

THIS OPINION IS NOT A  
PRECEDENT OF THE  
T.T.A.B.

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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Chaim Lowenstein  
v.  
Morrison Distribution & Marketing, Inc.

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Cancellation No. 92045446

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Daniel Earle of Shlesinger, Arkwright & Garvey LLP for Chaim  
Lowenstein.

Robert Trent Pipes of Dunlap, Coddling & Rogers for Morrison  
Distribution & Marketing, Inc.

—————  
Before Hairston, Rogers and Cataldo, Administrative  
Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

Chaim Lowenstein has petitioned to cancel the  
registration owned by Morrison Distribution & Marketing,  
Inc. for the mark "24-7 GREAT COFFEES" (GREAT COFFEES is  
disclaimed) for "coffee."<sup>1</sup> As his grounds for cancellation,  
petitioner alleges that prior to both the filing date of the

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<sup>1</sup> Reg. No. 2837070, issued on April 27, 2004 from an intent-to-  
use application filed on September 9, 2002, which sets forth  
dates of first use of October 12, 2003.

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underlying application for registration of such mark and respondent's claimed dates of first use thereof, petitioner adopted and used the mark "24 7 COFFEE" for coffee and related goods; that, in addition thereto, petitioner has filed an application to register the mark "24 7 COFFEE - CLOSEST TO THE ROAST - TAKING AMERICA ONE CUP AT A TIME" (COFFEE is disclaimed) for "roasted coffee, green coffee beans, teas, and beverages made of coffee;"<sup>2</sup> that petitioner's application has been refused registration under Section 2(d) of the Trademark Act in light of respondent's registration for its mark; that there are "similarit[ies] between Petitioner's mark and Registrant's mark"; that the goods of the respective parties are "related"; and that the contemporaneous use of the parties' marks in connection with their respective goods is likely to cause confusion, to cause mistake, or to deceive.

Respondent, in its answer, has denied the salient allegations of the petition to cancel.<sup>3</sup>

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<sup>2</sup> Ser. No. 78537563, filed on December 23, 2004, which alleges dates of first use of November 1, 1998, and first use in commerce of December 27, 1999.

<sup>3</sup> As affirmative defenses, respondent asserts that petitioner lacks standing, does not have superior rights, and the petition for cancellation fails to state a claim. These, however, are not true affirmative defenses, but rather are assertions that relate to respondent's position that there is no likelihood of confusion. Further, respondent asserts as an affirmative defense that "the petition is barred in whole or in part by petitioner's unclean hands and misuse of trademark rights." It appears from respondent's brief that this unclean hands defense is based on its contention that petitioner intentionally misused the registration symbol in connection with his mark. A review of

**EVIDENTIARY OBJECTIONS**

Two evidentiary matters require consideration prior to our discussion of the merits of this case.

**a. Exhibits to Petitioner's Trial Testimony Deposition**

Respondent has objected to fifteen exhibits and the testimony related thereto introduced during the testimony deposition of petitioner, Chaim Lowenstein. Specifically, respondent objects to Exhibits 1-3, 7, 8, 10-18 and 21 and the testimony related thereto. Respondent first objected to the introduction of these exhibits and all of the lines of testimony related to such exhibits during the Lowenstein deposition. Respondent maintains that these exhibits were the subject of respondent's Interrogatory Nos. 2, 7, 10, 13, 14 and 21, and Production Requests Nos. 9, 12 and 13. Relying on TBMP § 527.01 (2d ed. rev. 2004), respondent maintains that "[b]ecause these documents were not provided to Registrant during discovery Petitioner should be estopped from thereafter relying upon them and they should be excluded from the evidence considered in this proceeding."

Petitioner, on the other hand, states that in response to Production Requests Nos. 9 and 12, he stated that

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petitioner's testimony, however, reveals that his use of the registration symbol was inadvertent. Consequently, the assertion of intentional misuse of the registration symbol has not been proved. See generally 3 *McCarthy on Trademarks and Unfair Competition* §19:146 (4<sup>th</sup> ed. 2008).

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documents would be produced, and that such documents were made available for inspection and copying pursuant to 37 C.F.R. § 2.120(d). Petitioner maintains that respondent made no effort to inspect and copy the documents as they are kept in petitioner's usual course of business. Petitioner states that he objected to Production Request No. 13 on the ground that it was not relevant. Petitioner maintains that respondent never challenged this objection, and in any event, none of petitioner's exhibits at issue are responsive to this request.

Inssofar as Interrogatory Nos. 7, 10, 13 and 21 are concerned, petitioner states that he responded to each of these interrogatories, and that respondent's objection is merely a complaint concerning the adequacy of the responses. Petitioner argues that respondent failed to follow the proper procedure for resolving such issues prior to trial, namely by filing a timely motion to compel.

With respect to Interrogatory No. 2, petitioner states that he objected to this interrogatory on the ground that it was overbroad and unduly burdensome. Again, petitioner argues that respondent failed to follow the proper procedure for resolving such issues prior to trial, namely by filing a timely motion to compel.

Inssofar as Interrogatory No. 14 is concerned, petitioner states that he objected to this interrogatory on

the ground that it sought confidential, proprietary information. Again, petitioner argues that respondent failed to follow the proper procedure for resolving such issues prior to trial, namely by filing a timely motion to compel. Petitioner states that no protective order was ever entered in this case, but he ultimately determined that making the information of record was more important than maintaining the confidentiality of such information.

TBMP § 527.01 provides that "[a] party that responds to a request for discovery by indicating that it does not have the information sought, or by stating objections thereto, may be barred by its own action from later introducing the information sought in the request as part of its evidence on the case, providing that the propounding party raises the matter by objecting to the evidence in question on that ground, and preserves the objection in its brief on the case... ." On the other hand, TBMP § 523.04 provides that "[i]f a party that served a request for discovery receives a response thereto which it believes to be inadequate, but fails to file a motion to test the sufficiency of the response, it may not thereafter be heard to complain about the sufficiency thereof."

In this case, respondent filed a motion to compel production of the documents and responses to the interrogatories at issue. The Board, in an order issued

January 25, 2007, denied the motion as untimely. As indicated in that order, a motion to compel must be filed prior to the opening of the first testimony period. 37 C.F.R. § 2.120(e)(1).

Under the circumstances, respondent cannot now be heard to complain that the requested documents were not produced, or that the interrogatory responses were inadequate or incomplete. See *Linville v. Rivard*, 41 USPQ2d 1731, 1733 (TTAB 1996); *Time Warner Entertainment Co. v. Jones*, 65 USPQ2d 1651, 1656 (TTAB 2002). So as to be perfectly clear, this is not a case where the objections to the interrogatories and request for production of documents were of a nature which would have led respondent to believe that no such documents existed.

In view thereof, respondent's objections are overruled. Lowenstein deposition Exhibit Nos. 1-3, 7, 8, 10-18 and 21 are accepted and made part of the record. Similarly, the testimony related thereto will be considered in reaching our decision herein.

***b. Exhibit E to Respondent's Notice of Reliance***

Petitioner has objected to Exhibit E to Respondent's Notice of Reliance, on the ground that it is not proper subject matter for a Notice of Reliance. Exhibit E is respondent's answer to Petitioner's Interrogatory No. 5.

37 C.F.R. § 2.120(j)(5) provides that:

[I]f fewer than all of the ... answers to interrogatories ... are offered in evidence by the ... inquiring party, the ... responding party may introduce under a notice of reliance any other ... answers to interrogatories ... which should in fairness be considered so as to make not misleading what was offered by the ... inquiring party. The notice of reliance filed by the ... responding party must be supported by a written statement explaining why the ... responding party needs to rely upon each of the additional ... discovery responses..., and absent such statement the Board, in its discretion, may refuse to consider the additional written ... responses.

In this case, petitioner relied on respondent's answer to petitioner's Interrogatory No. 2. This interrogatory asked respondent to "Identify the date of use for each [of the products marketed or sold by Respondent under Respondent's mark]. If there have been any cessations of use for any of the products identified, state the period of non-use and reasons therefore." Respondent answered this interrogatory by providing a chart identifying its products and the date of first use of the mark on each product.

Petitioner's Interrogatory No. 5 asks, "State whether Registrant commissioned or performed any search, formal or informal, prior to the selection, creation or application for federal registration of Registrant's mark; and, if so, describe with particularity the results of the search or searches, and identify when each search was conducted." Respondent answered this interrogatory by providing

petitioner with the results of a trademark search performed by a private company on respondent's behalf.

Respondent offers the following explanation as to the need to use its response to petitioner's Interrogatory No.

5:

... the [results of the search performed by the private company] revealed that the registration status of the domain name claimed by Petitioner, www.247coffee.com, was "Deleted or On Hold." Id. at page 137. Thus, petitioner could not have been actively operating a website, or conducting interstate commerce, at that domain.

...

Interrogatory No. 5 should, in fairness, be considered along with Interrogatory No. 2 because both are directly relevant to the use of the marks at issue, or lack thereof, in interstate commerce; the lack or cessation of use of Petitioner's claimed mark; the continuous use of Registrant's Mark; and the issue of priority of use.

(Brief, p. 20)

Respondent obviously misapprehends CFR § 2.120(j)(5). Interrogatory No. 2 inquires as to respondent's use (and any cessation) of use of its mark on its goods. Interrogatory No. 5, on the other hand, inquires as to whether respondent commissioned or performed a trademark search. Respondent cannot rely on its own response to Interrogatory No. 5 in an attempt to introduce evidence it obtained concerning the purported status of petitioner's domain name registration.

In short, respondent's response to Interrogatory No. 5 is not necessary to "avoid an unfair interpretation of" the response to Interrogatory No. 2. See *Heaton Enterprises of*

*Nevada, Inc. v. Lang*, 7 USPQ2d 1842, 1844 n. 5 (TTAB 1988) (noting "it is the purpose of "[the fairness provision of Rule 2.120(j)(5)] to allow an answering party to avoid an unfair interpretation of the responses relied on by the propounding party... .").

Accordingly, petitioner's objection to Exhibit E of respondent's notice of reliance is sustained, and this exhibit will not be considered in reaching our decision herein.<sup>4</sup>

#### **THE RECORD**

The record consists of the pleadings; the file of the involved registration; the trial testimony deposition of petitioner, Chaim Lowenstein, with accompanying exhibits; petitioner's notice of reliance upon respondent's responses to certain of petitioner's interrogatories and certain of petitioner's first request for admissions; the trial testimony deposition of Michael Morrison, president and sole owner of respondent, Morrison Distribution & Marketing, Inc.; and respondent's notice of reliance on two Florida Department of State official records, and two New York State Department of State official records.

Both parties have filed briefs.

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<sup>4</sup> We add, however, that had we considered Exhibit E, it would not change our decision in this proceeding.

**FACTS**

- (1) Petitioner, Chaim Lowenstein began using the mark 24 7 COFFEE in 1998. Lowenstein dep. at 11; Petitioner's Exhibit No. 9.
- (2) At that time, the mark was used primarily in connection with coffee. Lowenstein dep. at 11.
- (3) Petitioner has continuously used the mark in connection with coffee since 1998. Lowenstein dep. at 11; Petitioner's Exhibit No. 17.
- (4) At the time petitioner began using the mark, he performed market research to determine potential customers and geographic markets for his coffee. Lowenstein dep. at 13-17; Petitioner's Exhibit No. 2.
- (5) In March 2000, petitioner performed a search of the U.S. Patent and Trademark Office records, "all yellow pages, all white pages, called directory assistance for all major area codes, contacted various major database compilers and ... contacted various states to see if there were any corporations, limited partnerships [or] DBAs that were in the name of 24 7 Coffee or anything that was similar." Lowenstein dep. at 18; Petitioner's Exhibit No. 3.

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- (6) On February 17, 2000, petitioner created a corporation in the state of Delaware under the name 247coffee.com. Lowenstein dep. at 19; Petitioner's Exhibit No. 4.
- (7) On January 4, 2002, petitioner created a limited liability company in the state of Michigan named 247 Coffee LLC. Lowenstein dep. at 19; Petitioner's Exhibit No. 5.
- (8) Petitioner allowed the Delaware corporation to dissolve after the creation of the Michigan limited liability company. Lowenstein dep. at 19.
- (9) 247 Coffee LLC is an active limited liability company in the state of Michigan. Lowenstein dep. at 20; Petitioner's Exhibit No. 6.
- (10) Petitioner has operated 247coffee.com and 247 Coffee LLC from locations in Georgia, New York and Florida. Lowenstein dep. at 96-115. Petitioner's Exhibit No. 11.
- (11) Petitioner controls the quality of the products sold under the mark by getting samples from potential sources and checking the quality and taste. Lowenstein dep. at 20; Petitioner's Exhibit No. 18.
- (12) Petitioner takes steps to improve the products offered in connection with the mark by researching the best practices for the production of the goods,

talking to customers, and researching the industry.

Lowenstein dep. at 37-38.

(13) Petitioner's customers may order the products by fax or e-mail. Lowenstein dep. at 24.

(14) Petitioner's products are sold to individuals, offices, businesses that offer coffee service, coffee shops, and to fundraising organizations. Lowenstein dep. at 28.

(15) Petitioner markets the products by mailing promotional materials, e-mail promotions, product giveaways, and through the Internet. Lowenstein dep. at 30-32; Petitioner's Exhibit Nos. 12, 13, 14, 15 and 16.

(16) Petitioner also places the mark on address labels, business cards, and invoices, and sells collateral merchandise, such as t-shirts and coffee mugs, and provides information on brewing and storing coffee. Lowenstein dep. at 11, 25-26, 29 and 34.

(17) Orders for petitioner's products are submitted via fax or e-mail, the order is transmitted to "fulfillment" companies, who then roast the product and, if applicable, grind the coffee beans, place the goods in packaging, weigh it, seal it, and ship it. Sometimes promotional items are included, along

with a packing slip and an invoice. Lowenstein dep. at 24-25.

(18) Petitioner's sales have increased each year since 1998. \$41,500 in 1998; \$102,700 in 1999; \$209,600 in 2000; \$463,000 in 2001; \$946,00 in 2002; \$1,260,400 in 2003; \$1,643,500 in 2004; and \$1,996,800 in 2005. Lowenstein dep. at 36.

(19) Petitioner's advertising expenses have also increased, through 2002, but declined some since then. \$67,000 in 1998; \$92,000 in 1999; \$115,000 in 2000; \$117,000 in 2001; \$121,000 in 2002; \$101,200 in 2003; \$101,900 in 2004; and \$103,000 in 2005. Lowenstein dep. at 37.

(20) Petitioner owns application Serial No. 78537563, filed on December 23, 2004, for the mark 24 7 COFFEE - CLOSEST TO THE ROAST - TAKING AMERICA ONE CUP AT A TIME. On August 2, 2005, this application was refused registration on the ground of a likelihood of confusion between petitioner's mark and the marks in Registration Nos. 2837070 (involved herein) and 2848710.<sup>5</sup> Petitioner's Exhibits Nos. 19 and 20.

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<sup>5</sup> Reg. No. 2848710 was cancelled under Section 18 on August 16, 2006 pursuant to the Board's order in Cancellation proceeding 92045601.

**THE ISSUES**

The issues to be decided in this proceeding are standing, priority of use, and likelihood of confusion. In Board proceedings regarding the registrability of marks, our primary reviewing Court has held that the plaintiff must establish his pleaded case as well as his standing, and must generally do so by a preponderance of the evidence. See *Cunningham v. Laser Golf Corp.*, 55 USPQ2d 1842, 1848 (Fed. Cir. 2000). Thus, petitioner bears the burden of proving by a preponderance of the evidence his standing, and his claim of priority and likelihood of confusion.

**STANDING AND PRIORITY**

Standing requires only that petitioner have a real interest in this proceeding. See *Section 14 of the Trademark Act*, 15 U.S.C. § 1064; and *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982). Petitioner may establish his standing by proof of ownership and use of the 24 7 COFFEE mark.

Insofar as priority is concerned, in order for petitioner to prevail on his claim of likelihood of confusion, petitioner must establish prior rights in the 24 7 COFFEE mark. In this regard, we note that the earliest date upon which respondent can rely for purposes of priority is the September 9, 2002 filing date of the intent-to-use application which matured into its involved registration.

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Petitioner, therefore, may establish his priority by proving that on or before September 9, 2002, he had made use of the 24 7 COFFEE mark in connection with coffee.

Respondent maintains that petitioner has not demonstrated his standing or priority as to the mark 24 7 COFFEE. First, respondent argues that "[p]etitioner's deposition testimony was not clear, consistent and free from uncertainty," citing *Longini Shoe Mfg. Co. v. Ratcliff*, 27 C.C.P.A. 784, 788 (CCPA 1939) ("[W]here cancellation must rest upon the testimony of a single witness such testimony should at least be clear, consistent and free from uncertainty."). Second, respondent argues that petitioner does not own the 24 7 COFFEE mark or abandoned the mark when the Delaware corporation, 247Coffee.com Inc., and/or the Michigan limited liability company, 24 7 Coffee LLC, were formed and began using the mark.

We find, however, that the record demonstrates that petitioner made initial sales of coffee under the mark 24 7 COFFEE in 1998 and that such sales have been followed by activities proving continuous use of the mark.

Petitioner testified that he first used the mark 24 7 COFFEE in connection with coffee in 1998.<sup>6</sup> Petitioner's

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<sup>6</sup> Lowenstein dep. at 11.

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Exhibit No. 9 was identified as "original packaging that [petitioner] had used."<sup>7</sup> The packaging bears a label that displays the mark and additional wording, "24 7 COFFEE - Closest to the Roast. Taking America One Cup At A Time. COLUMBIAN SUPREMO Auto Drip Grind 16 Oz/1 Pound."

Respondent's cross-examination elicited that this was the front label used in 1998.<sup>8</sup>

Petitioner testified that sales of coffee under the mark 24 7 COFFEE mark have been continuous.<sup>9</sup> Petitioner's Exhibit No. 17 consisted of eleven invoices dated May 2, 1999 through January 20, 2006. On cross-examination, respondent elicited from petitioner that: the invoices were kept electronically and reprinted on current stock paper forms;<sup>10</sup> and, some of the sales were to friends and acquaintances.<sup>11</sup> Petitioner's testimony is clear and consistent as to how the invoice records are kept electronically and were printed on a current paper stock. With regard to some sales being made to friends and acquaintances, it is not uncommon for or unreasonable to expect a certain amount of initial sales for a small start-up business to be made to family and friends. However, petitioner also testified to increasing sales and

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<sup>7</sup> Lowenstein dep. at 23.

<sup>8</sup> *Id.* at 57-58.

<sup>9</sup> *Id.* at 11.

<sup>10</sup> *Id.* at 78-79.

<sup>11</sup> *Id.* at 77-86.

substantial advertising expenditures each year since.<sup>12</sup>

We find that petitioner has demonstrated, by a preponderance of the evidence, use of the mark 24 7 COFFEE as of 1998 - a date prior to the earliest date respondent can rely on, September 2, 2002, and that initial sales were followed by activities proving continuous use of the 24 7 COFFEE mark. See *National Bank Book Co. v. Leather Crafted Products, Inc.*, 218 USPQ 826, 828 (TTAB 1993) [oral testimony may be sufficient to prove the first use of a party's mark when it is based on personal knowledge, it is clear and convincing, and it has not been contradicted]; *Liqwacon Corp. v. Browning-Ferris Industries, Inc.*, 203 USPQ 305, 316 (TTAB 1979) [oral testimony may be sufficient to establish both prior use and continuous use when the testimony is proffered by a witness with knowledge of the facts and the testimony is clear, convincing, consistent, and sufficiently circumstantial to convince the Board of its probative value].

Further, we find that petitioner has established that he is the owner of the 24 7 COFFEE mark. As discussed *infra*, the record shows that petitioner first used the 24 7 COFFEE mark on coffee in 1998 and that petitioner

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<sup>12</sup> *Id.* at 36-37.

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subsequently formed the Delaware corporation 247coffee.com and the Michigan company 247 Coffee LLC to market his goods. Although there is no evidence that either the Delaware corporation or the Michigan company were ever granted an express license to use the mark, the evidence is sufficient to presume at least implied licenses to the corporation and the limited liability company. Indeed, petitioner testified on cross-examination that, upon "[thinking] it through," 247Coffee.com and 247Coffee LLC were licensees.<sup>13</sup> See *McCarthy*, supra at § 18:43.1 and e.g., *University Book Store v. University of Wis. Bd. Of Regents*, 33 USPQ2d 1385, 1396 (TTAB 1994). Further, petitioner testified that he controlled all aspects of the nature and quality of the goods. The entity which controls the nature and quality of the goods or services provided under the mark is presumed to be the owner. We conclude, therefore, that the record supports a finding that petitioner is the owner of the 24 7 COFFEE mark and that use of the mark by the Delaware corporation 247coffee.com and the Michigan company 247 Coffee LLC inured to petitioner.

In sum, we find that petitioner has demonstrated his standing, i.e., a real interest in this proceeding, and

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<sup>13</sup> Lowenstein dep. at 134.

priority with respect to the mark 24 7 COFFEE for coffee.<sup>14</sup>

**LIKELIHOOD OF CONFUSION**

In determining the legal question of likelihood of confusion, the Board must consider all of the probative facts in evidence which are relevant to the factors bearing on likelihood of confusion as identified in *In re E.I. du Pont de Nemours & Co.*, 177 USPQ 563 (CCPA 1973).

*Similarity Between the Goods; Channels of Trade; Potential Consumers*

The first *DuPont* factors we consider are whether the goods of the petitioner and the respondent, the channels of trade through which the goods travel, and the potential consumers for the goods are the same or related.

Respondent argues that "... the goods ... and channels of trade ... are substantially different... ." Respondent argues that its goods are primarily for the convenience store industry, and are only available to consumers as brewed cups

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<sup>14</sup> We note respondent's contention that 247 Coffee LLC's use of the 24 7 COFFEE mark in New York and Florida violates the laws of such states, and is therefor unlawful. Respondent has submitted certificates from each state indicating that the records thereof do not disclose an application for incorporation or the existence of a corporation with the name 247 Coffee LLC. Apart from the fact that respondent has offered no evidence which establishes that it is unlawful for an entity to do business in New York or Florida if the entity is not incorporated there, it is not within the province of this Board to determine whether such activity is a violation of a state's laws. *Cf. American-International Travel Service, Inc. v. Aits, Inc.*, 174 USPQ 175 (TTAB 1972). [Board held that it was without jurisdiction to determine whether the acts of an opposer constituted a violation of a criminal statute].

of coffee through a convenience store that has purchased respondent's goods. Citing to the deposition of petitioner, respondent argues that petitioner's goods are marketed as ground or whole bean coffee packages directly to consumers as a custom roasted specialty coffee.

Respondent, however, may not restrict the scope of the goods in the registration by extrinsic argument or evidence. Rather, the nature and scope of the respondent's goods must be determined on the basis of the goods recited in the registration. *See, e.g., Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002).

Turning to the channels of trade and class of purchasers, "regardless of what the record may reveal as to the particular nature of [a registrant's] goods, the particular channels of trade or the class of purchasers to which sales of the goods are directed," the determination of whether there is a likelihood of confusion must be based on the goods as they are identified in the registration. *See Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1786-1787 (Fed. Cir. 1990). The presumption under Trademark Act Section 7(b), 15 U.S.C. §1057(b), is that use of the mark extends to all goods identified in the registration and that the registrant operates in all normal channels of trade and reaches all classes of purchasers of the identified goods. *In re*

*Melville Corp.*, 18 USPQ2d 1386, 1389 (TTAB 1991); see TMEP §1207.01(a)(iii).

Respondent's goods are identified in the registration as "coffee," and, therefore, must be presumed to encompass all types of coffee, including whole bean and ground roasted specialty coffees, i.e., the goods shown by the record to have been sold by petitioner under his mark. Similarly, the presumption is that the respondent's goods travel through all normal channels of trade for coffee, including direct marketing to end consumers, just as petitioner's goods are directly marketed to consumers. In this case, the goods, channels of trade, and classes of purchasers of the parties' goods are identical or overlapping.

Where the goods of the respective parties are identical, the degree of similarity between the marks required to support a finding of likelihood of confusion is not as great as would be required with diverse goods.

*Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992).

*Similarity Between the Marks*

Next we consider the *du Pont* factor of the similarity between petitioner's mark 24 7 COFFEE and respondent's mark 24-7 GREAT COFFEES. This factor requires an examination of the similarity or dissimilarity of 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, 1692 (Fed. Cir. 2005). The test under this factor 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 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. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Furthermore, although the marks at issue must be considered in their entireties, 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.*, 743 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

Respondent's mark is 24-7 GREAT COFFEES. Petitioner's mark is 24 7 COFFEE. The term GREAT COFFEES is descriptive and disclaimed in respondent's mark. Similarly, the term COFFEE is descriptive in petitioner's mark. Thus, it is the 24-7 and 24 7 components in the respective marks that are

entitled to more weight in our likelihood of confusion analysis.

We find that the marks are highly similar in appearance, sound, connotation and commercial impression. The respondent's mark incorporates the petitioner's entire mark and modifies it by pluralizing the term COFFEE and adding the laudatory term GREAT and a hyphen between the numbers 24 and 7.

These minor differences are outweighed by the similarities of the marks. Both marks begin and end with similarly sounding and appearing terms, 24 7 and 24-7, and COFFEE and COFFEES. The dominant features of the marks, 24 7 and 24-7, are phonetically identical and create the same overall commercial impression, and the marks create nearly identical overall commercial impressions.

*Conditions Under Which and Buyers to Whom Sales are Made*

The Board has previously found that coffee products and services "are neither expensive nor complicated, and may be purchased on impulse by ordinary consumers." *Starbucks U.S. Brands, LLC v. Ruben*, 78 USPQ2d 1741, 1752 (TTAB 2006).

"[B]ecause retail coffee and tea beverages and coffee and tea itself are inexpensive products and may be purchased on impulse and without care, consumers devote limited attention to the purchase of such goods and services, and thus are more susceptible to confusion." *Id.*

Actual Confusion

Respondent argues that petitioner has offered no evidence of actual confusion and this suggests that confusion is unlikely. The absence of any instances of actual confusion is a meaningful factor only where the record demonstrates that there has been an opportunity for such confusion to occur. See *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768 (TTAB 1992); and *Chemetron Corp. v. Morris Coupling & Clamp Co.*, 203 USPQ 537 (TTAB 1979). Respondent has offered no information as to the extent of its sales or advertising. Moreover, respondent maintains that the parties' products are offered in different trade channels.<sup>15</sup> Under the circumstances, we unable to conclude that there has been an opportunity for incidents of actual confusion to occur. In any event, it is not necessary to prove actual confusion in order to make out a prima facie showing of likelihood of confusion. See *Weiss Associates Inc. v. HRL Associates Inc.*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990).

Conclusion

In view of the foregoing, we find that the contemporaneous use of the substantially similar marks 24-7

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<sup>15</sup> In analyzing actual confusion, we look to what occurs in the marketplace. In contrast, as discussed *infra*, in analyzing likelihood of confusion, we look to the identification of goods in respondent's registration which does not contain any limitations in terms of trade channels.

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GREAT COFFEES and 24 7 COFFEE in connection with legally identical goods, coffee, is likely to cause confusion, mistake or to deceive.

**Decision:** The petition to cancel is granted.