

**THIS OPINION  
IS NOT A PRECEDENT  
OF THE TTAB**

Mailed: March 28, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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In re Ames True Temper Properties, Inc.  
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Serial No. 78858471  
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David V. Radack of Hodgson Eckert Seamans Cherin & Mellott, LLC  
for Ames True Temper Properties, Inc.

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(Karen M. Strzyz, Managing Attorney).

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Before Rogers, Zervas and Taylor, Administrative Trademark  
Judges.

Opinion by Taylor, Administrative Trademark Judge:

Ames True Temper Properties, Inc. has filed an application  
to register on the Principal Register the mark DIG EZ (in  
standard character format) for

"[m]anually operated hand tools, namely, shovels;  
rakes; hoes; spades; cultivators; forks; scoops;  
fruit pickers; weeders; scrapers; spoons; edgers;  
post hole diggers; potato hooks; manure hooks;  
lutes; come-a-longs in the nature of manually  
operated winch hoists; sod cutter/remover in the  
nature of a spade; concrete finishing floats;  
trowel for use as a bulb planter; axes; wood-  
splitting wedges; hammers; sledge hammers;  
mattocks; picks; tampers; wrecking bars; ripping  
chisels; punches; hand trowels; hand spades; hand  
cultivators; hand weeders; trowel for use as a  
bulb planter; trowel for use as a hand

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transplanter; planter's/landscaper's multi-purpose knife tool; pruners; grass shears; hedge shears; loppers; saws; pole tree trimmers; garden scissors; floral shears; bush hooks; bank blades; weed cutters; grass whips; grass hooks; floral snips; bow saws; folding saws; double-edge saws; and replacement saw blades therefore; machete corn knives; weed hooks; snow shovels; snow pushers; snow scoops; snow roof rakes; ice scrapers; snow sleigh shovel; snow brushes; ice chisels; and hand scrapers" in International Class 8.<sup>1</sup>

At the request of the examining attorney, applicant disclaimed the term "DIG."

Registration has been refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when used in connection with the identified goods, so resembles the registered mark EZ-DIGGER (in typed form) for "gardener's hand tool; namely, a curved plow-like blade for digging holes, opening and closing rows, loosening soil and chopping weeds" in International Class 8,<sup>2</sup> as to be likely to cause confusion, mistake or to deceive.

When the refusal was made final, applicant appealed. Both applicant and the examining attorney filed briefs. For the reasons discussed below, we affirm the refusal to register.

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<sup>1</sup> Serial No. 78858471, filed April 11, 2006, and alleging a bona fide intent to use the mark in commerce.

<sup>2</sup> Registration No. 1614644, issued September 25, 1990, renewed.

Our determination of the issue of likelihood of confusion is based on an analysis of all the probative facts in evidence that are relevant to the factors set forth in *In re E. I. duPont 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 any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

We consider first the goods based on a comparison of the identifications in the application and the cited registration. *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 at n. 4 (Fed. Cir. 1993). Pointing out that applicant did not "contest in its brief that the goods of the parties are similar for purposes of a likelihood of confusion analysis," the examining attorney maintains that the goods are identical. (Brief at unnumbered p. 4). He specifically maintains that "[a]pplicant's goods encompass the registrant's goods because they are both intended to be used by hand to perform the same tasks, and possess similar physical attributes such as handles and curved blades." (*Id.*). We agree that applicant's manually-operated

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hand tools for digging, cultivating the soil and cutting weeds and the gardener's hand tool for digging holes, loosening soil and cutting weeds covered by the cited registration are very closely related, if not legally identical. See *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981) (likelihood of confusion must be found if there is likely to be confusion with respect to any item that comes within the identification of goods in the application).

Further, in the absence of any limitations in the identifications of goods in either the application or the cited registration as to channels of trade or classes of purchasers, we must presume that both applicant's and registrant's legally identical hand tools for digging, cultivating soil and weeding will be offered in the same channels of trade, such as hardware stores, home improvement stores and gardening centers, and will be offered to the same consumers, namely ordinary purchasers, seeking such tools. See *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). In view thereof, the *du Pont* factors of the similarity of the goods, channels of trade and classes of purchasers strongly favor a finding of likelihood of confusion as to the cited registration.

We now consider the marks. In determining the similarity or dissimilarity of the marks, we must compare the marks in their entireties as to appearance, sound, connotation and

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commercial impression. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in their entireties that confusion as to the source of the goods 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. *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Additionally, where, as in the present case, the marks would appear on virtually identical goods, the degree of similarity between the marks which is necessary to support a finding of likely confusion declines. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992).

Applicant argues that there is no likelihood of confusion between the two marks because:

The Registrant's mark is EZ-DIGGER, whereas Applicant's mark is DIG EZ. There are substantial differences in pronunciation and commercial impression due to Applicant's use of DIG as opposed to DIGGER, and due to Applicant's use of DIG first, as opposed to the use of EZ first in Registrant's mark.

(Brief at p. 2).

The examining attorney, on the other hand, maintains that:

[M]erely transposing the terms EZ and DIGGER, and deleting GER does not change the overall commercial impression. Potential consumers will understand that both marks connote digging with ease, regardless of the order of the words or shorter form of DIGGER used by applicant.

(Brief at unnumbered p. 4).

As applied to the goods at issue, we find that applicant's mark DIG EZ is similar in connotation and commercial impression to the cited mark EZ-DIGGER. Both marks consist of two-words and contain the term "EZ," the phonetic equivalent of the word "easy." Further, DIG in applicant's mark is a variant of the word DIGGER in the registered mark, and similar in meaning; "dig" meaning the act of breaking up or loosening the soil with a shovel or other implement and "digger" meaning the implement used in breaking up or loosening the soil.<sup>3</sup> In addition, we are

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<sup>3</sup> We take judicial notice of the definitions of the terms "dig" and "digger," taken from the online dictionary Dictionary.com Unabridged (v1.1) based on the Random House Unabridged Dictionary (2006). Dig is defined, in relevant part, as:

-verb (used without object)

1. to break up, turn over, or remove earth, sand, etc., as with a shovel, spade, bulldozer, or claw; make an excavation.

-verb (used with object)

3. to break up, turn over, or loosen (earth, sand, etc.), as with a shovel, spade, or bulldozer (often followed by up).

"Digger" is defined, in relevant part, as:

-noun

2. a tool, part of a machine, etc., for digging.

The Board may take judicial notice of dictionary definitions, including online dictionaries which exist in printed format. See *In re CyberFinancial.Net Inc.*, 65 USPQ2d 1789 (TTAB 2002). See also *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

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not persuaded by applicant's unsupported claim that there is a change in commercial impression as a result of the transposition of EZ and DIG or DIGGER. Instead, we find that both applicant's mark and the cited mark convey the same commercial impression of digging with ease. Viewing the marks in their entireties, and keeping in mind the fallibility of memory, we find that the similarity of the marks, due to the presence in both marks of the identical term EZ and the words DIG or DIGGER, outweighs the slight differences in pronunciation and appearance which results from the transposition of EZ and DIG and DIGGER, the differences in form of DIG and DIGGER and the hyphen present in the cited mark. See *In re Wine Society of America Inc.*, 12 USPQ2d 1139 (TTAB 1989); and *In re Nationwide Industries Inc.*, 6 USPQ2d 1882 (TTAB 1988) (RUST BUSTER, with "RUST" disclaimed, for rust-penetrating spray lubricant held likely to be confused with BUST RUST for penetrating oil). This factor thus favors a finding of likelihood of confusion.

Applicant also argues that the terms DIG and EZ are somewhat weak and diluted terms, and thus the mark EZ-DIGGER has a very narrow scope of protection. In support of its position that the marks are weak, applicant made of record copies of third-party registrations for marks containing the terms DIG, and EZ (in various forms) for similar goods. As regards these third-party registrations, while they may be used to demonstrate

that a portion of a mark is suggestive or descriptive, they are not evidence that the marks shown therein are in use or that the public is aware of them. See *AMF Incorporated v. American Leisure Products, Inc.*, 177 USPQ 268, 269 (CCPA 1973) ["little weight is to be given such registrations in evaluating whether there is likelihood of confusion."]. Moreover, our review of such registrations reveals none of the marks in the third-party registrations (i.e., GARDENESE, WHEEL EASY, CLEAN 'N EASY, DIG RIG, U-DIG-IT, TRIM-EZY, FRAME E-Z) contain both the terms EZ and DIG or DIGGER and, hence, none of the marks in the third-party registrations is as similar to registrant's mark as is applicant's mark. Also, two of the registrations cover different goods (i.e., lawn and garden carts and multi-use hand operated tool for use in framing houses).

Nonetheless, we note that even if marks which contain the words EZ (easy), DIG and DIGGER are considered to be weak due to an asserted degree of suggestiveness conveyed by such terms, even weak marks are entitled to protection where confusion is likely. See *Matsushita Electric Company v. National Steel Co.*, 442 F.2d 1383, 170 USPQ 98, 99 (CCPA 1971) ["Even though a mark may be 'weak' in the sense of being a common word in common use as a trademark, it is entitled to be protected sufficiently to prevent confusion from source arising"]. Here, notwithstanding any alleged weakness in the terms "EZ," "DIG" and "DIGGER" the

registered mark is still similar in appearance, connotation and commercial impression to applicant's mark. We accordingly find this *du Pont* factor is neutral.

Two final arguments made by applicant require comment. First, noting that it had a previously registered mark for DIG-EZY<sup>4</sup> that predates registrant's use and registration of its mark, and that registrant's mark was registered "in the face of" applicant's earlier registration, applicant argues that it would be manifestly unfair if it were prevented from registration of its nearly identical mark DIG EZ. We find this argument unavailing. The mark involved in this proceeding is not the same as the one previously registered. Similarly, the goods at issue in this proceeding differ from those in the previous registration, in that applicant has significantly expanded its line of tools to particularly include manually-operated hand tools for digging, cultivating and weeding. In light of the broad identification in the present application, the fact that applicant owned a registration for a non-identical mark for significantly narrower goods does not persuade us that there is no likelihood of confusion in this case.

Last, citing to *In re Woman's Publishing Co., Inc.*, 23 USPQ2d 1876, 1878 (TTAB 1992), applicant argues that "there is

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<sup>4</sup> Registration No. 988345 for "shovel and spades," cancelled April 23, 2005, cancelled Section 8, expired Section 9.

recent and directly on-point U.S. Patent and Trademark Office [Office] precedent allowing virtually the same mark that is the subject of this application." (Brief at p. 2). We presume by this statement that applicant is arguing that the Office's history of registration of a particular term should be of some persuasive authority in handling later applications involving similar marks. As stated above, neither the mark nor the goods in this application are the same as those in applicant's previous application. Moreover, we are not privy to the record of the prior proceeding and are bound to make a decision based on the record before us. See *AMF Inc. v. American Leisure Products, Inc.*, 177 USPQ 268, 269 (CCPA 1973); *In re International Taste, Inc.*, 53 USPQ2d 1604 (TTAB 2000); and *In re Sunmarks Inc.*, 32 USPQ2d 1470 (TTAB 1994).

We conclude that purchasers familiar with registrant's EZ-DIGGER mark for a gardener's hand tool; namely, a curved plow-like blade for digging holes, opening and closing rows, loosening soil and chopping weeds, would be likely to believe upon encountering applicant's EZ DIG mark for various manually-operated hand tools for digging, cultivating the soil and cutting weeds, that the goods originate from or are associated with or sponsored by the same source.

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