

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

Mailed: July 3, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Klise Manufacturing Company
v.
Braided Accents, L.L.C.

Cancellation No. 92045607

Leslie C. Ruitter of Stokes Lawrence, P.S. for Klise
Manufacturing Company

Muriel M. Burke of Owens & Crandall for Braided Accents,
L.L.C.

Before Quinn, Rogers, and Wellington, Administrative
Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Klise Manufacturing Company has petitioned to cancel
Registration No. 2438164, owned by Braided Accents, L.L.C.,
for the following mark:



for "building materials made of wood, namely, moldings, door
frames, window frames, rails and wainscotting" in
International Class 19. The registration issued on March

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27, 2001. On March 31, 2007, the Office accepted respondent's Section 8 declaration of use.

Petitioner filed this cancellation on the ground of priority of use and likelihood of confusion, pleading ownership of a registration for the mark ACCENT (in typed letters) for "decorative trim mouldings made of wood or wood-substitutes"¹; and an application for the same mark for "Non-metal decorative mouldings and decorative trim for use on built-in cabinetry, building construction, and manufactured housing; multi-layered wood, namely, wood trim; non-metal cove bases; non-metal door frames; and window mullions and muntins made of wood" in International Class 19, and "Non-metal decorative mouldings and decorative trim for use on furniture, picture frames, toys, caskets, boats, musical instruments, and store fixtures" in International Class 20.² Petitioner alleges that "long prior to the date registrant claims it first used [registrant's mark]," petitioner has been and is now using its mark and that it will be damaged if respondent is "permitted to retain the registration sought to be cancelled...on goods which are substantially identical to those offered by Petitioner,

¹ Registration No. 1158106 issued June 23, 1981, with a claimed date of first use on August 31, 1975. Sections 8 and 15 affidavits have been accepted and, in 2001, it was renewed.

² Application Serial No. 78808873 matured into Registration No. 3186944 on December 19, 2006; the goods recited above reflect the identification of goods in the registration. The registration contains a claim of first use on all goods of August 31, 1975.

[and] confusion in the trade is likely to result from any concurrent use of Petitioner's mark and that of Registrant."

Respondent denied the pertinent allegations of the petition for cancellation. As an affirmative defense, respondent asserted that petitioner is precluded by laches from canceling respondent's registration.

Both parties filed briefs.

The Record

By operation of the rules, the record includes the pleadings and the subject registration file.

Neither party took testimony. However, both parties introduced evidence by way of notices of reliance filed during their respective testimony periods. In its trial brief, petitioner specifically recited the materials identified in both parties' notices of reliance as being of record. Respondent, in its trial brief, "concur[red] with the description of the record as contained in [petitioner's brief] and finds it to be accurate and satisfactory..." Brief, p. 4. We construe these statements in the parties' briefs as a stipulation to the complete record.

That evidence includes: a status and title copy of petitioner's pleaded registration and a certified copy of its pleaded application³; copies of various responses to

³ At the time of filing of the notice of reliance, petitioner's pleaded application had already matured into a registration for

admission and interrogatory answers from both parties;⁴ copies of documents produced by both parties during discovery;⁵ and copies of excerpts from petitioner's own website.⁶

Standing

Because petitioner has properly made its pleaded registration (Registration No. 1158106) of record, petitioner has established its standing to cancel respondent's registration. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982).

Respondent argues that petitioner does not have standing because petitioner "has abandoned its ACCENT mark"

nearly eight months (see footnote 2). Because a status and title copy of this registration has not been filed, we will not consider this registration. *Cf.*, *DC Comics v. Pan American Grain Mfg. Co.*, 77 USPQ2d 1220 (TTAB 2005) (Opposer's pleaded application matured into a registration during course of proceeding; pleadings deemed amended to include reliance upon a pleaded registration and opposer properly made the newly-issued registration of record.)

⁴ First respondent and then petitioner (in its rebuttal testimony period) relied on several of their own answers to interrogatories, pursuant to Rule 2.120(j)(5), each doing so because they were not submitted previously by the other party and should have been as a matter of fairness. Neither party objected to the other's inclusion of these answers or reliance thereon.

⁵ Both parties admitted via mutual admission requests (introduced via notices of reliance) that all documents produced are genuine and authentic. See TBMP § 704.11 (2d ed. rev. 2004).

⁶ Internet website printouts generally may not be introduced by way of a notice of reliance alone. See TBMP § (2d ed. rev. 2004) and authorities cited therein. However, because the parties have stipulated to the record, we consider any possible objection to this evidence as waived.

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and it otherwise has "failed to show continuous use in commerce, [and] there is prima facie evidence that the ACCENT [mark] fell to the public domain." Brief, pp. 14-15. Because respondent has not counterclaimed to cancel petitioner's pleaded registration, this argument is essentially an improper collateral attack on the pleaded registration and, as such, has not been considered. *Cosmetically Yours, Inc. v. Clairol Inc.*, 424 F.2d 1385, 1387, 165 USPQ 515, 517 (CCPA 1970) ("As long as the registration relied upon ... remains uncanceled, it is treated as valid and entitled to the statutory presumptions.").

Priority

Where both petitioner and respondent are owners of registrations, petitioner must prove priority of use. *Henry Siegel Co. v. M & R Mfg. Co.*, 4 USPQ2d 1154, 1160 n.9 (TTAB 1987); *American Standard Inc. v. AQM Corp.*, 208 USPQ 840, 841-842 (TTAB 1980); *SCOA Industries Inc. v. Kennedy & Cohen, Inc.*, 188 USPQ 411, 413 (TTAB 1975). In proving its priority of use, petitioner may rely upon the filing date of the application resulting in issuance of its pleaded registration as evidence of its first use of the mark. *Henry Siegel Co. v. M & R Mfg. Co.*, *supra*; *American Standard Inc. v. AQM Corp.*, *supra*. Thus, at the very least, petitioner may claim a priority date of June 24, 1977. Respondent, on the other hand, admits that it did not begin

use of its mark until 1998. Response to Pet.'s Interrogatory No. 1. In view thereof, petitioner has proven that it has priority of use.

Likelihood of confusion

Our determination of likelihood of confusion under Section 2(d) of the Lanham Act is based on an analysis of all the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). The relevant *du Pont* factors in this proceeding are discussed below.

We turn first to the similarity of the parties' goods. Here, the goods are identical inasmuch as petitioner's pleaded registration covers decorative wood (and wood-substitute) trim molding and the subject registration covers wood molding building materials. Also, the other goods identified in the subject registration, i.e., wood building materials such as door frames, window frames, rails and wainscoting, are closely related to petitioner's wood molding.

Respondent attempts to distinguish the parties' goods by arguing that its products are not related "in style, design, appearance or use." Brief, p. 9. However, neither petitioner's nor respondent's identified goods are restricted to a certain style or appearance. Likewise,

although respondent's identification of goods is prefaced as "building materials," petitioner's goods are not so limited and could also include building materials. And, we must make our findings based on the goods as they are recited in the registrations. See *Octocom Systems Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *In re Linkvest S.A.*, 24 USPQ2d 1716 (TTAB 1992); *In re Elbaum*, 211 USPQ 639 (TTAB 1981).

Because there are no restrictions as to the channels of trade for the molding in either party's registration, we must presume that the parties' respective goods are marketed in all of the normal trade channels for such goods, and that the goods are bought by the usual classes of purchasers. *Canadian Imperial Bank of Commerce v. Wells Fargo Bank*, *supra*; *Toys R Us v. Lamps R Us*, 219 USPQ 340, 343 (TTAB 1983). In other words, given that the parties' goods are, in part, identical, it is presumed that they move in the same trade channels to the same classes of purchasers.

The *du Pont* factors of the similarity of the goods and trade channels weigh in favor of a finding of likelihood of confusion.

We now turn our attention to the level of similarity or dissimilarity in the parties' marks. In considering the marks, we initially note that when they are used in connection with identical goods, as they are here, "the

degree of similarity [between the marks] necessary to support a conclusion of likely confusion declines." *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

Under this *du Pont* factor, we look to the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. 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 their overall commercial impressions that confusion as to the source of the goods offered under the respective marks is likely to result. The focus is on the perception and recollection of the average purchaser of the involved goods, who normally retains a general rather than specific impression of trademarks. See *Chemetron Corp. v. Morris Coupling & Clamp Co.*, 203 USPQ 537 (TTAB 1979); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). In this case, the average purchaser would include members of the general public engaged in home repair or remodeling.

We begin our analysis by pointing out that although respondent's mark essentially incorporates petitioner's entire mark, ACCENT, the term "accent" itself is suggestive inasmuch as the parties' goods, e.g. decorative crown molding or wainscotting, may be used to provide "accent" to

a room.⁷ Thus, we cannot say that petitioner's mark is arbitrary and that respondent's adoption of the term for its composite mark falls within the line of cases holding that when one incorporates the entire arbitrary mark of another into a composite mark, inclusion in the composite mark of a significant, nonsuggestive element will not necessarily preclude a likelihood of confusion. See, e.g., *Wella Corp. v. California Concept Corp.*, 558 F.2d 1019, 194 USPQ 419, 422 (CCPA 1977) (CALIFORNIA CONCEPT with a surfer design is similar to CONCEPT for hair products).

As indicated above, likelihood of confusion must be determined by analyzing the marks in their entirety; nevertheless, "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entirety." *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). In this regard, with respect to respondent's mark, the literal portion BRAIDED

⁷ In this regard, we rely on the following applicable defined meaning of the term "accent": "A distinctive feature or quality, such as a feature that accentuates, contrasts with, or complements a decorative style." The American Heritage Dictionary of the English Language: Fourth Edition. 2000. It is well settled that the Board may take judicial notice of dictionary definitions. See, e.g., *Hancock v. American Steel & Wire Co. of New Jersey*, 203 F.2d 737, 97 USPQ 330, 332 (CCPA 1953); *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983); and *Marcal Paper Mills, Inc. v. American Can Co.*, 212 USPQ 852, 860 n.7 (TTAB 1981).

ACCENTS is accorded greater weight than the design element because it is the word portion of the mark that consumers use to request and to identify respondent's products. *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593, 1596 (TTAB 2001); *In re Appetito Provisions Co.*, 3 USPQ2d 1553, 1554 (TTAB 1987); *Kabushiki Kaisha Hattori Tokeiten v. Scutto*, 228 USPQ 461, 462 (TTAB 1985). Also, within the literal portion, the term ACCENTS makes a greater impression than the term BRAIDED because the latter term is disclaimed and its meaning is reinforced by the image of braided rope in the design. Disclaimed or descriptive matter is generally viewed as a less dominant or significant feature of the mark. *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001). See also *Cunningham*, 55 USPQ2d at 1846, quoting *In re National Data Corp.*, 224 USPQ at 750 ("Regarding descriptive terms, this court has noted that the 'descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion'"). Accordingly, respondent's adoption of the term BRAIDED and the braided rope-like design have less significance in distinguishing the marks.

In sum, we find the marks in their entirety to be more similar than dissimilar. This is a factor that favors a finding of likelihood of confusion.

As to the *du Pont* factor involving instances of actual confusion, there have been no known instances.⁸ To determine whether the absence of actual confusion is relevant, we must consider the length of time and conditions under which the parties have concurrently used their marks without any reported instances of confusion. And, in this regard, we note that at the time of trial the parties had concurrently used their marks in commerce for approximately nine years, i.e., since 1998. Respondent's goods are "sold throughout the U.S.A. by approximately 140 qualified dealers/distributors"⁹ and its "typical or targeted customers" are "qualified dealers/distributors, architectural, hardwood moulding suppliers and large manufacturers of architectural products."¹⁰ Respondent has also used "all available means for advertising throughout the U.S.A., including trade shows," but "has not used radio or [television]."¹¹ On the other hand, petitioner, by its own estimates for the years 2001-2005, had sales for goods bearing the ACCENT mark ranging from \$ 15-23,000.00 per year.¹² Petitioner has "marketed and sold goods using the

⁸ "Petitioner responds that it has not confirmed that instances of actual confusion have occurred yet." (petitioner's response to respondent's Interrog. No. 19); "There have been no instances of confusion." (respondent's response to petitioner's Interrog. No. 11).

⁹ Respondent's response to petitioner's Interrogatory No. 9.

¹⁰ Respondent's response to petitioner's Interrogatory No. 5.

¹¹ Respondent's response to petitioner's Interrogatory No. 6.

¹² Petitioner's response to respondent's interrogatory no. 12.

ACCENT mark to small cabinet shops...[and] for the last two years [between 2004-2006], petitioner has marketed and sold goods using the ACCENT mark predominantly to kitchen cabinet manufacturers or distributors."¹³ In addition, petitioner "markets goods using the ACCENT mark on the Internet, in nationally distributed magazines, by direct mail, through trade shows, and through a national network of independent sales representatives."¹⁴ Based on these facts, we find there has been some overlap of concurrent use of the parties' marks on their goods inasmuch as both parties sell their goods to distributors and have advertised their goods nationally, including at trade shows. However, there is no evidence that the parties share common distributors for their goods or that they advertised in the same publications or attended the same trade shows. We therefore find that the lack of actual confusion weighs only slightly in favor of respondent and against a finding of likelihood of confusion. *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992).

In conclusion, we have considered all relevant evidence in this case bearing on the *du Pont* factors and conclude that there is a likelihood of confusion between petitioner's ACCENT mark and respondent's BRAIDED ACCENTS (with design)

¹³ Petitioner's response to respondent's interrogatory no. 14.

¹⁴ Petitioner's response to respondent's interrogatory no. 21.

mark. Notwithstanding the lack of any instances of actual confusion, we conclude so principally because the goods are identical, the trade channels are presumptively the same, and the marks are similar.

Laches

Having found a likelihood of confusion, we now turn to respondent's asserted laches defense.

By statute, laches is available as an affirmative defense. Section 19 of the Lanham Act, 15 U.S.C. §1069. In order to prevail on the affirmative defense of laches, respondent is required "to establish that there was undue or unreasonable delay [by petitioner] in asserting its rights, and prejudice to [respondent] resulting from the delay." *Bridgestone/Firestone Research Inc. v. Automobile Club de l'Ouest de la France*, 245 F.3d 1359, 58 USPQ2d 1460, 1462-1463 (Fed. Cir. 2001). See also *Lincoln Logs Ltd. v. Lincoln Pre-Cut Log Homes Inc.*, 971 F.2d 732, 23 USPQ2d 1701, 1703 (Fed. Cir. 1992). The laches defense, if successful, will serve as a bar against a petition for cancellation grounded on likelihood of confusion unless confusion is inevitable. *Ultra-White Co., Inc. v. Johnson Chemical Industries, Inc.*, 465 F.2d 891, 175 USPQ 166, 167 (CCPA 1972).

First, we look at the length of delay between a petitioner's notice of defendant and its mark and

petitioner's filing of a petition for cancellation, as this is a critical factor when considering a laches defense.

See, e.g., *Teledyne Technologies, Inc. v. Western Skyways, Inc.*, 78 USPQ2d 1203, 1210 (TTAB 2006), *aff'd* unpublished opinion, Appeal Nos. 2006-1366 and 1367 (Fed. Cir. Dec. 6, 2006) [3 years, 8 months of unexplained delay held sufficient for laches]; and *Charrette Corp. v. Bowater Communication Papers, Inc.*, 13 USPQ2d 2040 (TTAB 1989) [14 months of delay held not sufficient for defense of laches].

Here, petitioner states that it "first became aware that [respondent] was promoting products using [respondent's] mark in similar marketing channels in early 2005.

Approximately seven or eight years ago [in December of 1999 or 1998], Petitioner had previously searched for other companies that offered rope moulding and encountered [respondent] but believed [respondent] was selling to a very small market and not competing with Petitioner."¹⁵

Therefore, petitioner had actual notice of respondent's use of its mark as early as 1998 or 1999, both dates preceding the publication date of the application for the subject registration. In such situations, our principal reviewing court has held that in a cancellation proceeding, "... laches begins to run from the time action could be taken against the acquisition by another of a set of rights to

¹⁵ Petitioner's response to respondent's Interrogatory No. 22.

which objection is later made. In an opposition or cancellation proceeding the objection is to the rights which flow from registration of the mark." *National Cable Television Association Inc. v. American Cinema Editors Inc.*, 937 F.2d 1572, 19 USPQ2d 1424 (Fed. Cir. 1991). See also, *Teledyne Technologies, Inc.*, 78 USPQ2d at 1210. Therefore, laches begins to run in this case from the date the application for the subject registration was published for opposition, and that date is January 2, 2001. Petitioner filed the instant petition for cancellation on March 20, 2006, thus creating a period of delay of approximately five years and two months.

Respondent's reliance on petitioner's delay in filing a petition for cancellation is not a requirement for laches. In other words, petitioner does not have to overtly or covertly lull respondent into believing that petitioner would not act. "Economic prejudice arises from investment in and development of the trademark, and the continued commercial use and economic promotion of a mark over a prolonged period adds weight to the evidence of prejudice." *Teledyne Technologies Inc. v. Western Skyways Inc.*, *supra* at 1211. See also *Trans Union Corp. v. Trans Leasing International, Inc.*, 200 USPQ 748, 756 (TTAB 1978) (prejudice occurs where senior user takes action after the junior user builds up its business and goodwill around a mark).

It is not disputed that "registrant has greatly expanded its operations in recent years," prior to petitioner commencing this proceeding. Petitioner's Brief, p. 3. Petitioner acknowledges that respondent "opened a new manufacturing building and showroom with much larger capacity and increased resources." *Id.* Specifically, petitioner itself relies on an article from "The Merchant Magazine" (January 2006) describing respondent's activity shortly before the date of the article.¹⁶ During this time, respondent acquired a new 22,000 square foot plant and expended \$450,000.00 for new equipment that includes a moulder, dentil machine, laser-guided rip saw and a computerized template maker.

In view of the above, we find that the length of delay is significant and that prejudice to respondent would result should its registration be cancelled because, during this time of delay, respondent continued to invest in and expand its business. Petitioner argues, however, that its reason

¹⁶ For hearsay reasons, magazine articles are generally only probative for what they show on their face, not for the truth of the matters contained therein, unless a competent witness has testified to the truth of such matters. See TBMP § 704.08 (2d ed. rev. 2004) and authorities cited therein. However, in this case, we note that both parties have set forth arguments based on the truth of the matters asserted in the article and neither party has objected to the content as hearsay in their trial briefs. Accordingly, we have weighed the evidence without regard to any theoretical hearsay objection. *Akro Corp. v. Luker*, 45 F.3d 1541, 1546, 33 USPQ2d (BNA) 1505 (Fed. Cir. 1995) (hearsay objections will not be heard later if the objections were not raised at the time evidence was presented to the trial court).

for delay was justified and not "undue," and, "we cannot determine that respondent has established the defense of laches until we examine whether petitioner has, as it contends, an adequate excuse for the delay." *Jansen Enterprises Inc. v. Rind*, 85 USPQ2d 1104 (TTAB 2007), citing *Leinoff v. Louis Milona & Sons, Inc.*, 726 F.2d 734, 220 USPQ 845 (Fed. Cir. 1984).

Petitioner's argument for why it did not act sooner is essentially that:

[Petitioner] never sat on its rights. Registrant fails to disclose that until late 2005, it was a much smaller enterprise. Registrant greatly expanded its operations at that time. Almost immediately after learning of this expansion, and realizing that Registrant was encroaching on [petitioner's] markets, [petitioner] filed this action. It is irrelevant that [petitioner] knew of Registrant's existence a few years earlier. A trademark holder is not required to immediately challenge each and every infringing use, especially those that do not pose economic threats.

[Reply Brief, p. 5]

In support of its argument, petitioner cites the decision by our primary reviewing court's predecessor in *Wallpaper Mfrs., Ltd. v. Crown Wallcovering Corp.*, 680 F.2d 755, 214 USPQ 327 (CCPA 1982), and Professor McCarthy from his treatise, *McCarthy on Trademarks and Unfair Competition*.

In essence, the argument put forth by petitioner is a request for the Board to apply the doctrine of 'progressive encroachment' in this cancellation proceeding. As to laches

and the doctrine of progressive encroachment, Professor McCarthy has stated:

[l]aches should not necessarily always be measured from defendant's very first use of the contested mark, but from the date that defendant's acts first significantly impacted on plaintiff's good will and business reputation ... any change in the format or method of use of the mark or expansion into new product lines or territories should be sufficient to excuse a prior delay.

And that:

[u]nder the doctrine of "progressive encroachment," a trademark owner is not forced by the rule of laches to sue until the likelihood of confusion caused by the accused use presents a significant danger to the mark. A relatively low level infringement or use of a similar mark in a different product or service line or in a different territory does not necessarily trigger an obligation to immediately file suit. But when the accused use moves closer or increases in quantity, the doctrine of progressive encroachment requires the trademark owner to remain alert and to promptly challenge the new and significant acts of infringement. Thus, there may be no obligation to sue until the accused use progressively encroaches on the trademark.

McCarthy on Trademarks and Unfair Competition, §§ 31:19 and 31:20, respectively, (4th ed. updated 2006).

However, as the Board recently noted, the case law cited by Professor McCarthy in support of the above-mentioned sections from his treatise pertains to common law rights and trademark infringement actions. *Jansen Enterprises*, 85 USPQ2d at 1117. Accordingly, in the *Jansen* decision, the Board examined the applicability of laches and the progressive encroachment doctrine to *inter partes* proceedings before the Board. The Board ultimately concluded that "[t]he concept of laches, thus, essentially

acts as an exception for issuing a judgment in favor of a party that has proved its case; that is, although 'at law' the plaintiff would be entitled to judgment, the defendant has shown special circumstances that would make the application of strictly formulated rules of law unacceptable. The defense of laches is not determined by adherence to rigid legal rules; rather, we analyze laches by a consideration of the specific facts and a balancing of the respective interests and equities of the parties, as well as of the general public." *Id.*

In applying the aforementioned principles to the facts of this case and taking petitioner's reason for delay into consideration, we find that petitioner's petition to cancel is barred by the equitable defense of laches. Since adopting its mark in 1998 and being issued the subject registration in 2001, respondent has acted as many other small to mid-size businesses might, i.e., it expanded its production capacity. Section 7(b) of the Trademark Act not only provides that a certificate of registration on the Principal Register is prima facie evidence of the validity of the registration and of the registrant's ownership of the mark, but it also accords the registrant the presumptive exclusive right to use the mark in interstate commerce in connection with the goods or services identified in the certificate. And, as the owner of an unrestricted

registration on the Principal Register since March 2001, respondent was presumed to have been well within its rights to use its BRAIDED ACCENTS (with braided rope design) mark throughout the United States. Petitioner's argument that it decided not to act until respondent "expanded its operations" and encroached upon petitioner's business rings hollow. There is no evidence to suggest that respondent was ever 'put on notice' by petitioner as to any limits to its geographic areas of commerce, production capacity, or any possible encroachment upon petitioner's business. The facts before us may be distinguished from those in the *Jansen* case, wherein the Board found that a change in the nature of respondent's services warranted or excused petitioner's delay in bringing a petition for cancellation. *Jansen Enterprises*, at p. 1118 ["Essentially, the change in respondent's services, from 'restaurant services featuring bagels as a main entrée to restaurants that also serve pizza and other Italian food, constituted such a change in circumstances that petitioner's previous failure to take action against the registration does not preclude petitioner from taking action against the registration when it learned of the change."]. In this case, however, respondent did not change the nature or type of its goods being sold under its registered mark, but stayed within its rights accorded to it by virtue of the subject registration. On the record before

us, we do not find that respondent changed the 'nature' of its business to warrant petitioner's significant delay in bringing the petition for cancellation.

Finally, while we have found that elements of laches have been established in this case, we further note that this equitable defense is not an available defense where confusion is inevitable. In other words, laches is applicable only in cases where there is reasonable doubt that likelihood of confusion exists. *Ultra-White Co., Inc. v. Johnson Chemical Industries, Inc.*, 465 F.2d 891, 175 USPQ 166, 167 (CCPA 1972); *CBS, Inc. v. Man's Day Publishing Co., Inc.*, *supra*. This is so because any injury to respondent caused by plaintiff's delay is outweighed by the public's interest in preventing confusion. *Turner v. Hops Grill & Bar, Inc.*, 52 UPSQ2d 1310, 1313 (TTAB 1999), citing *Coach House Restaurant Inc. v. Coach and Six Restaurants, Inc.*, 934 F.2d 1551, 19 UPSQ2d 1401, 1409 (11th Cir. 1991).

Although there is a likelihood of confusion between petitioner's ACCENT mark and respondent's BRAIDED ACCENTS (with braided rope design) mark, we find that the evidence of record does not establish that confusion is inevitable. Although the goods are identical in part, the marks are not so similar that we can find confusion to be inevitable. The marks are somewhat suggestive and may be entitled to a narrower scope of protection than purely arbitrary or coined

marks. In addition, there has been over nine years of concurrent use of the marks without any reported instances of actual confusion. In view thereof, we do not view confusion between the parties' marks to be inevitable.

Decision: When used in connection with their respective identified goods, respondent's BRAIDED ACCENT (with braided rope design) so closely resembles petitioner's registered ACCENT mark, as to be likely to cause confusion. However, respondent's affirmative defense of laches is applicable and, thus, petitioner's likelihood of confusion claim is barred by this equitable defense.

The petition for cancellation is dismissed.