

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: September 29, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Schwan's IP, LLC

Serial No. 77057385

Gregory C. Golan, Merchant & Gould PC, for Schwan's IP, LLC.

Andrea Koyner Nadelman, Trademark Examining Attorney, Law Office 110, Chris A.F. Pederson, Managing Attorney.

**Before Drost, Mermelstein, and Ritchie de Larena,
Administrative Trademark Judges.**

Opinion by Mermelstein, Administrative Trademark Judge:

Schwan's IP, LLC seeks registration of the mark TIMBER CREEK (in standard characters) for goods described as a "grilling accessory, namely, tray for smoking meats and vegetables." International Class 11.¹

Registration has been finally refused pursuant to Trademark Act § 2(d), 15 U.S.C. § 1052(d), on the ground that applicant's mark so resembles the mark TIMBER CREEK

¹ Filed December 5, 2006, based on an allegation of a *bona fide* intent to use the mark in commerce. The application includes goods in International Class 29. However, the examining attorney has explicitly limited her refusal to applicant's International Class 11 goods. Therefore, despite the result in this decision,

Serial No. 77057385

(typed), registered for a variety of camping equipment,² as to be likely, if used on the identified goods, to cause confusion, to cause mistake, or to deceive. Trademark Act § 2(d); 15 U.S.C. § 1052(d).

We affirm.

I. Applicable Law

Our determination under Trademark Act § 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 and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

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 [or services] and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192

applicant's mark will be published for opposition with respect to its Class 29 goods.

USPQ 24, 29 (CCPA 1976); and *In re Azteca Rest. Enters., Inc.*, 50 USPQ2d 1209 (TTAB 1999).

II. Discussion

A. The Similarity Or Dissimilarity of the Marks in Their Entireties as to Appearance, Sound, Connotation and Commercial Impression.

In a likelihood of confusion analysis, we compare the marks for similarities and dissimilarities in appearance, sound, connotation and commercial impression. *Palm Bay*, 73 USPQ2d at 1692. The marks in this case are identical in every respect.

Applicant nonetheless argues that the cited mark is weak, and not entitled to a broad scope of protection. In support of its argument, applicant points to a number of registrations it made of record which contain the terms "TIMBER" or "CREEK."³ Suffice it to say that we do not find that these registrations for other marks and other goods demonstrate the weakness of the prior registration for the goods recited therein.

² Registration No. 3007751, issued November 18, 2005.

³ By our count, applicant submitted the records of sixteen marks for this purpose. Of that number, we have disregarded six, because they are either still pending as applications or have been cancelled after registration. Of the remaining registrations, only one includes both "TIMBER" and "CREEK," Registration No. 2996002, TIMBER CREEK LODGE for "wallcoverings." There is no evidence or argument that wallcoverings are in any way related to the registrant's goods.

We conclude that, because the marks at issue are identical, this factor strongly supports the examining attorney's refusal of registration.

B. The Similarity Or Dissimilarity And Nature Of The Goods

We begin our analysis of the goods with the premise that, because the marks at issue are identical, the extent to which the applicant's and registrant's goods must be similar or related to support a finding of likelihood of confusion is lessened. *In re Opus One Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001). It is only necessary that there be a viable relationship between the goods to support a finding of likelihood of confusion. *In re Concordia Int'l Forwarding Corp.*, 222 USPQ 355, 356 (TTAB 1983).

Moreover, 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 or intended to be 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

Serial No. 77057385

the producers of each parties' goods or services. *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991).

Applicant identifies its goods as a "grilling accessory, namely, tray for smoking meats and vegetables."

The goods set out in the cited registration comprise a variety of camping and outdoor equipment as follows:

Int'l Class	Goods
6	Metal tent stakes, carabiner type, metal key chains
7	Air compressors, compressed air pumps
8	Camping mess kits, consisting primarily of locking knife blade, fork, spoon, corkscrew, bottle opener, fry pan, plate, boiling plate, boiling pot with lid, cup and nylon case; hand tools, namely pliers, screw drivers, toaster forks, shovels, and hand operated shears; camping tool kits consisting primarily of multi-function hand tools comprised of needle nose pliers, wire cutters, wire strippers, Phillips head screwdriver, can opener, bottle opener, nail file, slotted screwdrivers, serrated blade, knife blade, saw blade, tape measure, 17-bit set comprised of 8 Phillips head bits, 5 slotted screwdriver bits, and 3 Allen wrench bits, storage case; utility tool sets consisting primarily of adjustable wrench, fish scaler, file, large slotted screwdriver, Phillips head screwdriver, knife blade, serrated blade, needle nose pliers, nail claw, mini hammer, bottle opener, 9-bit set comprised of 3 Phillips head bits, 3 slotted screwdriver bits, and 3 Allen wrench bits, storage case; hand-pumped water sprayer
9	Directional compasses, sport whistles
11	Camping stoves, kerosene lanterns, propane lanterns, portable propane heaters, chemically-activated light sticks, flashlights, water coolers, solar showers, portable camp toilets, portable battery-operated head lights, portable fire pits, plastic portable fan with light for use when camping
18	Fanny packs, duffel bags, backpacks, umbrellas, lawn umbrellas
20	Lawn furniture, furniture for use when camping, air mattresses, air beds with frames, all for use when camping, non-metal tent stakes; nylon detachable key chains; handheld pocket fan; sleeping bags
21	Portable coolers, plastic water bottles sold empty, thermal insulated containers for food or beverage, egg carriers, flasks, utensils, namely toaster fork and extendable fork and pots for use when cooking, soap dishes, toothbrush covers, enamel cookware, namely, ladle, kettle, skillet, serving spoons, coffee cup, mixing bowl, cup, soup plate, dinner plate, dishes, beverage containers, aluminum beverage containers, bottle carriers, non-electric percolators, canteen and accompanying belt, all of the foregoing goods for use when camping
22	Tents, poly and polyethylene canopies and tarps, and tie downs for use when camping, hammocks, hammock stands, all-purpose straps, laundry reel made of string
24	Mosquito netting, thermal blankets

Thus, while applicant's goods are a device for smoking food on an outdoor grill, the prior registrant's goods include camping stoves and cookware for outdoor cooking. Applicant contends that its goods are typically used with larger outdoor grills, and that such grills are not usually used for camping.⁴ But whether or not large outdoor grills are used by campers is a red herring; applicant does not allege that its goods are only suitable for use on large grills, that its goods are not portable, or that they are otherwise unsuited to camping. Applicant's goods are clearly related to the registrant's in purpose and use, in that they are both used for cooking food outdoors.

The examining attorney has introduced evidence⁵ indicating that campers in fact use smoke to cook food. One website advises that "A near complete camping gear

⁴ We note that applicant's statements in this regard are unsupported by any evidence. Applicant filed its application under the intent-to-use provisions of the Trademark Act and has not yet filed an allegation of use. If applicant's mark is actually in use on the goods, applicant has not filed any documentation about its product on this record.

⁵ The examining attorney conducted a search using the Google search engine, and submitted the first two pages of the search results into evidence. Based on this, the examining attorney argues that "camping equipment" and "smoker" appeared together in approximately 19,200 stories. Ex. Att. Br. at 8.

We agree with applicant that this evidence is problematic. The two-page Google "hit list" is entitled to very little probative weight because it contains little information by which we can judge the context in which the searched words appear. *In Re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1833 (Fed. Cir. 2007). On the other hand, there is no evidence at all

Serial No. 77057385

should consist of ... cooking equipment (charcoal chimney, smoker, Dutch oven" Camping-Net.com, www.camping-net.com/camping_gear.html (July 7, 2007). Other evidence demonstrates that camping equipment and outdoor cooking equipment are sold or rented together. See Community Recreation, Fort Sam Houston, Texas, www.fortsamhoustonmwr.com/rfd/outdoorequipmentcenter/default.asp (July 12, 2007).

We conclude that applicant's goods and the goods of the cited registrant are related, a factor which likewise supports refusal of registration.

C. The similarity or dissimilarity of established, likely-to-continue trade channels.

Finally, applicant argues that

none of the [examining attorney's evidence] in any way suggest[s] that Applicant's goods are routinely marketed and sold via the same channels of trade as camping goods. Rather, these excerpts demonstrate that Applicant's goods are commonly marketed and sold with barbecue grills and/or in stores specializing in barbecue grills and grilling-related items."

App. Br. at 5-6.

In determining registrability, we must limit our consideration to the goods as set out in the application and in the cited registration. See *In re Elbaum*, 211 USPQ

of the context for the remainder of the 19,200 "hits," and we have given that information no consideration.

Serial No. 77057385

639, 640 (TTAB 1981). Regardless of applicant's actual goods or the consumers to whom they are sold, we may not read limitations into the goods as recited. *Octocom Syst. Inc. v. Houston Computers Svcs. Inc.*, 16 USPQ2d 1783, 1786-87 (Fed. Cir. 1990).

In this case, the goods in the subject application contain no limitations as to their channels of trade or potential customers. We thus consider applicant's goods to move in all the usual channels of trade and to the usual customers for goods such as applicant's. As noted above, the examining attorney's evidence suggests that at least some smoking equipment is used while camping and is sold in close proximity to camping gear. Based on this evidence we cannot conclude that the normal channels of trade for the applicant's and registrant's goods are so distinct and separate as to mitigate the likelihood of confusion which would arise from the use of the identical marks on the related goods at issue.

III. Conclusion

After careful consideration of the record evidence and argument, we conclude that, in light of the identical marks and related goods at issue, use of applicant's mark on or in connection with the identified goods would pose a likelihood of confusion with the mark in the cited prior

Serial No. 77057385

registration.

Decision: The refusal to register under Trademark Act § 2(d) is accordingly affirmed. As previously noted, registration has not been refused with respect to applicant's International Class 29 goods, which will be published for opposition in due course.