

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF THE TTAB 8/15/00  
**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re **Rugg Manufacturing Company**

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Serial No. 75/262,988

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**Donald S. Holland of Holland & Bonzagni, P.C.** for **Rugg Manufacturing Company**

**Chad M. Smith**, Trademark Examining Attorney, Law Office 104  
(Sidney Moskowitz, Managing Attorney)

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Before Seeherman, Holtzman and Rogers, Administrative  
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Rugg Manufacturing Company has appealed from the final refusal of the Trademark Examining Attorney to register LITENING as a trademark for "shovels, snow scoops, and rakes with aluminum tubular handles."<sup>1</sup> Registration has been refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so

resembles the mark LIGHTNING, previously registered for "hand tools; namely, manual log splitters"<sup>2</sup> that, if used on applicant's identified goods, it is likely to cause confusion or mistake or to deceive.

Applicant and the Examining Attorney have filed briefs, but an oral hearing was not requested.

We affirm the refusal of registration.

Our determination is based on an analysis of all of the probative facts in evidence that are 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). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. **Federated Food, Inc. v. Fort Howard Paper Co.**, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

Turning first to the goods, as applicant has pointed out, its identified shovels, snow scoops and rakes do not compete for sales with manual log splitters, and a manual log splitter cannot do the same work as applicant's products. The test for likelihood of confusion, however, is not whether customers can tell the difference between the goods, but whether they are likely to confuse the

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<sup>1</sup> Application Serial No. 75/262,988, filed March 24, 1997, and asserting a bona fide intention to use the mark in commerce.

source of the goods. It is well established that the goods of the parties need not be similar or competitive, or even that they move in the same channels of trade to support a holding of likelihood of confusion. It is sufficient that the respective goods of the parties are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same producer. **In re International Telephone & Telegraph Corp.**, 197 USPQ 910 (TTAB 1978).

In this case, applicant's shovels and rakes and the registrant's identified manual log splitters, which would include axes, can be used by gardeners and homeowners, and both may be used in connection with the same type of activity, e.g., preparing land for a garden. Moreover, applicant's and the registrant's goods are all the type of tools that can be found in a work shed or garage.

The Examining Attorney has also made of record numerous third-party registrations which indicate that companies have registered their marks both for goods of the type listed in applicant's application and for goods of the

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<sup>2</sup> Registration No. 1,862,268, issued November 15, 1994.

type identified in the registrant's registration.<sup>3</sup> Although third-party registrations are not evidence that the marks shown therein are in commercial use, or that the public is familiar with them, nevertheless third-party registrations which individually cover a number of different items and which are based on use in commerce may have some probative value to the extent that they serve to suggest that the listed goods and/or services are of a type which may emanate from a single source. **In re Albert Trostel & Sons Co.**, 29 USPQ2d 1783 (TTAB 1993).

We note that applicant's vice president, Stephen E. Peck, has submitted a declaration in which he states he knows of no manufacturer that makes manual log splitters and rakes, shovels or snow scoops, and that he believes this does not occur because log splitters are sold for a higher price than the other items. We cannot explain the inconsistency between Mr. Peck's views and the third-party registrations which indicate that numerous parties have

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<sup>3</sup> Applicant has apparently misread the identifications of goods in these registrations as though the phrase "hand tools, namely" meant that the identification included all hand tools. However, although the term "hand tools," used in this manner, refers to a general category, such identifications are in fact limited to the specific items following the word namely. Thus, these third-party registrations do not cover all hand tools, but most do include the specific items which are listed in applicant's identification of goods, and "axes," which are encompassed by the registrant's identification of goods.

each adopted a single mark for both kinds of products. At the very least the third-party registrations certainly call into question whether Mr. Peck's information and beliefs actually reflect the situation in the marketplace.

Applicant also argues that the channels of trade for applicant's and the registrant's goods are different, relying on Mr. Peck's statement that applicant's goods are sold in small hardware store chains or co-ops and the hardware departments of other stores, such as supermarkets, while manual log splitters would be sold in huge stores such as THE HOME DEPOT or in specialty stores. The difficulty with applicant's argument is that we must determine the question of likelihood of confusion based on the identification of goods set forth in the application and the cited registration, rather than on what the evidence shows the goods and/or services to be. **Canadian Imperial Bank of Commerce v. Wells Fargo Bank**, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). Because there is nothing about applicant's goods which must necessarily restrict their sale to small hardware stores and the like, we must presume that the goods are sold through all channels of trade usually used for goods of this type, and this would include large stores such as THE HOME DEPOT. See **In re Davis-Cleaver Produce Company**, 197 USPQ 248 (TTAB

1977). Even if, as Mr. Peck asserts, manual log splitters would be displayed in a different section of a store than shovels, snow scoops and rakes, a consumer could still encounter and purchase all of the products at such a store.

In addition, we find that applicant's and registrant's identified goods are items which may be purchased by the same class of consumers, namely, the general public.

Applicant asserts that the average consumer purchasing applicant's identified goods "would not likely be skilled in using a manual log splitter." Brief, p. 4. However, there is nothing inherent in the nature of manual log splitters which would prevent members of the general public from using them and, as noted above, applicant has stated that they are sold in general consumer stores such as THE HOME DEPOT. Whether or not every purchaser of a shovel, rake or snow scoop would also purchase a manual log splitter, certainly purchasers of manual log splitters may well purchase shovels, rakes and snow scoops.

Turning to the marks, they are identical in pronunciation, and similar in appearance, the only difference being that the cited mark spells LIGHTNING in the conventional manner, and applicant's mark uses the more informal "LITE" for the "LIGHT" portion of the mark. This misspelling does give applicant's mark a double entendre,

suggesting, in addition to the normal connotation of the word "lightning," that the "shovels, snow scoops and rakes with aluminum tubular handles" are light in weight. However, this additional connotation is not sufficient to distinguish the two marks. First, applicant's mark still has, besides this additional connotation, the same connotation as does the cited mark, i.e., the noun LIGHTNING.<sup>4</sup> Second, as applicant's vice president has stated, manual log splitters may be sold in a different area of a store from shovels, rakes and snow scoops. As a result, consumers will not be able to make side-by-side comparisons between marks, and must instead rely on hazy past recollections. See, **Dassler KG v. Roller Derby Skate Corporation**, 206 USPQ 255 (TTAB 1980). Under these marketing conditions, consumers may well not remember or notice the different spellings of the marks.

Applicant has also asserted that the prices of its goods and manual log splitters are different, with log splitters being a more expensive item. Applicant has not provided any information as to the price range for the various goods, and there is certainly no indication that a

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<sup>4</sup> To the extent that the word "lightning" suggests something that is very fast, both applicant's and the registrant's mark would convey the same suggestive meaning, i.e., that the respective tools would make quick work of the task at hand.

manual log splitter would be an extremely expensive purchase. All of these goods are in the general category of hand tools, which are purchased by ordinary consumers. Such members of the general public are not likely to exercise an extreme degree of care and are not likely to note the minor differences between the cited mark and applicant's mark.

For the reasons stated above, we find that applicant's use of the mark LITENING on shovels, snow scoops and rakes with aluminum tubular handles is likely to cause confusion with the mark LIGHTNING registered for hand tools, namely manual log splitters.

Decision: The refusal of registration is affirmed.

E. J. Seeherman

T. E. Holtzman

G. F. Rogers  
Administrative Trademark Judges  
Trademark Trial and Appeal Board