

This Opinion is not a  
Precedent of the TTAB

Mailed: September 6, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re All Seasons Feeders, Ltd.*  
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Serial No. 86699952  
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S. Roxanne Edwards of Klemchuk LLP,  
for All Seasons Feeders, Ltd.

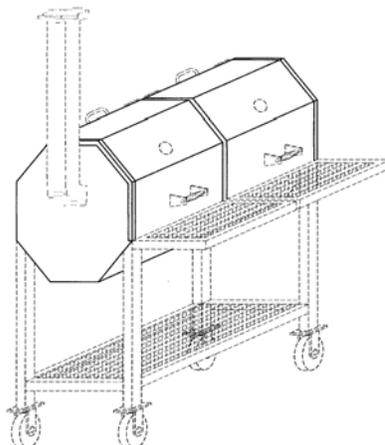
Natalie Polzer, Trademark Examining Attorney, Law Office 108,  
Andrew Lawrence, Managing Attorney.

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Before Zervas, Shaw and Goodman,  
Administrative Trademark Judges.

Opinion by Shaw, Administrative Trademark Judge:

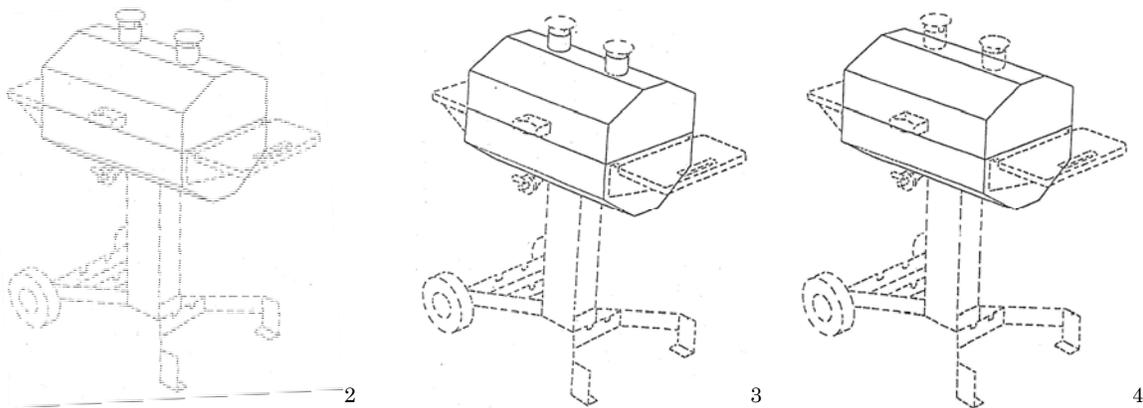
All Seasons Feeders, Ltd. (“Applicant”) seeks registration on the Principal

Register of the mark:



for “barbeque grills,” International Class 11.<sup>1</sup> The description of the marks reads: “The mark consists of a three-dimensional configuration of the octagonal firebox of an outdoor grill with equal length sides. The matter shown in dotted lines serves to show positioning of the mark and is not part of the mark.” Applicant claims the mark has acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f).

Registration has been refused under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark, when used on the identified goods, so resembles the following three commonly-owned marks registered for “outdoor cooking grills,” in International Class 11:



<sup>1</sup> Application Serial No. 86699952, filed on July 21, 2015 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), alleging a date of first use and first use in commerce of May 1, 2010.

<sup>2</sup> Registration No. 2372122, issued on August 1, 2000; renewed. The description of the mark reads: “The mark consists of outdoor grill design featuring an octagonal housing with dual chimneys thereon.”

<sup>3</sup> Registration No. 2914040, issued on December 28, 2004; renewed. The description of the mark reads: “The mark consists of the octagonal firebox portion of an outdoor grill with dual chimneys thereon. The matter shown in dotted lines serves to show positioning of the mark and is not part of the mark.”

<sup>4</sup> Registration No. 2915459, issued on January 1, 2005; renewed. “The description of the mark reads: The mark consists of the configuration of the octagonal firebox of an outdoor grill. The matter shown in dotted lines serves to show positioning of the mark and is not part of the mark.”

When the refusal was made final, Applicant appealed. After filing its brief, Applicant requested remand to the Examining Attorney for consideration of a request for reconsideration, including an amended drawing. The Examining Attorney accepted the amended drawing shown above, but otherwise denied the request for reconsideration. The appeal resumed and the case is fully briefed. We affirm the refusal to register.

### Analysis

Our determination of the issue of likelihood of confusion is based on an analysis of all the probative facts in evidence 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). We have considered each *du Pont* factor that is relevant. *See M2 Software, Inc. v. M2 Commc'ns, Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006); *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1242 (TTAB 2015) (“While we have considered each factor for which we have evidence, we focus our analysis on those factors we find to be relevant.”).

The only significant difference between the three cited marks is that in the first two marks, the “dual chimneys” on the top of the grills are part of the mark, whereas in the third mark the “dual chimneys” are not claimed as part of the mark. We therefore focus our analysis on the third mark, Registration No. 2915459, which is most similar to Applicant’s mark. If we do not find a likelihood of confusion with this registered mark and its associated goods, then there would be no likelihood of

confusion with the marks in the other registrations. *See In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

*A. The similarity of the goods, channels of trade, and classes of purchasers*

We begin with the similarity of the respective goods. Both the application and the registration are for legally identical goods: “barbeque grills” and “outdoor cooking grills.” Applicant admits that, despite the slight difference in wording, “[b]oth Applicant’s and Registrant’s goods are barbeque grills.”<sup>5</sup>

Additionally, because the goods are legally identical, and there are no restrictions in the identification of goods, we must presume that the grills are sold in all normal trade channels and to all normal classes of purchasers for such goods, and that the channels of trade and classes of purchasers of Applicant’s and Registrant’s goods are the same. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 76 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *In re Yawata Iron & Steel Co., Ltd.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same).

The *du Pont* factors regarding the similarity of the goods, channels of trade, and classes of purchasers favor a finding of a likelihood of confusion.

Notwithstanding the legal identity of the respective goods, Applicant argues that “this factor should be given little weight since the marks at issue are comprised of product configuration trade dress.” As Applicant explains:

In other words, some measure of product similarity will always be present in cases involving product configuration

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<sup>5</sup> Applicant’s Reply Br., p. 1, 16 TTABVUE 2.

trade dress. Here, the marks at issue are comprised of a product configuration trade dress of a barbeque grill. As such, the relevant goods are necessarily going to be the same, i.e., grills. The similarity of the goods should therefore be afforded little probative value in the likelihood of confusion analysis and other factors should be given greater weight (i.e., the differences between Applicant's Mark and the Cited Marks).<sup>6</sup>

Applicant similarly argues that the *du Pont* factor relating to channels of trade should be given little probative value:

Likewise, whether the goods are similar and marketed through the same channels of trade is of little probative value. This factor is designed for application to noncompeting products since competing products are, by nature, generally marketed through similar trade channels. This factor therefore carries very little weight toward establishing the probability of confusion in product configuration trade dress cases where the goods are necessarily similar and competing. In fact, this factor will rarely, if ever, need to be considered in a product configuration trade dress case since the goods at issue will by definition be in competition. Rather, the focus should be on other factors, as in the present case.<sup>7</sup>

These arguments are unpersuasive. Similarity of the respective goods is a key consideration of the likelihood of confusion analysis. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”). Moreover, Applicant's suggestion that these *du Pont* factors are of “little probative value” would have us virtually discard these factors. As the predecessor to our primary reviewing court has

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 3.

said: “We find no warrant, in the statute or elsewhere, for discarding *any* evidence bearing on the question of likelihood of confusion.” *Du Pont*, 177 USPQ at 567.

Further, adoption of Applicant’s argument would have a perverse effect on the likelihood of confusion analysis—it would reduce a registrant’s scope of protection as a competitor’s goods come closer to those of the registrant. Such an argument strains credulity. Rather, it is the newcomer who must avoid confusion with the senior user. “[I]t is the affirmative duty of the newcomer to take reasonable precautions in the selection of a mark, so as to avoid needless public confusion and private injury by the invasion of the field previously occupied by another.” *Kalart Company, Inc. v. The Camera-Mart, Inc.*, 258 F.2d 956, 119 USPQ 139, 141 (CCPA 1958), citing *Waterman Co. v. Modern Pen Co.*, 235 U.S. 88, 94 (1914).

Accordingly, we see no reason to ignore the legal identity of the goods in order to give “little probative value” to the *du Pont* factors regarding similarity of the goods or channels of trade. *See In re Homeland Vinyl Prods., Inc.*, 81 USPQ2d 1378, 1382 (TTAB 2006) (*Du Pont* factors apply to likelihood of confusion analysis between product configuration marks).

Applicant also argues that “[c]onsumers have grown to rely on other factors to distinguish the trade dress such as the products’ labeling and packaging, trademarks, and advertising.”<sup>8</sup> This argument is unavailing in *ex parte* proceedings. We must make our determination regarding the similarities between the services based on how they are identified in the subject application and cited registration, respectively, not

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<sup>8</sup> *Id.* at 2.

on any extrinsic evidence of actual use. *Stone Lion Capital Partners*, 110 USPQ2d at 1162.

The *du Pont* factors regarding similarity of the goods, channels of trade, and classes of purchasers favor a finding of a likelihood of confusion.

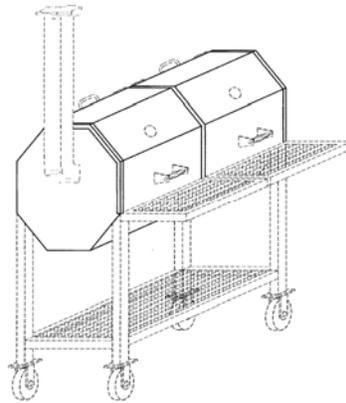
*B. The similarity or dissimilarity of the marks in their entireties in terms of appearance, sound, connotation and commercial impression*

Next, we consider the similarity of the marks. In comparing the marks we must consider their appearance, sound, connotation and commercial impression. *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). The emphasis of our analysis must be on the recollection of the average purchaser who normally retains a general, rather than specific, impression of trademarks. Although we consider the mark as a whole, “in articulating reasons for reaching a conclusion on the issue of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark. . . .” *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

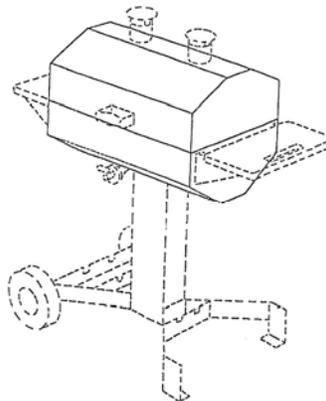
Inasmuch as the respective marks are product configurations and therefore, like design marks, cannot be pronounced, the issue of likelihood of confusion must be decided primarily on the basis of the overall visual similarity of the marks. *Cf. In re ATV Network Ltd.*, 522 F.2d 925, 193 USPQ 331, 332 (CCPA 1977); *In re Burndy Corp.*, 300 F.2d 938, 133 USPQ 196, 197 (CCPA 1962). Moreover, because the matter depicted in broken or dotted lines is not part of the mark, it should not be considered

in determining likelihood of confusion. *In re Homeland Vinyl Prods, Inc.*, 81 USPQ2d at 1382.

To recap, Applicant's mark appears below, with the mark description stating: "The mark consists of a three-dimensional configuration of the octagonal firebox of an outdoor grill with equal length sides."



The mark in Registration No. 2915459 appears below, with the mark description stating: The mark consists of the configuration of the octagonal firebox of an outdoor grill.



Discounting the matter in dotted lines, as we must, the most obvious similarity between the mark is that they both consist of the configuration of a grill with a three dimensional "octagonal firebox." In addition, both grills are greater in width than

height or depth. Conversely, the main differences between the marks appear to be (1) Applicant's mark has two lids to Registrant's one, and (2) Registrant's firebox does not appear to be precisely octagonal in cross section.

Applicant argues that “[t]he differences in the shape of the chambers, coupled with the inclusion of a single cooking chamber in the Cited Marks and a double cooking chamber in Applicant's Mark, creates significantly distinct commercial impressions for the marks so that confusion is unlikely.”<sup>9</sup>

In response, the Examining Attorney argues that, notwithstanding these differences, “the drawings of the marks at issue demonstrate that the shared dominant feature in creating the commercial impression is the octagonal shape of a grill firebox configuration design.”<sup>10</sup> Regarding the two lids or “cooking chambers” of Applicant's grill, the Examining Attorney argues that the evidence of record “demonstrates that the same entities commonly manufacture and/or provide the relevant goods, e.g. barbecue grills with two cooking chambers and outdoor cooking grills with one cooking chamber, and markets these goods under the same mark.”<sup>11</sup> In particular, the Examining Attorney points to a number of third-party web sites showing that manufacturers commonly offer grills under the same mark with one and two lids, or “cooking chambers.”<sup>12</sup> In fact, Applicant's own specimens show it offers

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<sup>9</sup> Applicant's Br., p. 6, 4 TTABVUE 8.

<sup>10</sup> Examining Attorney's Br., p. 7, 15 TTABVUE 7.

<sup>11</sup> *Id.* at 12.

<sup>12</sup> Office Action of February 15, 2017, pp. 2-95.

for sale under the same mark, one-, two-, and three-chambered octagonal grills, including the single chamber model below.



This evidence, that consumers are accustomed to seeing grills offered under the same mark with one and two lids, establishes that the number of lids would be perceived more as a feature of a particular grill rather than as an element of a trademark.

Nor do we find significant the fact that Registrant's grill, as shown in the drawing of the mark, is not precisely octagonal. The appropriate emphasis is on the recollection of the average customer, who normally retains a general rather than a specific impression of trademarks or service marks. *Spoons Rests., Inc. v. Morrison, Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991) (citations omitted), *aff'd.*, No. 92-1086 (Fed. Cir. June 5, 1992). See *Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212

<sup>13</sup> Application of July 21, 2015, TSDR p. 5.

USPQ 233, 234 (CCPA 1981); *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1740 (TTAB 2014). Moreover, the description of Registrant's mark simply describes an "octagonal firebox." A description of the mark is part of the registration and helps define the scope of the registration. See Trademark Rules 2.37 and 2.52, 37 C.F.R. §§ 2.37 and 2.52. Notwithstanding slight variations in the proportions of Registrant's "octagonal firebox" grill, we find the dominant feature of both grills to be a similar "octagonal firebox" configuration.

Accordingly, this *du Pont* factor favors a finding of a likelihood of confusion.

*C. Aesthetic Functionality of Registrant's mark*

Citing the Supreme Court's decision in *TrafFix Devices, Inc. v. Mktg. Displays Inc.*, 532 U.S. 23 (2001), Applicant argues that the refusal to register its mark "effectively places all competitors at a disadvantage by eliminating all aesthetically appealing octagonal shaped grill chambers from the available designs."<sup>14</sup> We disagree.

Applicant's argument is a thinly-veiled collateral attack on the cited registrations. Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b), provides that a certificate of registration on the Principal Register shall be prima facie evidence of the validity of the registration, of the registrant's ownership of the mark, and of the registrant's exclusive right to use the mark in commerce in connection with the goods or services specified in the certificate. During *ex parte* prosecution, an applicant will not be heard on matters that constitute a collateral attack on the cited registration. See *In re Dixie Rests., Inc.*, 105 F.3d 1405, 1408, 41 USPQ2d 1531, 1534-35 (Fed. Cir. 1997).

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<sup>14</sup> Applicant's Br., p. 9, 4 TTABVUE 9.

*D. Conclusion*

Having considered all the evidence and arguments on the relevant *du Pont* factors, we conclude that there is a likelihood of confusion between Applicant's octagonal grill configuration mark and Registrant's octagonal grill configuration mark.

**Decision:** The refusal to register Applicant's mark under Section 2(d) of the Trademark Act is affirmed.