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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 Lucky Paws, LLC

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Serial No. 77929696

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Kurt L. Grossman of Wood Herron & Evans LLP for Lucky Paws, LLC.

Odessa B. Bibbins, Trademark Examining Attorney, Law Office 105 (Thomas G. Howell, Managing Attorney).

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Before Bergsman, Ritchie and Kuczma,
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Lucky Paws LLC ("applicant") filed an intent-to-use application for the mark LUCKY PAWS, in standard character form, for "pet treats, namely, organic material to be mixed with other organic material and microwaved" in Class 31.

The examining attorney refused registration under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. § 1052(d), on the ground that applicant's mark, when used in connection with pet treats made from organic materials, so resembles the registered mark LUCKY PAWZ, in standard

character form, for "pet boarding services; pet day care services," in Class 43, as to be likely to cause confusion.[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 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 goods. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

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

The marks are very similar:

LUCKY PAWZ vs. LUCKY PAWS

Applicant's use of "Paws" will be perceived as the equivalent of registrant's use of "Pawz" and, therefore, the marks have the same meaning and engender the same commercial impression. *Cf. In re Carlson,* 91 USPQ2d 1198,

[1] Registration No. 3372243, issued January 22, 2008.

1201 (TTAB 2009). Such slight differences in marks [the letter "S" instead of "Z" in the word "Paws] do not normally create dissimilar marks. *In re Great Lakes Canning, Inc.*, 227 USPQ 483, 485 (TTAB 1985) ("Moreover, although there are certain differences between the [marks' CAYNA and CANA] appearance, namely, the inclusion of the letter 'Y' and the design feature in applicant's mark, there are also obvious similarities between them. Considering the similarities between the marks in sound and appearance, and taking into account the normal fallibility of human memory over a period of time (a factor that becomes important if a purchaser encounters one of these products and some weeks, months, or even years later comes across the other), we believe that the marks create substantially similar commercial impressions"). *See also United States Mineral Products Co. v. GAF Corp.*, 197 USPQ 301, 306 (TTAB 1977) ("'AFCO' and 'CAFCO,' which differ only as to the letter 'C' in USM's mark, are substantially similar in appearance and sound") and *In re Bear Brand Hosiery Co.*, 194 USPQ 444, 445 (TTAB 1977) ("The mark of the applicant, 'KIKS' and the cited mark 'KIKI' differ only in the terminal letter of each mark. While differing in sound, the marks are similar in appearance and have a somewhat similar connotation").

In view of the foregoing, we find that the marks are similar in terms of appearance, sound, meaning and commercial impression.

B. The similarity or dissimilarity and nature of the goods and services, channels of trade and classes of consumers.

It is well settled that applicant's goods and registrant's services do not have to be directly competitive to support a finding that there is a likelihood of confusion. It is sufficient if the respective products and 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 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).

> The degree of "relatedness" must be viewed in the context of all the factors, in determining whether the [goods and] services are sufficiently related that a reasonable consumer would be confused as to source or sponsorship. It is relevant to consider the degree of overlap of consumers exposed to the respective [goods and] services, for as discussed in *Philip Morris v. K2 Corp.*, 555 F.2d 815, 194 USPQ 81, 82 (CCPA

> 1977), even when goods or services are not competitive or intrinsically related, the use of identical marks can lead to the assumption that there is a common source.

In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993).

In *Philip Morris v. K2 Corp,* the Court of Customs and Patent Appeals, the predecessor of our primary reviewing court, affirmed the refusal to register the mark K2 for "filter cigarettes" because it is likely to cause confusion with the registered mark K2 for skis. According to the Court, because the marks were identical and inherently distinctive and the goods were advertised in the same magazines, "[i]t would not be unusual for consumers, simultaneously confronted with the same arbitrary mark for intrinsically unrelated goods to assume a relationship between the source of the goods." 26 USPQ2d at 82.

There is no evidence in the record that any company that manufactures pet treats also renders pet day care services. There is only one registration that has been made of record for both "pet treats" and "boarding and daycare for private pets."[2] Thus, the record fails to show

[2] Registration No. 3033757 issued December 25, 2007.

that pet boarding and day care services and pet treats are intrinsically related.

On the other hand, there is evidence in the record that companies rendering pet boarding and day care services provide food and treats to the pets albeit not under the same marks. For example:

1. Hickory Hill Kennel (*hickoryhillkennelonline.com*) provides IAMS Adult (chicken & rice) or Eukanuba Veterinary Diet;[3]

2. Club Pet Boarding (*animalcenter.org*) provides IAMS products;[4]

3. Norwinds Dog Boarding (*norwindsboarding.com*) provides Solid Gold and IAMS pet foods;[5]

4. Preferred Pet Care (*preferredpetcare.com*) provides the following products:

> Fromm Family Foods
> Wellness 5 Star
> Merrick all –natural bones
> Evangers all-natural canned and dry dog food and treats
> Grandma Lucy's all-natural treats
> Science Diet Treats[6]

[3] Applicant's September 7, 2010 response.
[4] *Id.*
[5] *Id.*
[6] *Id.*

5. Citrus County Pet Boarding, Grooming, and Pet Store (URL not provided) advertises that "[p]et owners will even find a selection of organic pet foods."[7]

8. Chama's Doge Wash & Wellness (*chamashillcrestdogwash.com*) advertises dog boarding services and supplies a wide variety of dog foods and treats.[8]

In view of the foregoing, we find that organic pet treats are a type of product that is offered in conjunction with pet boarding and day care services, they move in the same channels of trade, and are sold to the same classes of consumers.

C. Balancing the factors.

Applicant argues that the facts in this case are analogous to the facts in *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059 (Fed. Cir. 2003) (BLUE MOON and design for beer is not likely to cause confusion with BLUE MOON and design for restaurant services). The examining attorney argues, on the other hand, that the facts in this case are analogous to the facts in *In re Shell Oil* (RIGHT-A-WAY and design for service station oil and lubrication services is likely to cause confusion with RIGHT-A-WAY and

[7] September 30, 2010 Office Action.
[8] Applicant's December 16, 2010 Request for Reconsideration.

design for distributorship services). We find that this case is more akin to than *Shell Oil* than *Coors* Brewing.

In *Coors Brewing*, the court held that there was insufficient evidence to establish a relationship between beer and restaurant services to support finding that there was a likelihood of confusion. In *Shell Oil*, on the other hand, the court found that the marks were strikingly similar and all of the registrant's customers would be prospective customers for applicant's services. Likewise, in this case, the marks are very similar, pet treats are offered in conjunction with pet boarding services and the products and services are sold to the same classes of consumers.

In view of the foregoing, we find that applicant's mark LUCKY PAWS for "pet treats, namely, organic material to be mixed with other organic material and microwaved" is likely to cause confusion with the mark LUCKY PAWZ for pet boarding and pet day care services.

Finally, to the extent that there is any doubt regarding the likelihood of confusion, such doubt is resolved against applicant because the applicant, as the newcomer, has the duty of avoiding confusion, and is charged with the obligation of doing so. *In re Shell Oil Co.*, 26 USPQ2d at 1691.

Decision: The refusal to register is affirmed.