

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF THE TTAB                      AUG. 30, 99  
U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

---

Trademark Trial and Appeal Board

---

In re **Kispiox Forest Products Ltd.**

---

Serial No. 75/164,644

---

**William H. Pavitt, Jr.** of **Beehler & Pavitt** for **Kispiox Forest Products Ltd.**

**Thomas W. Wellington**, Trademark Examining Attorney, Law Office 112 (**Janice O'Lear**, Managing Attorney).

---

Before **Cissel**, **Hohein** and **Hairston**, Administrative Trademark Judges.

Opinion by **Hairston**, Administrative Trademark Judge:

An application has been filed by Kispiox Forest Products Ltd., a Canadian corporation, to register the mark shown below for "lumber, namely finished boards for use in construction."<sup>1</sup>

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when applied to the identified goods, so resembles the mark KFP, which is registered for "timber logs,"<sup>2</sup> as to be likely to cause confusion.

Applicant has appealed. Briefs have been filed, but no oral hearing was requested.

Turning first to the marks, it is essentially the Examining Attorney's position that the marks create the same commercial impression. The Examining Attorney points out that the literal portions of the marks are identical. In his analysis, the literal portion is the dominant

---

<sup>1</sup> Application Serial No. 75/164,644, filed September 12, 1996, claiming first use and first use in commerce of May 1996.

**Ser No.** 75/164,644

element in applicant's mark because this is the portion which would be impressed on the purchaser's memory and be used in calling for the goods.

Applicant, however, contends that in a side-by-side comparison, the marks are very different because of the "three pyramid" design in its mark.

We agree with the Examining Attorney that the marks create substantially similar commercial impressions. As noted by the Examining Attorney, the dominant feature of applicant's mark is the literal portion, "KFP," which is the portion that purchasers will remember and use in calling for the goods. In re Appetito Provisions Co., Inc., 3 USPQ2d 1553, 1554 (TTAB 1987). The literal component of applicant's mark is identical to the registered mark. Also, it is well established that the test to be applied in determining likelihood of confusion is not whether the marks are distinguishable upon side-by-side comparison, but rather whether they so resemble one another as to be likely to cause confusion. This requires us to consider both the fallibility of memory over a period of time and the fact that the average purchaser retains a general, rather than a specific

---

<sup>2</sup> Registration No. 1,616,756 issued October 9, 1990; Sections 8 & 15 affidavit filed.

impression of marks. See Sealed Air Corporation v. Scott Paper Company, 190 USPQ 106 (TTAB 1975).

Turning then to the goods, it is the Examining Attorney's position that lumber and timber logs are closely related goods which travel in the same channels of trade. In support of his position, the Examining Attorney made of record thirteen third-party registrations wherein a single mark has been registered by the same entity for both types of goods.<sup>3</sup> According to the Examining Attorney, "[t]his is evidence that consumers are accustomed to viewing the same mark used in connection with timber goods, e.g., logs and lumber, e.g., boards." (Brief, p. 5).

Applicant, however, maintains that the involved goods travel in different channels of trade to different purchasers. In this regard, applicant submitted the declaration of its president, Barry L. Tyrer. Mr. Tyrer states that he has been involved with the forest products industry, and in particular, the production and marketing of lumber products, since about 1966; that lumber is a finished product sold at wholesale to construction companies or retail lumberyards; that purchasers of lumber

---

<sup>3</sup> We note that five of these registrations issued under Section 44(e) of the Trademark Act and, thus, are entitled to little probative weight with respect to the asserted relatedness of the involved goods.

are usually parties engaged in construction or retailing of lumber; that, in contrast, purchasers of timber logs are ordinarily sawmill operators, paper pulp manufacturers, or vendors to sawmills or other operators who utilize unfinished logs. Further, Mr. Tyrer states that purchasers of lumber will typically encounter the product at building sites or at retail lumberyards, whereas logs are typically sold in booms or rafts in the water in preparation for towing to the sawmill, or at a commercial dryland facility where they are stacked.

At the outset, we note that while lumber is made from logs, the goods are nonetheless different. Also, while the third-party registrations made of record by the Examining Attorney are probative of the fact that the involved goods may emanate from the same sources, they do not establish that such goods travel in the same channels of trade and are bought by the same purchasers. This is not a case where all of the involved goods are bought by ordinary purchasers. Rather, it is clear from the declaration of applicant's president, Mr. Tyrer, that timber logs, in particular, are bought by a specialized class of purchasers which is substantially different from the purchasers of

lumber.<sup>4</sup> Further, as indicated in the declaration, the channels of trade for lumber and timber logs are entirely different. The Examining Attorney has offered no evidence to the contrary regarding the purchasers of the involved goods and the channels of trade in which they move.

In sum, since lumber and timber logs are different, and since these goods travel in distinct channels of trade to substantially different purchasers, notwithstanding any similarities in the marks, confusion is not likely. See, for example, *Electronic Design & Sales Inc. v. Electronic Data Systems Corp.*, 21 USPQ2d 1388 (TTAB 1992) [Applicant's use of E.D.S. for battery chargers and power supplies which are incorporated into medical instruments and devices is not likely to cause confusion with opposer's mark EDS for computer services sold to customers in the medical field since goods/services are different and purchasers are substantially different and usually sophisticated].

---

<sup>4</sup> We recognize that some of the persons who purchase timber logs for sawmills and paper pulp manufacturers may well buy lumber at lumberyards or hardware stores for use in home remodeling or other projects. We believe that the number of persons who fall

Ser No. 75/164,644

**Decision:** The refusal to register is reversed.

R. F. Cissel

G. D. Hohein

P. T. Hairston  
Administrative Trademark Judges  
Trademark Trial and Appeal Board

---

into this category is extremely small, and they are sophisticated with respect to the marketing of these goods.

**Ser No.** 75/164,644