

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

Mailed:  
March 14, 2011  
Bucher

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Benedent Corporation

Serial No. 77666733

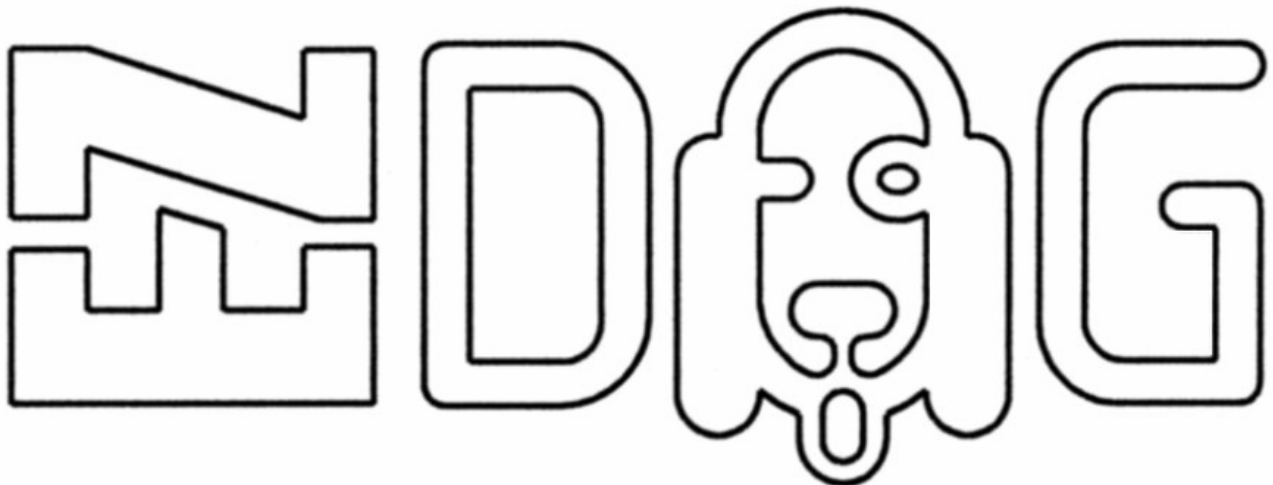
Kathleen A. Pasulka of Procopio Cory Hargreaves & Savitch LLP  
for Benedent Corporation.

John Kelly, Trademark Examining Attorney, Law Office 117  
(Brett Golden, Managing Attorney).

Before Seeherman, Bucher and Ritchie, Administrative  
Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

Benedent Corporation seeks registration on the Principal  
Register of the following mark:



for goods identified as "toothbrush, namely, for animal use" in International Class 21.<sup>1</sup>

This case is now before the Board on appeal from the final refusal of the Trademark Examining Attorney to register this designation based upon Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d). The Trademark Examining Attorney has taken the position that applicant's mark, when used in connection with the identified goods, so resembles the following mark:



registered for the following goods:

"paper and paper articles, cardboard and cardboard articles, namely, cardboard containers, catchers and scoops for the disposal of pet excrement made of paper or cardboard, plastic bags for the collection and disposal of pet waste, disposable housebreaking pads for pets, paper pet-crate mats; printed matter, namely newspapers, newsletters, pamphlets and magazines in the field of pet and animal care" in Int. Class 16;

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<sup>1</sup> Application Serial No. 77666733 was filed by Benefit International Products, Ltd., a corporation of the Cayman Islands, on February 9, 2009, based upon applicant's allegation of a *bona fide* intention to use the mark in commerce. According to Reel 4071/Frame 0905 of the United States Patent and Trademark Office Assignment Branch records, this application has been assigned to Benedent Corporation, a Texas corporation.

"animal carriers" in International Class 18 ;

"beds for domestic animals and pets; sleeping mats for pets and domestic animals" in International Class 20;

"apparatus and instruments for use in the collection, storage and disposal of animal faeces, namely, inflatable animal faeces collection devices; collapsible animal faeces collection devices, namely, long-handled inflatable handle containing a plastic or cardboard bag or box at the end that is used for the catching and collection of dog excrement; scoops for the catching and collection of dog excrement; combs, sponges, brushes for pet care, food and water containers all for pet animals; small domestic utensils, namely, mixing spoons, jar openers; containers, namely pet feeding dishes and container for storage of pet food, articles for cleaning purposes, namely, cleaning cloths" in International Class 21; and

"blankets for pets and domestic animals" in International Class 24,<sup>2</sup>

as to be likely to cause confusion, to cause mistake or to deceive.

After the Trademark Examining Attorney made the refusal final, applicant appealed to this Board. The Trademark Examining Attorney and applicant have briefed the issues involved in this case. We reverse the refusal to register.

In supporting his claim of likelihood of confusion, the Trademark Examining Attorney contends that the marks are highly similar as to appearance, sound, meaning and commercial impression, and that the goods are arguably

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<sup>2</sup> Registration No. 3209888 issued on February 20, 2007.

overlapping but otherwise closely related, and will be available in the same trade channels.

By contrast, in urging registrability, applicant argues that confusion is unlikely because of the differences in the marks and the differences in the goods.

As we turn to a consideration of likelihood of confusion, our determination is based upon our analysis of all of the probative facts in evidence that are relevant to the factors bearing on this issue. *See In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). The legal briefs filed herein confirm that in this case, the two key considerations in our likelihood of confusion analysis are the similarities between the marks and the relationship between the goods. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

Turning first to the relationship of the respective goods, the Trademark Examining Attorney focuses his attention on the "brushes for pet care" identified in the cited registration - presumably because this is the pet care product closest to applicant's goods. He argues that the goods must be presumed to be identical inasmuch as the wording "brushes for pet care" in the identification of goods in the registration is sufficiently broad as to encompass

"toothbrushes for animal use." We disagree. A toothbrush is a specific item that is called a "toothbrush"; the term "brushes for pet care" has a different meaning, identifying brushes used in grooming the coats of animals. Certainly nothing in the record leads us to conclude that the term "brushes for pet care" would ever be presumed to include toothbrushes for animals.

The Trademark Examining Attorney goes on to argue that even if the goods are not presumed to be identical, third-party registrations taken from the United States Patent and Trademark Office X-SEARCH database demonstrate that brushes for pets and toothbrushes for animals are goods that may emanate from a single source. The Trademark Examining Attorney has submitted four third-party registrations in support of his statement. However, a closer examination of these registrations reveals that only one registration includes both toothbrushes for animals and brushes for pets (*emphasis* added):



for "grooming products for animals, namely non-medicated pet shampoos, cream rinses for animal hair/fur, conditioners for animal hair/fur, exfoliant shampoos, detanglers for animal hair/fur, colognes, deodorants, nail polishes, skin and coat moisturizers; stain removers; cooling sprays and cleaners for clipper blades; and toothpastes" in International Class 3;

"medicated animal care products, namely, medicated shampoos, medicated conditioners, products for prevention and treatment of fleas, ticks, lice and ear mites, namely flea shampoos, preparations for ticks, lice and ear mites, medicated ear cleaners, eye cleaners, eye moisturizers, styptic powders, gels and liquids for stopping bleeding, medicated ointments to stop bleeding, and dental products, namely **toothbrushes**, tooth pastes, dental rinses and dental wipes; and cleaning products for use by animal groomers, namely all purpose disinfectants, deodorizing cleaners for rooms" in International Class 5;

"grooming furniture and equipment for animals, namely grooming tables, arms for grooming tables and animal stairs" in International Class 20;

and

**"animal grooming equipment, namely dispensers for liquid and powder products; grooming tools for animals, namely, combs, brushes, rakes; and toothbrushes"** in International Class 21;<sup>3</sup>

The three other registrations completing the foursome submitted by the Trademark Examining Attorney for this purpose do not list toothbrushes for animals:

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<sup>3</sup> Registration No. 3052293 issued on January 31, 2006.

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for "hair combs; cleaning combs; hair brushes; nail brushes; shaving brushes; bath brushes; non-electric tooth brushes; cosmetic brushes; toilet brushes; shoe brushes; clothes brushes; dusting brushes; floor brushes; **brushes for pets**; bath products, namely, loofah sponges; sponge massagers" in Int. Class 21.<sup>4</sup>

**PAW BROTHERS**

for, *inter alia*, "home dental care products for dogs and cats, namely, toothpaste; hand cleaning preparations: in Int. Class 3; "pet manicure implements, namely, nail files, nail clippers" in International Class 8; "grooming tables for companion animals" in International Class 20; "combs for pets, **brushes for pets**; pet grooming device, namely, dematting tools; pet grooming device, namely, rakes for pets; cages for pets, wash tubs, dispensers for cleaning and disinfecting solutions" in International Class 21;<sup>5</sup>

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for, *inter alia*, "combs and sponges; **brushes, namely, :** hair brushes, **brushes for pets**; unworked or semi-worked glass, except glass used in buildings; glassware, porcelain and earthenware for household and domestic use, namely, : beverage glassware, porcelain mugs, earthenware mugs; baking dishes; containers for household or kitchen use not of precious metal; cooking pots; electric tooth brushes; frying pans" in International Class 21;<sup>6</sup>

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<sup>4</sup> Registration No. 2729196 issued on June 24, 2003; Section 8 affidavit (six-year) accepted.

<sup>5</sup> Registration No. 3698799 issued on October 20, 2009

<sup>6</sup> Registration No. 3727669 issued on December 22, 2009.

Under the circumstances, we will not treat a single third-party registration as indicative of what is occurring in the marketplace. See *In re Coors Brewing Co.*, 343 F.2d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003) ["... [A]lthough the Board had before it a few registrations for both restaurant services and beer ... the small number of such registrations suggests that it quite uncommon for restaurants and beer to share the same trademark."].<sup>7</sup>

As to whether these respective goods would be available in the same channels of trade for such goods (e.g., retail stores featuring pet supplies), the Trademark Examining Attorney included in the record copies of screenprints from the websites of two national, pet-supply chains. It is clear from five pages of Internet screenprints that PetCo sells both types of goods under the **PETCO** brand. However, the Trademark Examining Attorney located both products online only by doing two different searches within that website - one for toothbrushes and a second for brushes. The respective goods, as pictured and described in detail in the

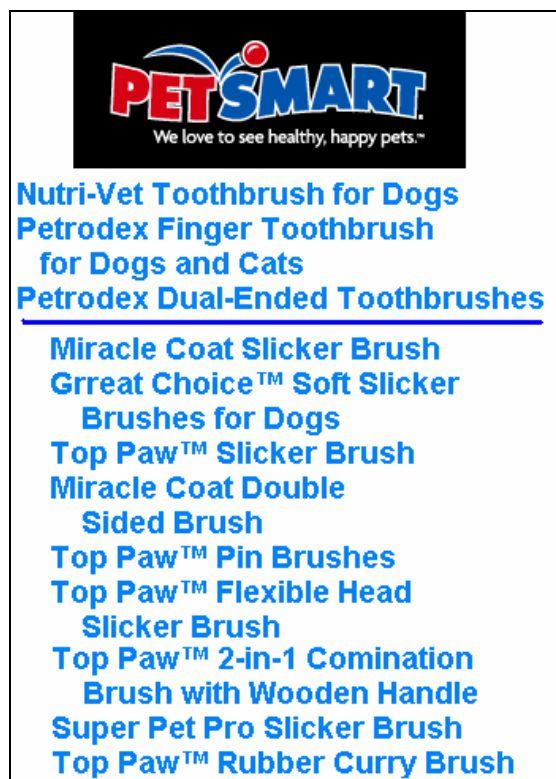
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<sup>7</sup> We are not indicating that we want to be inundated with countless third-party registrations which amount to the needless presentation of cumulative evidence. However, without an indication that the single third-party registration made of record (i.e., showing the same product mark for brushes and toothbrushes for pets) is representative of a larger number of similar registrations, we must assume that this one registration made of record is the only relevant third-party registration. See *In re The Monotype Corp. PLC*, 14 USPQ2d 1070, 1071 n.2 (TTAB 1989).



copies of record, were not side-by-side on the same screenprint.<sup>8</sup>

Similarly, the Examining Attorney supplied for the record eight pages from the PetSmart website, and as noted in the summary listing to the right, different trademarks are used for the brushes for pets and the animal toothbrushes.



As to the similarities between the marks, the Trademark Examining Attorney argues that they are virtually identical in sound and meaning, and highly similar in appearance. He also argues that the literal portions of the marks herein are more dominant than any images or letter stylizations.

Regarding the appearance, both applicant's mark and the cited registered mark are composite marks, having a combination of literal terms and imagery. Applicant argues

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<sup>8</sup> <http://www.petco.com/>

<sup>9</sup> <http://www.petsmart.com/>

that both marks have prominent design features that are each unique and that differ substantially from each other. In applicant's mark, for example, within the word "DOG," the letter "O" is represented by a very stylized design of the front of a dog's face contained within a carrier device reminiscent of a dog tag. The cited registration contains a side view of a smiling, cartoon-like dog having a halo, and sitting on its haunches in the space defined by the lower portion of the letter "g."

We agree with applicant that the overall visual dissimilarities of these two marks is significant. In fact, the degree of stylization in applicant's entire mark pushes it toward a gray region between pure design marks, which cannot be vocalized, and word marks which are clearly intended to be vocalized. That is, although applicant's mark contains letters that one eventually recognizes as "EZ DOG," in many ways it has more the feeling of a design mark. We conclude that this visual character of applicant's mark dominates the commercial impression conveyed by the mark.

By contrast, while the cited registered mark is a composite mark having a prominent design feature, it is still primarily a word mark. Overall, these stark dissimilarities in appearance engender quite different commercial impressions.

Therefore, although, as the Trademark Examining Attorney argues, the literal portions of the marks are phonetically equivalent - having the identical sound of the term "easy dog," on the facts of this case, the identical pronunciation is not determinative. Unlike some types of consumer goods (e.g., children's toys), animal toothbrushes do not seem to be the kind of item that persons recommend by brand. Instead, consumers may simply peruse the store aisle containing health and dental products for animals. The pet owner in search of such a device is likely looking for a particular design of pet toothbrush - e.g., one having a single set of bristles, dual ended, three separate heads, plastic finger toothbrush, etc. As the Court stated in the decision *In re Electrolyte Laboratories Inc.*, 913 F.2d 930, 16 USPQ2d 1239, 1240 (Fed. Cir. 1990), "the spoken or vocalizable element of a design mark, taken without the design, need not of itself serve to distinguish the goods. The nature of stylized letter marks is that they partake of both visual and oral indicia, and both must be weighed in the context in which they occur." In the context of the marketing of these goods, the strong dissimilarities in the visual appearances of the marks and the consequent differences in commercial impressions outweigh the similarity

in pronunciation and meaning of the words contained within the marks.

In conclusion, we find that the Office has failed to meet its preponderance of the evidence burden of proof in this case.

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