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Mailed: September 8, 2004

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Keith W. Carmichael *dba* Cutting-Edge Agri Products

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Serial No. 76379678

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Jonathan A. Bay, Esq. for Keith W. Carmichael *dba* Cutting-Edge Agri Products.

Josette M. Beverly, Trademark Examining Attorney, Law Office 112 (Janice O'Lear, Managing Attorney).

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Before Hanak, Hairston and Walters, Administrative Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

Keith W. Carmichael *dba* Cutting-Edge Agri Products has filed an application to register the mark LEGEND LESPEDEZA on the Principal Register for "common or striate Lespedeza (*Kummerowia striata*) seed used by pasture owners or managers for growing forage for livestock consumption."<sup>1</sup> The

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<sup>1</sup> Serial No. 76379678, in International Class 31, filed March 7, 2002, based on use in commerce, alleging first use and use in commerce as of December 31, 1999.

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application includes a disclaimer of LESPEDEZA apart from the mark as a whole.

The Trademark Examining Attorney has issued a final refusal to register under Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the mark LEGEND, previously registered for "grass seed mixtures,"<sup>2</sup> that, if used on or in connection with applicant's goods, it would be likely to cause confusion or mistake or to deceive.

Applicant has appealed. Both applicant and the Examining Attorney have filed briefs, but an oral hearing was not requested. We affirm the refusal to register.

The Examining Attorney states that the marks are substantially similar, contending that both marks contain the word LEGEND and applicant merely adds a generic term, LESPEDEZA, thereto; that LEGEND is not a weak mark in connection with registrant's goods; and that applicant's specimens show use of the mark with the term LESPEDEZA of lesser dominance because it is smaller and below the term LEGEND. Regarding the goods, the Examining Attorney contends that the goods are related and the channels of trade the same. In support of her position, the Examining

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<sup>2</sup> Registration No. 1,192,249 issued March 16, 1982, to E.J. Smith & Sons Company, in International Class 31. The records of the USPTO show that the current owner of the registration is Smith Turf & Irrigation Co. [Sections 8 (six year and ten year) and 15 affidavits accepted and acknowledged, respectively; renewed.]

Attorney submitted numerous third-party registrations for marks that contain both "grass seeds" and "forage seeds" in the identifications of goods; numerous excerpts from articles in the LEXIS/NEXIS database that indicate that many grasses are used for forage<sup>3</sup>; and definitions from *The American Heritage Dictionary of the English Language* (3<sup>rd</sup> ed. 1992) of "legend" and of "lespedeza" as "noun. See bush clover. [New Latin *Lespedeza*, genus name, after V.M. de Cespedez (misread as Lespedez; fl. 1785), Spanish governor of Florida.]."

To summarize applicant's arguments, applicant contends that the marks are different due to the addition of LESPEDEZA to his mark; that LEGEND is a weak and laudatory term; that a type of "lespedeza" is a rampant invasive perennial plant that is difficult and costly to eradicate from pastures and, thus, the use of the term LESPEDEZA with the highly laudatory term LEGEND creates a "sonorous" mark that is an oxymoron; and that applicant's annual plant is a distant cousin to the invasive perennial plant. Regarding

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<sup>3</sup> The following is a representative sample of excerpts:

"The technique for raising grass (for forage) is so much better..." *The Courier Journal* (Louisville, KY), January 14, 2003.

"The native bluegrasses, junegrass, and the exotic cheatgrass are important sheep forage." *Lewiston Morning Tribune*, January 2, 2003.

"Its also used as a winter grass in the South and as forage for grazing animals." *USA Today*, December 17, 2002.

the goods, applicant contends that such products are purchased with great care and in consultation with "expert seed merchants"; that prospective purchasers evaluate pasture plant types "according to feed value such as total tonnage production, total digestible nutrients and vitamins, adaptability, palatability, animal acceptance, and various other health issues including matters involving pregnant stock, young-of-the-year stock, milk-producing stock and so on" (Brief, p. 15); that purchasers sign a purchase and use license for such products; and that there is a substantial difference between a grass family forage plant and a legume family forage plant. Applicant states that pasture grasses are distinct from landscape grasses; that different considerations are involved in the purchase of landscape grasses; and that the purchasers thereof do not exercise the same degree of care in purchasing landscape grass.

In support of his position, applicant submitted lists of third-party registrations for marks that include the term LEGEND<sup>4</sup>; a technical report regarding applicant's product; brochures for other products produced by applicant; and print-outs from the USPTO database of registrations that

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<sup>4</sup> In order to make these registrations properly of record, soft copies of the registrations themselves, or the electronic equivalent thereof, i.e., printouts of the registrations taken from the electronic records of the Patent and Trademark Office's (PTO) own database, should have been submitted. See, *Weyerhaeuser Co. v. Katz*, 24 USPQ2d 1230 (TTAB 1992).

include the term LEGEND for goods that include flowers, plants and trees.<sup>5</sup>

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences 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); *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997); and *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein. The factors deemed pertinent in this proceeding are discussed below.

We turn, first, to a determination of whether applicant's mark and the registered mark, when viewed in their entireties, are similar in terms of appearance, sound, connotation and commercial impression. The test is not

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<sup>5</sup> A significant number of these registrations are expired or cancelled and, thus, are of little probative value.

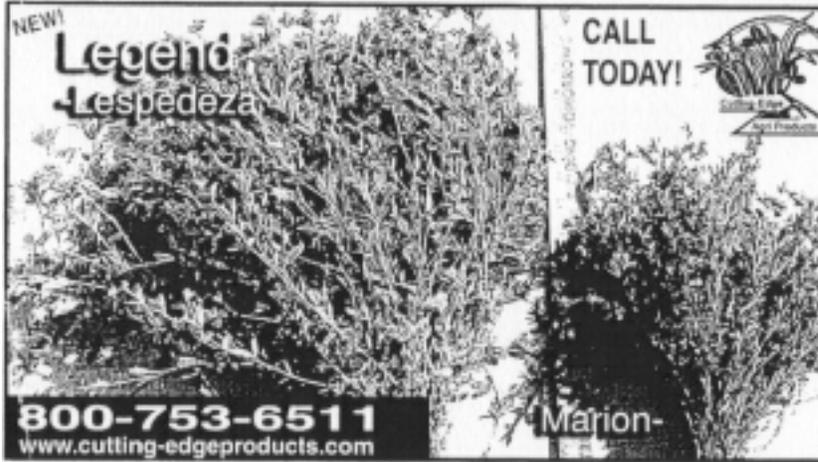
whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impressions that confusion as to the source of the goods or services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Furthermore, although the marks at issue must be considered in their entirety, it is well settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

We take judicial notice of the definition of "lespedeza" in *Merriam-Webster's Collegiate Dictionary* (11<sup>th</sup> ed. 2003) as "n. ... any of a genus (*Lespedeza*) of herbaceous or shrubby plants of the legume family including some widely used for forage, soil improvement, and hay." We conclude from this definition and evidence in the record that LESPEDEZA is merely descriptive, if not generic, in connection with applicant's identified goods.

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Applicant's mark consists of the cited mark, LEGEND, to which the descriptive, or generic, word LESPEDEZA has been added. Generally, the addition of a descriptive term to another's mark will not avoid likelihood of confusion. Moreover, when a mark consists of a descriptive term and a distinctive term, the distinctive term will be considered the dominant part of the mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). We note, further, that applicant's own use of its mark on its specimens of record emphasizes the term LEGEND, which appears in larger font and on a separate line from the term LESPEDEZA. Following are two examples from applicant's specimens of use:





We find that the marks are sufficiently similar in sound, appearance and connotation and overall commercial impression that, if used in connection with similar or related products, confusion as to source is likely. The marks in both the registration for LEGEND and the application for LEGEND LESPEDEZA are depicted in typed drawing form. This means that the application and registration are "not limited to the mark[s] depicted in any special form," and hence we are mandated "to visualize what other forms the mark[s] might appear in." *Phillips Petroleum Co. v. C.J. Webb Inc.*, 442 F.2d 1376, 170 USPQ, 35, 36 (CCPA 1971). See also *INB National Bank v. Metrohost Inc.*, 22 USPQ2d 1585, 1588 (TTAB 1992).

We are not persuaded by applicant's arguments that LEGEND is a laudatory and weak term and, thus, the addition of the descriptive, if not generic, term LESPEDEZA gives a

unique connotation to applicant's mark that is adequate to distinguish the marks.

Turning to consider the goods involved in this case, we note that the question of likelihood of confusion must be determined based on an analysis of the goods or services recited in applicant's application vis-à-vis the goods or services recited in the registration, rather than what the evidence shows the goods or services actually are. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). See also, *Octocom Systems, Inc. v. Houston Computer Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1992); and *The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ2d 1715 (TTAB 1991).

Further, it is a general rule that goods or services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that goods or services are related in some manner or that some circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used therewith, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each parties' goods or services. *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991), and cases cited therein.

The goods in the cited registration, "grass seed mixtures," is not limited in any way and, thus, encompasses mixtures of all types of grass seed for all purposes, including for forage, soil improvement, hay and/or landscaping. The evidence of record includes numerous third-party registrations that include both grass seed and forage seed. Applicant's product, "common or striate Lespedeza (*Kummerowia striata*) seed used by pasture owners or managers for growing forage for livestock consumption," is clearly used for forage. It is not clear if it is considered, technically, a "grass." To the extent that applicant's seed may be considered a grass, it would be encompassed within the registrant's identified goods. Even if applicant's product is not, technically, a grass, it is used for forage, as are many of the grasses encompassed within registrant's identified goods. As such, the goods involved herein are closely related in nature and purpose. The goods are related regardless of the fact that various soil, climate and other factors would lead a particular purchaser to choose one type of forage seed over another.

While it is logical that, as applicant states, purchasers of its seed for forage are likely to carefully consider the type of product that they will grow, as applicant also states, purchasers of the registrant's seeds for, for example, landscaping purposes are not likely to be

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such careful consumers. Also, it does not necessarily follow that even knowledgeable business purchasers are immune from confusion when the marks are as similar as these marks and there is evidence that the goods with which these marks are used do sometimes emanate from the same source. See *In re General Electric Company*, 180 USPQ 542 (TTAB 1973).

Therefore, we conclude that in view of the similarity in the commercial impressions of applicant's mark, LEGEND LESPEDEZA, and registrant's mark, LEGEND, their contemporaneous use on the closely related goods involved in this case is likely to cause confusion as to the source or sponsorship of such goods.

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