insulated containers for beverages; crockery namely, cups and mugs; drinking glasses; mugs, drinking flasks; drinking cups; drinking bottles; baby bottles; drinking flasks for travellers; drinking glasses; drinking vessels namely, mugs; piggy banks; eyeglass cases; textiles and textile goods namely, bath linen, bed linen, towels, face towels, face cloths, bath robes, towelling, towelling robes; bed and table covers; play swimming pools; swimming pool toys; bath tub toys; swimming rings; toys namely, toy boats; teaching apparatus namely, floatation aids used for swimming instructions.

(2) Clothing namely nappies, nappies made of paper swimming nappies and nappy pants; clothing namely, underwear; shirts, socks, tee-shirts, trousers, shorts, vests coats, jumpers, pyjamas, gloves and mittens; handkerchiefs; articles of clothing for swimming namely, swimsuits, children's, toddler's and infant bathing suits; swimming caps; headwear namely, baseball caps, golf caps, and toques; footwear namely, sandals, casual shoes, sport shoes, sport training shoes; wetsuits; wetsuits for

children, infants and babies; nose clips for divers and swimmers; ear plugs; goggles for sports; swimming goggles; swimming masks; flotation aids for bathing and swimming for children, infants, toddlers and babies for recreational use; swimming flotation aids adapted for incorporation into bathing suits; flotation aids namely, swimming jackets, vests and belts; water wings; swimming boards; life-buoys; apparatus for the recording, transmission or reproduction of sound or images namely tape recorders, digital recorders, digital video recorder, digital cameras; blank optical disks; pre-recorded DVDs, CDroms, compact discs, video and audio tapes, data carriers namely flash drives and downloadable MP3 files, containing swimming classes, swimming routines, swimming techniques and swimming instructions; blank computer recording discs; computers; mouse pads; stationery, namely, sticker books, stickers; stickers for car bodywork; posters; car stickers affixed by suction; printed matter namely, books, leaflets, pamphlets, and manuals containing instruction and coursework in the field of swimming classes, techniques and swimming routines; books namely, children's books; photographs; photographs of babies; photographs of babies for car windscreens; photographs of babies on cards; underwater photographs; banners; portable baby baths; travel bags; rucksacks; sports bags; bags for carrying sports and swimming clothing; household or kitchen utensils and containers; hair brushes, hair combs and sponges; toothbrushes; heat insulated containers for beverages; crockery namely, cups and mugs; drinking glasses; mugs, drinking flasks; drinking cups; drinking bottles; baby bottles; drinking flasks for travellers; drinking glasses; drinking vessels namely, mugs; piggy banks; eyeglass cases; textiles and textile goods namely, bath linen, bed linen, towels, face towels, face cloths, bath robes, towelling, towelling robes; bed and table covers; play swimming pools; swimming pool toys; bath tub toys; swimming rings; toys namely, toy boats; teaching apparatus namely, flotation aids used for swimming instructions.

Services

(1) Retail sales and retail internet sales of clothing, swim wear, footwear, headwear, bed and bath linens, sports goods, wetsuits, personal flotation aids, flotation aids for recreational use, flotation aids used for swimming instruction, sports bags, knapsacks, general purpose carry bags, audio and video recording and playback equipment, computers, computer peripheral equipment and hardware, computer programs, and computer accessories, pre-recorded computer flash drives, CD-ROMs, DVDs, CDs, audio and video tapes containing information, instruction and coursework in the field of swimming classes, techniques and/or routines, books, manuals and brochures containing information, instruction and coursework in the field of swimming classes, techniques and/or routines, toys, photographs, photographs of babies, photographs of babies for car windscreens, underwater photographs of babies, stickers, stickers for car bodywork, car stickers affixed by suction, eyeglass cases, household or kitchen utensils and containers, housewares, hair combs and brushes, washing sponges, portable baby baths, heat insulated containers for beverages, drinking bottles, baby bottles, crockery, cups, drinking flasks for travellers, drinking glasses, drinking vessels, mugs, piggy banks, children's toys, sports equipment; training of photographers namely, workshops and seminars in the field of photography; photographic services; business management consulting services in the field of swimming instructions and fitness classes; business

management franchise consulting services in the field of swimming instructions and fitness classes; swimming instruction; provision of swimming classes, instruction and lessons; education, teaching and instructional services in field of swimming classes and swimming instruction; aerobics, exercise and/or aquanatal instruction; teaching of aerobics, exercise and aquanatal exercises; training of aerobics, exercise and aquanatal teachers and coaches; personal coaching in the field of swimming instruction, swimming training and aquanatal physical fitness; training of teachers and coaches in the fields of swimming, swimming instruction, fitness and aquanatal fitness.

(2) Retail sales and retail internet sales of clothing, swim wear, footwear, headwear, bed and bath linens, sports goods, wetsuits, personal floatation aids, floatation aids for recreational use, floatation aids used for swimming instruction, sports bags, knapsacks, general purpose carry bags, audio and video recording and playback equipment, computers, computer peripheral equipment and hardware, computer programs, and computer accessories, pre-recorded computer flash drives, CD-ROMs, DVDs, CDs, audio and video tapes containing information, instruction and coursework in the field of swimming classes, techniques and/or routines, books, manuals and brochures containing information, instruction and coursework in the field of swimming classes, techniques and/or routines, toys, photographs, photographs of babies, photographs of babies for car windscreens, underwater photographs of babies, stickers, stickers for car bodywork, car stickers affixed by suction, eyeglass cases, household or kitchen utensils and containers, housewares, hair combs and brushes, washing sponges, portable baby baths, heat insulated containers for beverages, drinking bottles, baby bottles, crockery, cups, drinking flasks for travellers, drinking glasses, drinking vessels, mugs, piggy banks, children's toys, sports equipment; training of photographers namely, workshops and seminars in the field of photography; photographic services; business management consulting services in the field of swimming instructions and fitness classes; business management franchise consulting services in the field of swimming instructions and fitness classes; swimming instruction; provision of swimming classes, instruction and lessons; education, teaching and instructional services in field of swimming classes and swimming instruction; aerobics, exercise and/or aquanatal instruction; teaching of aerobics, exercise and aquanatal exercises; training of aerobics, exercise and aquanatal teachers and coaches; personal coaching in the field of swimming instruction, swimming training and aquanatal physical fitness; training of teachers and coaches in the fields of swimming, swimming instruction, fitness and aquanatal fitness.

Schedule B – Application No. 1,693,298

Goods (1) and Services (1) Based on Proposed Use in Canada

Goods (1) and Services (3) Based on Use and Registration in the United Kingdom

Services (2) Based on Use in Canada since at least as early as April 2014

Goods

(1) Printed matter, namely, books, leaflets, pamphlets, and manuals containing instruction and coursework in the field of swimming classes, techniques and routines; books, namely children's books; photographs; photographs of babies; photographs of babies for car windscreens; stickers; stickers for car bodywork; underwater photographs; car stickers; car stickers affixed by suction.

Services

(1) Training services, tuition services, and entertainment services, all relating to aerobics, exercise and aquanatal activities; education and training services relating to photography; photography; photography services; portrait photography; underwater photography; provision of swimming bath and swimming pool facilities; aerobics, exercise and aquanatal instruction; teaching of aerobics, exercise and aquanatal; training of aerobics, exercise and aquanatal teachers; training of photographers; physical fitness training services; education, teaching, instruction and training services in the fields of aerobics, exercise and aquanatal classes and instruction; providing of training services, being the provision of aerobics, exercise and aquanatal classes and instruction; organising and conducting events relating to aerobics, exercise and aquanatal; aerobics, exercise and aquanatal classes, lessons, schools and shows; entertainment in the nature of aerobics, exercise and aquanatal; instruction in aerobics, exercise and aquanatal; presentation of aerobics, exercise and aquanatal; personal coaching services in the fields of aerobics, exercise and aquanatal; entertainment in the nature of aerobics, exercise and aquanatal performances; physical education services; entertainment in the nature of swimming; personal coaching services; personal coaching services in the field of swimming; providing digital music and other audio/video content from MP3 Internet web sites; entertainment in the nature of swimming performances; consultancy, advisory and information services for or in relation to any or all of the aforementioned services.

(2) Training services, tuition services, and entertainment services, all relating to swimming for infants and babies; swimming instruction; teaching of swimming; training of swimming teachers; educational, teaching, instruction and training services in the field of swimming; education, teaching and instructional services, being the provision of swimming classes and instruction; providing of training services, being the provision of swimming classes and instruction; provision of swimming classes and instruction; organising and conducting events relating to swimming; swimming classes, lessons, schools and shows; instruction in swimming; presentation of swimming.

(3) Training services, tuition services, and entertainment services, all relating to swimming for infants and babies; education and training services relating to photography; photography; photography services; portrait photography; underwater photography; swimming instruction; teaching of swimming; training of swimming teachers; educational, teaching, instruction and training services in the field of swimming; education, teaching and instructional services, being the provision of swimming classes and instruction; providing of training services, being the provision of swimming classes and instruction; provision of swimming classes and instruction;

organizing and conducting events relating to swimming; swimming classes, lessons, schools and shows; instruction in swimming; presentation of swimming.