

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

Mailed:
October 24, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Hale

Serial No. 78963970

B. Craig Killough of Barnwell Whaley Patterson & Helms LLC
for Nathan S. Hale.

Cimmerian Coleman, Trademark Examining Attorney, Law Office
102 (Karen M. Strzyz, Managing Attorney).

Before Hairston, Zervas and Bergsman, Administrative
Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Nathan S. Hale ("applicant") filed an intent-to-use
application to register the mark WHISKEY CREEK RANCH, in
standard character format, for services ultimately
identified as follows:

Recreational services, namely, providing hunting
preserves; summer camps and not including golf courses
or golf tournaments; environmental education services,
namely, providing classes about the environment;
recreational camp services, namely, providing wildlife
and nature studies for others, in Class 41; and,

Dude ranches, in Class 43.

Serial No. 78963970

Applicant disclaimed the exclusive right to use the word "ranch."

The Trademark Examining Attorney refused to register applicant's mark under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. §1052(d), on the ground that applicant's mark is likely to cause confusion with the mark WHISKEY CREEK, in typed drawing format, for "golf courses, golf tournaments, and providing facilities for recreational activities," in Class 41.¹

Our determination of likelihood of confusion 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 issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). *See also, In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by §2(d) goes to the

¹ Registration No. 2492786, issued September 25, 2001; affidavits under Sections 8 and 15 accepted and acknowledged.

Serial No. 78963970

cumulative effect of differences in the essential characteristics of the goods and differences in the marks").

- A. The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.

We turn first to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *In re E. I. du Pont De Nemours & Co., supra*. In a particular case, any one of these means of comparison may be critical in finding the marks to be similar. *In re White Swan Ltd.*, 9 USPQ2d 1534, 1535 (TTAB 1988); *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1042 (TTAB 1988). In comparing the marks, 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 terms of their overall commercial impression so that confusion as to the source of the goods offered under the respective marks is likely to result.

San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp., 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd unpublished*, No. 92-1086 (Fed. Cir. June 5, 1992). The proper focus is on the recollection of

Serial No. 78963970

the average customer, who retains a general rather than specific impression of the marks. *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). In this case, the relevant public would be members of the general public who golf, hunt, camp, and otherwise enjoy outdoor activities.

The marks are virtually identical: WHISKEY CREEK RANCH vs. WHISKEY CREEK. Applicant's mark WHISKEY CREEK RANCH incorporates the entirety of the registered mark. The only difference between the marks is applicant's addition of the descriptive word "ranch" that it disclaimed. Accordingly, we find that the similarity of the marks is a factor that favors finding that there is a likelihood of confusion.

B. The similarity or dissimilarity and nature of the goods and services as described in the applications and registration at issue.

It is well settled that applicant's services and the registrant's services do not have to be identical or directly competitive to support a finding that there is a likelihood of confusion. It is sufficient if the respective services are related in some manner and/or that the conditions surrounding their marketing are such that they would be encountered by the same persons under

Serial No. 78963970

circumstances that could, because of the similarity of the marks used in connection therewith, give rise to the mistaken belief that they emanate from or are associated with a single source. *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785 (TTAB 1993); *In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978).

In addition, we must keep in mind that the greater the degree of similarity between the marks, the less similarity between the services is required to support a finding of likelihood of confusion. Where as here, the marks are virtually identical, there need be only a viable relationship between the services to find that a likelihood of confusion exists. *In re Opus One, Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001); *In re Concordia International Forwarding Corp.*, 222 USPQ 355, 356 (TTAB 1983).

There is no evidence in this record regarding any relationship between golf courses and golf tournaments on the one hand, and providing hunting preserves, summer camps, classes about the environment, wildlife and nature studies, and dude ranches on the other. However, the registration also includes the service of providing facilities for recreational activities.

In an *ex parte* appeal, likelihood of confusion is determined on the basis of the services as they are

Serial No. 78963970

identified in the application and the cited registration. *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981); *In re William Hodges & Co., Inc.*, 190 USPQ 47, 48 (TTAB 1976). See also *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed").

As the Court of Customs and Patent Appeals, the predecessor of our primary reviewing court, explained in *Tuxedo Monopoly, Inc. v. General Mills Fun Group, Inc.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981):

Here, appellant seeks to register the word MONOPOLY as its mark without any restrictions reflecting the facts in its actual use which it argues on this appeal prevent likelihood of confusion. We cannot take such facts into consideration unless set forth in its application.

Likewise, in this case, we must also analyze the similarity or dissimilarity of the services based on the description of services set forth in the application and

the cited registration, including providing facilities for recreational activities. In other words, we must determine whether there is a relationship between providing facilities for recreational activities and providing hunting preserves, summer camps, classes about the environment, wildlife and nature studies, and dude ranches.

The Examining Attorney contends that providing facilities for recreational activities is so broad that it encompasses applicant's services (*i.e.*, hunting preserves, summer camps, dude ranches, etc.).² However, applicant

² The Examining Attorney argued that applicant's services are within the registrant's normal field of expansion citing *In re 1st USA Realty Professionals, Inc.*, 84 USPQ2d 1581 (TTAB 2007). However, in that case, the Board noted that the "expansion of trade" doctrine is essentially a determination relevant to priority of use and that in *ex parte* appeals, "we look at the question of the relatedness of the services . . . based on whether consumers are likely to believe that the services emanate from a single source, rather than whether the Examining Attorney has shown that the registrant herein has or is likely to expand its particular business to include the services of applicant." Specifically, the Board stated "expansion of trade" is considered through a traditional relatedness of goods and services approach. To the extent that there is evidence that third parties offer both types of services that would be probative that consumers would believe that both types of services emanate from a single source. *In re 1st USA Realty Professionals, Inc.*, 84 USPQ2d at 1584. Suffice it to say, it is incumbent upon the Examining Attorney to support the relatedness of the services in general, and the "expansion of trade" doctrine in particular, with evidence. In this case, however, the Examining Attorney did not introduce any third-party evidence showing that single party rendered both types of services. The excerpts from the websites submitted by the Examining Attorney showed only that the word "ranch" is used in the name of some golf courses, that some golf courses provide restaurant services, and one golf course provides a lodge.

argues that the Examining Attorney's "sweeping interpretation" of the term "providing facilities for recreational activities" as encompassing applicant's services is incorrect.³

The only reasonable interpretation that can be given to the services identification of the Registration is that it encompasses only those specific recreational facilities that are traditionally and commonly present at golf courses and golf tournaments. This more limited interpretation of the services identification is the only construction that is in compliance with the Lanham Act and the Code of Federal Regulations. Further, the Registrant's website confirms that the narrower interpretation conforms to the Registrant's actual use of the mark.⁴

In essence, applicant asserts that if the term "providing facilities for recreational activities" is unrestricted (*i.e.*, not limited to golf), then the registration's description of services is "improperly indefinite" because it could include any number of recreational activities unrelated to golf⁵ and that these activities could fall within multiple classes of services.⁶ Accordingly, applicant concludes that "'providing facilities for recreational activities' should be construed to mean

³ Applicant's Brief, pp. 5-6.

⁴ Applicant's Brief, p. 6.

⁵ Applicant's Brief, p. 8.

⁶ Applicant's Brief, p. 9.

facilities that are commonly found at golf courses, such as changing facilities, driving ranges, and the like. The phrase should most certainly not have been construed to identify every imaginable form of recreation under the sun, including activities entirely unrelated to golf.”⁷

Unfortunately for applicant, the law is clear that the issue of likelihood of confusion must be determined on the basis of the services as they are identified in the application and the cited registration. Here, there are no limitations in the cited registration as to facilities and activities complementary to golfing. Accordingly, for our purposes, the description of services in the cited registration is broad enough to encompass providing facilities of recreational activities of all types, including activities unrelated to golf such as hunting, summer camps, recreational camps, and dude ranches. See *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 941 (Fed. Cir. 1983) (even though opposer used its mark in connection with toy balloons to promote its soft drinks, because there was no restriction in the description of goods limiting the balloons to promotion of the soft

⁷ Applicant's Brier, pp. 8-9.

drinks, the board improperly read limitations into the registration).⁸

In addition, because "providing facilities for recreational activities" was registered in Class 41, we presume that the activities encompassed by that description of services fall within the ambit of Class 41. TMEP §1402.03 (5th ed. 2007) ("However, the conclusions that a term would clearly include items classified in more than one class should not be drawn unless reasonable, in light of the commercial relationships between all the goods or services identified in the application"). Therefore, we will not expand the description of services in the registration to include activities beyond the scope of Class 41.

C. The similarity or dissimilarity of likely-to-continue trade channels and classes of consumers.

Because there are no limitations as to channels of trade or classes of purchasers in either the application or the registration, and because "providing facilities for recreational activities" is broad enough to encompass applicant's services, it is presumed that the registration

⁸ The proper way to pursue this argument is to file a petition to partially cancel the cited registration under Section 18 of the Trademark Act of 1946, 15 U.S.C. §1068 (in a cancellation proceeding, "the Director . . . may modify . . . the registration by limiting the goods or services specified therein").

Serial No. 78963970

and the application encompass all of the services of the type described in the description of services, that the services so identified move in all channels of trade normal for those services, and that the services are available to all classes of purchasers for the listed services. See *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992).

Accordingly, we must presume that applicant's hunting preserves, summer camps, and dude ranches and the registrant's facilities for recreational activities move in the same channels of trade and are rendered to the same classes of purchasers.

D. Balancing the factors.

In view of the facts that the marks are virtually identical and that the registrant's services of providing facilities for recreational activities encompass applicant's services, and because we must presume that the services move in the same channels of trade and are sold to the same classes of consumers, we find that applicant's registration of the mark WHISKEY CREEK is likely to cause confusion with the mark in the cited registration, WHISKEY CREEK RANCH.

Decision: The refusal to register is affirmed as to both classes.