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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Smokaroma, Inc.

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Serial No. 78135632

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Daniel P. Dooley of Fellers, Snider, Blankenship, Bailey & Tippens for Smokaroma, Inc.

Eugenia K. Martin, Trademark Examining Attorney, Law Office 114 (K. Margaret Le, Managing Attorney).

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Before Walters, Drost and Zervas, Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

Smokaroma, Inc. has appealed from the final refusal of the trademark examining attorney to register BAR-B-Q BOSS (in typed or standard character form) as a trademark for "[b]arbeque sauce as a liquid, and a dry mixture; barbeque

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spice mixes"<sup>1</sup> in International Class 30. In its response filed on April 21, 2003, applicant disclaimed the term BARBEQUE, but in its "Request for Amendment" filed December 4, 2004, and again in its response filed on June 2, 2005, applicant withdrew its disclaimer of BARBEQUE.

The examining attorney has refused registration of applicant's mark pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the previously registered mark BOSS SAUCE (also in typed or standard character form) for "sauces and dipping sauces,"<sup>2</sup> in International Class 30, that, as used on applicant's identified goods, applicant's mark is likely to cause confusion or mistake or to deceive. Additionally, the examining attorney has refused registration in view of her requirement that applicant disclaim the term "barbeque." According to the examining attorney, the term is merely descriptive of a feature of applicant's goods "because it describes the specific type of sauce or spice mix - barbeque spice mix or sauce." 15 U.S.C. § 1056(a). See also 15 U.S.C. § 1052(e)(1). The examining attorney

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<sup>1</sup> Application Serial No. 78135632, filed June 13, 2002, asserting first use anywhere and first use in commerce on June 8, 1979.

<sup>2</sup> Registration No. 2046864, issued March 25, 1977. Section 8 affidavit accepted, Section 15 affidavit acknowledged. The word SAUCE has been disclaimed.

has also maintained her refusal to allow applicant's proposed amendment to its identification of goods to "[d]ry spice mixes for commercial use," set forth in its June 2, 2005 response, because she maintains that it exceeds the scope of the identification of goods.<sup>3</sup>

Applicant has appealed the final refusal of his application and the examining attorney's refusal to allow applicant's proposed amendment to its identification of goods. Both applicant and the examining attorney have filed briefs. An oral hearing was conducted on July 19, 2006.

*Applicant's Identification of Goods*

Trademark Rule 2.71(a), 37 C.F.R. §2.71(a), restricts amendments to the identification of goods or services as follows, "[t]he applicant may amend the application to clarify or limit, but not to broaden, the identification of goods and/or services." In its response filed June 2, 2005, applicant proposed to amend its identification of goods from "barbeque sauces as a liquid, and a dry mixture;

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<sup>3</sup> Applicant evidently has proposed the amended identification of goods to "remov[e] the need for disclaiming the term 'BARBEQUE' because neither the term 'BARBEQUE' nor the term 'SAUCE' is present in the description of the goods [and] [d]eletion of the disclaimer of the term 'BARBEQUE' obviates the argument that the common element of both marks ('BOSS') creates the same commercial impression, because the mark 'BAR-B-Q BOSS' would no longer contain a dominant portion." Brief at p. 5.

barbeque spice mixes" to "dry spice mixes for commercial use."<sup>4</sup> Because applicant's original identification of goods is limited to barbeque sauce as a liquid, and a dry mixture, and barbeque spice mixes, and the proposed identification of goods is not limited to barbeque spice mixes, but may include other spice mixes, the proposed identification of goods exceeds the scope of the original identification of goods. The refusal to accept the amended identification of goods is affirmed.

*Likelihood of Confusion*

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key, although not exclusive, 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

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<sup>4</sup> In its request for reconsideration (filed October 31, 2003), applicant initially proposed to amend its identification of goods to "food seasoning, namely, dry spice mixes for commercial use." The examining attorney did not accept this proposed amendment and so stated in her September 29, 2004 Office action.

(CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

As discussed above, applicant has proposed an amendment to its identification of goods and that amendment is unacceptable. Thus, applicant's operative identification of goods is "[b]arbeque sauce as a liquid, and a dry mixture; barbeque spice mixes." Applicant's arguments in support of registration based on the proposed identification of goods therefore are unpersuasive.

In considering the similarities and dissimilarities between applicant's and registrant's goods, we find that they are identical in part. Specifically, applicant's "barbeque sauce as a liquid" is encompassed within "sauces and dipping sauces," which includes barbeque sauces.

As for the remaining goods in applicant's identification of goods, we find they are closely related to registrant's goods. The barbeque sauces as a dry mixture only require the addition of liquid additions such as catsup and water to become a sauce.<sup>5</sup> Thus, these remaining goods are essentially the same, only differing by

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<sup>5</sup> See applicant's webpage at [www.smokaroma.com/spice\\_sauce.asp](http://www.smokaroma.com/spice_sauce.asp), submitted by applicant with its April 21, 2003 response, stating: "Bar-B-Que Boss Sauce Mix is a dry mix of choice ingredients. One convenient pre-measured package mixed with number ten can of your favorite catsup and water makes one and one-eight gallon of Award Winning barbeque sauce ...."

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the solid or liquid state in which they are sold. Further, the evidence of record shows that the "barbeque spice mixes" are commercially related to "sauces." The web pages submitted by the examining attorney with her July 7, 2005 Office action show that sauces and spice mixes may be purchased from the same websites. Several of such web pages even show that barbeque sauces and barbeque dry rubs are marketed under the same trademarks. See [www.firemanschoice.com](http://www.firemanschoice.com) (FIREMAN'S CHOICE barbeque sauce and FIREMAN'S CHOICE rub); [www.marylanddelivered.com](http://www.marylanddelivered.com) (JERRY ELLIOTT'S Pig Sauce and JERRY ELLIOTT'S Bar-B-Q Rub); [www.bbqnfools.com](http://www.bbqnfools.com) (BBQ'N FOOLS Signature Barbecue Sauce and BBQ'N Fools Signature Seasoning/Dry Rub); and [www.zarda.com](http://www.zarda.com) (ZARDA Bold & Spicy Barbecue Sauce and ZARDA BBQ Rub). Here, through the information on the web pages, the examining attorney has established that the conditions surrounding the marketing of spice mixes and sauces are such that they would be encountered by the same persons under circumstances that could give rise to the mistaken belief that they emanate from, or are associated with, the same source. See *On-Line Careline Inc. v. America Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471 (Fed. Cir. 2000); *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991); *In re*

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*International Telephone & Telegraph Corp.*, 197 USPQ 910  
(TTAB 1978).

Applicant has argued that applicant's goods are "solely a commercial product" sold to restaurant professionals, while "Registrant's goods are sold to the average consumer, a fact that the Trademark Examining Attorney has apparently continued to ignore." Brief at p. 4. Further, applicant references its specimen of use and a photograph of registrant's goods and maintains that they demonstrate that applicant's product is "a commercial product consisting of a dry spice mix, packaged in what is clearly commercial wrapping, a white bag with black lettering; and Registrant's product ... has a vivid label ...." *Id.*

The problem with applicant's argument is that it ignores a long established and fundamental tenant of trademark law which the examining attorney has pointed out to applicant in two Office actions and in her brief, i.e., that the question of likelihood of confusion must be determined based on an analysis of the mark as applied to the goods and/or services recited in applicant's application vis-à-vis the goods and/or services recited in registrant's registration, rather than what the evidence shows the goods and/or services to be. If there are no

limitations in the identification, we must presume that the "registration encompasses all goods of the nature and type described, [and] that the identified goods move in all channels of trade that would be normal for such goods." *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). 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."). Applicant's identification of goods does not state that applicant's goods are commercial goods, intended only for commercial customers and registrant's identification of goods does not state that registrant's goods are intended only for non-commercial customers. Thus, we must consider applicant's and registrant's goods as being made available for sale to both commercial customers as well as to the general consumer. We must also assume that such goods travel in all trade channels normal for such goods. We therefore



find that the trade channels for both applicant's and registrant's goods overlap.

Applicant has also argued that "Applicant has consistently used its trade name Smokaroma, Inc. in conjunction with its mark ..." Brief at p. 4. It is immaterial that applicant has always used its trade name with its mark - the trade name is not part of applicant's mark and may not be considered.

In view of the foregoing, we find that the *du Pont* factors regarding the similarities of the goods and the similarities of likely-to-continue trade channels weigh heavily in favor of finding a likelihood of confusion. We also find that because there are no limitations in the respective identifications of goods, applicant's and registrant's goods may both be sold in small quantities such as by the can or jar to general consumers. Both goods, as inexpensive food accompaniments, are hence subject to impulse purchases. We therefore reject applicant's arguments at p. 8 of its brief that "[s]pecialized buyers or owners for [sic] restaurants purchase Applicant's goods" and may purchase registrant's sauces for consumption at their restaurants; and that "this class of purchaser [is] relatively sophisticated and discriminating in matters pertaining to the restaurant

industry," and resolve the *du Pont* factor regarding the conditions under which and buyers to whom sales are made against applicant.

We next consider the similarities or dissimilarities of the marks in their entireties. Our focus is on whether the marks are similar in sound, appearance, meaning, and commercial impression. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). We do not consider whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar 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). Also, we are guided by the well-established principle that although the marks must be considered in their entireties, there is nothing improper, under appropriate circumstances, in giving more or less weight to a particular portion of a mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

The examining attorney maintains that the marks are similar because they both have BOSS as their dominant terms. Further, she contends that BAR-B-Q in applicant's mark is a misspelling of "barbeque"; that both BAR-B-Q and SAUCE in registrant's mark are descriptive of applicant's and registrant's respective goods; and that BOSS "creates the most significant commercial impression." Brief at p. 5.

Applicant maintains that "BOSS SAUCE is an entirely different mark than BAR-B-Q BOSS"; that applicant's mark does not have the word "sauce" and is a suggestive mark that forms a separate commercial impression; that "the ordinary meaning [of "barbeque"] does not create a generic meaning for the Applicant's goods," relying on a definition from "the Merriam-Webster Online dictionary" which applicant maintains does not mention spice mixes;<sup>6</sup> and that the misspelling of barbeque in applicant's mark "is very suggestive of a use of its goods [and] the highly suggestive character of this term serves to distinguish

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<sup>6</sup> Because a copy of the online definition of "barbeque" mentioned by applicant is not of record, we cannot verify that indeed this definition of "barbeque" does not mention spice mixes. Applicant's argument is hence not particularly persuasive.

Applicant's mark."<sup>7</sup> Brief at pp. 4-5; Supplemental Brief at pp. 3-4.<sup>8</sup>

We are not persuaded by applicant's arguments but rather agree with the examining attorney that BOSS is the dominant portion of each mark. As applicant has acknowledged, BAR-B-QUE is a misspelling of "barbeque."<sup>9</sup> BAR-B-QUE in applicant's mark is at a minimum a merely descriptive term because it informs purchasers without imagination or thought that the goods are intended for use

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<sup>7</sup> On p. 4 of its corrected appeal brief (filed December 4, 2004), applicant cites several third party registrations containing the term RED and others containing the term BOSS. The registrations for marks containing the term RED are irrelevant to the present appeal because neither applicant's nor registrant's marks contain the term RED. Also, applicant has not entered a copy of these registrations into the record and simply identifying registrations in a brief does not make such registrations of record. *In re Dos Padres Inc.*, 49 USPQ2d 1860, 1861 n. 2 (TTAB 1998). Accordingly, the third-party registrations have not been further considered in determining the relative strength of BOSS. We hasten to add that the third-party registrations, even if considered, would not compel a different result in this case.

<sup>8</sup> On December 4, 2004, applicant filed its appeal brief and an amendment to the identification of goods. On January 11, 2005, the Board suspended proceedings and remanded the application to the examining attorney for consideration of the amendment, and informed applicant that it would be allowed time to file a supplemental brief.

<sup>9</sup> It is well settled that the use of a phonetically identical word or a simple misspelling does not normally change a descriptive word into a suggestive term. See *In re Quik-Print Copy Shops*, 616 F.2d 523, 205 USPQ 505, 507 n.9 (CCPA 1980) (QUIK-PRINT held descriptive; "There is no legally significant difference here between 'quik' and 'quick'"); *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315 (1938) (NU-ENAMEL; NU found equivalent of "new"); *In re Organik Technologies Inc.*, 41 USPQ2d 1690 (TTAB 1997) (ORGANIK); and *Hi-Shear Corp. v. National Automotive Parts Association*, 152 USPQ 341, 343 (TTAB 1966) (HI-TORQUE "is the phonetic equivalent of the words 'HIGH TORQUE'").

in making barbeque. See definition of "barbecue"<sup>10</sup> (also spelled "barbeque") in relevant part in *Webster's Third New International Dictionary of the English Language* (Unabridged 1997), i.e., "2 a : an "animal roasted or broiled, whole or split, over an open fire or barbecue pit[;] 3 ... d : meat or chicken cooked in a barbecue sauce."<sup>11</sup> See *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987) ("Whether a given mark is suggestive or merely descriptive depends on whether the mark 'immediately conveys ... knowledge of the ingredients, qualities, or characteristics of the goods ... with which it is used,' or whether 'imagination, thought, or perception is required to reach a conclusion on the nature of the goods.'").

Further, the manner in which applicant uses the term "barbeque" in promoting its goods - in close proximity to its mark - reinforces that the goods are intended for use in making barbeque. Applicant's webpage at [www.smokaroma.com/spice\\_sauce.asp](http://www.smokaroma.com/spice_sauce.asp), submitted with applicant's April 21, 2003 response, emphasizes that

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<sup>10</sup> The Board may take judicial notice of dictionary definitions. *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).

<sup>11</sup> "Barbecue sauce" is defined in the same dictionary as "a highly seasoned sauce of vinegar, condiments, and spices that may be used in cooking, basting, or serving meat or fish."

applicant's BAR-B-QUE BOSS sauces and spice mixes are "Great for Bar-B-Que ...". Additionally, the web page claims that, "[m]any barbeque connoisseurs claim this sauce is the best they have ever tested ... your customers will too!"; and that applicant's sauce is "particularly excellent for barbeque ...".

Because BAR-B-QUE is at a minimum a merely descriptive term, we accord BAR-B-QUE less weight in our comparison of the marks as a whole, and find BOSS is the dominant term in applicant's mark. It is completely appropriate to give less weight to a portion of a mark that is merely descriptive of the relevant goods or services in comparing marks in their entireties. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985) ("That a particular feature is descriptive ... with respect to the relevant goods or services is one commonly accepted rationale for giving less weight to a portion of the mark.").

We also find that BOSS is the dominant term in registrant's mark. Registrant's goods include "sauces," thus SAUCE is a generic term and is hence insignificant as a source identifier. Registrant has disclaimed SAUCE in its registration.

Thus, both marks contain BOSS as the identical dominant term along with descriptive or generic terms. While the marks have obvious differences in their appearances and pronunciations due in part to the inclusion of the merely descriptive term BAR-B-QUE in applicant's mark and the generic term SAUCE in registrant's mark, and possibly slight differences in connotation,<sup>12</sup> these differences are not as significant as the similarities created by the identical common term. Also, in view of the shared dominant term, we find that their commercial impressions are not dissimilar. We conclude, therefore, that when we consider these marks in their entirety, any differences in appearance, pronunciation, meaning, and commercial impression are eclipsed by the similarities of the marks. The *du Pont* factor regarding the similarities of the marks thus weighs in favor of finding a likelihood of confusion.

Applicant maintains that "there has been no actual evidence of the existence of confusion within either customer base." Brief at p. 10. Applicant also maintains that applicant's mark has been in the marketplace for

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<sup>12</sup> We take judicial notice of the definition of "boss" from *Webster's Third New International Dictionary of the English Language* (Unabridged 1997) as "adj 1 : being in charge : having authority : PRINCIPAL, MASTER ... 2 slang : marked by superiority : EXCELLENT, CHAMPION, FIRST-RATE."

twenty-five years and respondent's mark has been in the market place for at least eighteen years, and that there has been no "proof of actual consumer confusion with the Registrant[']s mark." Brief at p. 10. However, there is no evidence in the record as to the geographic locations where applicant and registrant have been doing business. If distant from each other, the geographic separation may account for this lack of actual confusion. Also, there is no evidence in the record regarding the level of sales or advertising by applicant. The absence of any instances of actual confusion is a meaningful factor only where the record indicates that, for a significant period of time, an applicant's sales and advertising activities have been so appreciable and continuous that, if confusion were likely to happen, any actual incidents thereof would be expected to have occurred and would have come to the attention of one or both of these trademark owners. Similarly, we have no information concerning the nature and extent of registrant's use, and thus we cannot tell whether there has been sufficient opportunity for confusion to occur, as we have not heard from the registrant on this point. All of these factors materially reduce the probative value of applicant's argument regarding a lack of actual confusion. Therefore, applicant's contention that there has been no



actual confusion is not indicative of an absence of a likelihood of confusion. See *In re Majestic Distilling Co., supra*. ("uncorroborated statements of no known instances of actual confusion are of little evidentiary value.") Applicant's argument regarding actual confusion therefore is unpersuasive.

When we consider the record and the relevant likelihood of confusion factors, and all of applicant's arguments relating thereto, including those arguments not specifically addressed herein, we conclude that, when potential purchasers of applicant's "barbeque sauce as a liquid, and a dry mixture; barbeque spice mixes" and registrant's "sauces and dipping sauces" encounter the marks BAR-B-Q BOSS and BOSS SAUCE for these goods, they are likely to believe that the sources of these goods are in some way related or associated. As a result, there is a likelihood of confusion.

*Disclaimer*

As discussed above, we do not accept that BAR-B-QUE, a misspelling of "barbeque," is "very suggestive," but rather find that BAR-B-QUE is at least merely descriptive of a feature of applicant's goods. In view thereof, we affirm the examining attorney's requirement for a disclaimer of BAR-B-QUE. See 15 U.S.C. §§ 1052(e)(1) and 1056(a).

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**DECISION:** The refusal to register the mark under Section 2(d) of the Trademark Act in view of Registration No. 2219977 is affirmed; the refusal to register applicant's mark in the absence of a disclaimer of BAR-B-QUE is affirmed; and the refusal to accept applicant's proposed amendment to the recitation of services is affirmed.