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THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF  
THE TTAB

Paper No. 31  
Bottorff

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

American Maze Company  
v.  
Shady Brook Farm, Inc.

Opposition No. 110,278  
to application Serial No. 75/226,922  
filed on January 17, 1997

Andrea L. Calvaruso and Marya Lenn Yee of Donovan & Yee LLP  
for American Maze Company.

Shady Brook Farm, Inc., pro se.

Before Hohein, Walters and Bottorff, Administrative  
Trademark Judges.

Opinion by Bottorff, Administrative Trademark Judge:

Applicant seeks registration on the Principal Register  
of the mark AMAIZEING CORN MAZE, in typed form,<sup>1</sup> for  
services recited in the application as "conducting  
entertainment exhibitions in the nature of a maze made of

<sup>1</sup> As originally filed, the drawing page of the application depicted the mark, in typewritten letters, as "aMAIZEing CORN MAZE." The Trademark Examining Attorney required applicant to submit either a proper typed-form drawing which depicts the mark entirely in capital letters or, if applicant was claiming special form, a proper special form drawing. In response, applicant

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corn." In the application, applicant alleged use of the mark since March 1, 1996. Applicant has disclaimed the exclusive right to use CORN MAZE apart from the mark as shown.

Opposer filed a timely notice of opposition to registration of applicant's mark, alleging as grounds therefor that applicant's mark, as applied to applicant's services, so resembles opposer's mark THE AMAZING MAIZE MAZE, which opposer has used since 1993 in connection with cornfield maze entertainment services and related promotional goods,<sup>2</sup> as to be likely to cause confusion, to cause mistake, or to deceive. See Trademark Act Section 2(d), 15 U.S.C. §1052(d). Applicant filed an answer to the notice of opposition, by which it admitted opposer's allegations regarding opposer's prior use of opposer's mark, but denied opposer's allegations regarding likelihood of confusion.

At trial, opposer presented the testimony of its principal, Donald B. Frantz, with accompanying exhibits, as well as notices of reliance on various official records.

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submitted an amended drawing depicting its mark as a typed-form drawing, entirely in capital letters.

<sup>2</sup> Opposer has pleaded ownership of Registration No. 2,221,411, issued February 2, 1999, of a mark consisting of the words THE AMAZING MAIZE MAZE and a circular maze design upon which three ears of corn are superimposed. The registration is for goods identified as clothing, namely, caps, t-shirts and sweatshirts. Opposer submitted status and title copies of this registration at trial.

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For its part, applicant presented the testimony of its principal, David Fleming, Jr., with accompanying exhibits. Opposer and applicant submitted main trial briefs, but opposer did not file a reply brief. Neither party requested an oral hearing.

Based on the evidence submitted by opposer and on the admissions contained in paragraphs 1 and 3 of applicant's answer to the notice of opposition and at page 3<sup>3</sup> of its trial brief, we find that opposer began using its mark THE AMAZING MAIZE MAZE in connection with its entertainment services in 1993, some three years prior to applicant's first use in 1996 of applicant's mark AMAIZING CORN MAZE, and that opposer's use of its mark has not been abandoned. We therefore conclude that opposer has established both its standing to bring this opposition and its priority under Trademark Act Section 2(d).<sup>4</sup> Thus, the only remaining issue

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<sup>3</sup> The pages of applicant's trial brief are not numbered. The Board has deemed the title page of the brief to be page 1, the first page of text as page 2, etc. Our references in this opinion to the page numbers in applicant's brief are based on this numbering system.

<sup>4</sup> Because opposer has made of record a status and title copy of its registration covering clothing items in Class 25, opposer need not prove priority of use as to those goods. See *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). Opposer's Class 25 registration also suffices to establish opposer's standing. However, opposer's arguments in support of its Section 2(d) claim in this case are based almost exclusively on its use of its mark in connection with its entertainment services, not on its use or registration of the mark for clothing goods. Opposer does not own a registration covering its entertainment services. Therefore, to the extent that opposer's Section 2(d) claim is based on its use of its mark

is whether a likelihood of confusion exists.

Our likelihood of confusion determination 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 issue. *See In re E. I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [and/or services] and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We turn first to the issues of the similarity or dissimilarity of the parties' respective services. It is not necessary that these services be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is sufficient that the services are related in some manner or that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons in situations that would give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an

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in connection with entertainment services, opposer's priority of

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association or connection between the producers of the respective goods. See *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991); *In re International Telephone & Telegraph Corp.*, 197 USPQ 910 (TTAB 1978).

It is apparent from the testimony of record and the exhibits thereto, including the parties' respective advertisements, that applicant and opposer are using their respective marks in connection with essentially identical services, i.e., entertainment services in the nature of walk-through cornfield mazes. Indeed, applicant has conceded that "both Applicant and Opposer construct and operate an outdoor maze for the purpose of entertainment." (Applicant's brief, p. 6.) See also applicant's answer to the notice of opposition, wherein applicant admits that opposer uses its mark "in connection with its cornfield mazes" (Paragraph 1) and that applicant uses applicant's mark "in connection with identical services" (Paragraph 6). In view of this evidence, we find that applicant's and registrant's respective services are legally identical.

Applicant's recitation of services includes no limitations or restrictions as to trade channels or classes of customers. Accordingly, and regardless of any limitations or restrictions which might exist with respect to applicant's services as actually rendered, we must

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use in connection with such services is an issue in this case.

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presume that applicant's services are marketed in all normal trade channels for such services and to all normal classes of customers for such services. See *Canadian Imperial Bank of Commerce v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987); *In re Continental Graphics Corporation*, 52 USPQ2d 1374 (TTAB 1999); *In re Elbaum*, 211 USPQ 639 (TTAB 1981). Inasmuch as applicant's services, as recited in the application, are legally identical to opposer's services, we find that the parties' respective trade channels and classes of customers are likewise legally identical.<sup>5</sup>

The entertainment services involved in this case appear on this record to be relatively inexpensive, and there is no probative evidence in the record from which we might conclude that purchasers are particularly knowledgeable, careful or discriminating when it comes to identifying and

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<sup>5</sup> Applicant argues that there are specific differences between the manner in which applicant and opposer offer their respective services, i.e., that opposer constructs and operates its maze on properties owned by third parties, while applicant constructs and operates its maze on its own farm property; that opposer's "business purpose" is to provide an entertainment attraction and to sell clothing and souvenirs to customers from around the globe, while applicant's "business purpose" is to promote its harvest of corn, sell corn products, and provide instruction on agricultural issues to a limited audience from applicant's surrounding community; and that opposer's season begins in June of each year while applicant's season begins the last week of September "when opposer's season for business is substantially or entirely completed." (Applicant's brief at p. 6.) These alleged differences do not suffice to distinguish the parties' respective services for purposes of our likelihood of confusion analysis. In any event, they are not reflected in applicant's recitation of services, and we accordingly cannot accord them any weight.

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distinguishing among the sources of such services, such that they would be immune to source confusion. Applicant's argument to the contrary is not persuasive.

We turn next to the issue of whether applicant's mark and opposer's mark, when compared in their entireties in terms of appearance, sound, connotation, and overall commercial impressions, are similar or dissimilar. 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 terms of their overall commercial impression that confusion as to the source of the services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Furthermore, because applicant's services are legally identical to opposer's services, the degree of similarity between the marks that is required to support a finding of likelihood of confusion declines. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

Applying these principles to the present case, we find that applicant's mark AMAIZEING CORN MAZE is confusingly

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similar to opposer's mark THE AMAZING MAIZE MAZE. Although applicant's mark is not exactly identical to opposer's mark in terms of sight and sound, the differences between the marks are inconsequential when the marks are viewed in their entirety. The presence of the word THE in opposer's mark, and the absence of that word from applicant's mark, is of little or no significance in our comparison of the marks. The words CORN and MAIZE are cognates;<sup>6</sup> applicant's substitution of CORN for MAIZE in its mark does little to distinguish the two marks. This is especially so in light of the fact that applicant reinserts the word MAIZE into its mark via its misspelling of the word AMAZING.<sup>7</sup> We also find that the two marks have the same connotation or meaning, given the essential equivalence of the words CORN and MAIZE and of the words AMAZING and AMAIZEING.

In view of these similarities between the marks in terms of sight, sound and connotation, we find that the marks are more similar than dissimilar in terms of their overall commercial impressions. Additionally, we find that the commercial impressions of the two marks are highly similar because the marks employ the same device or pun,

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<sup>6</sup> We take judicial notice that "maize" is defined as "Indian corn." Webster's Ninth New Collegiate Dictionary (1990) at 718. See generally TBMP §712.01.

<sup>7</sup> Additionally, as noted *supra* at footnote 2, opposer's registered mark includes a design featuring three ears of corn alongside the words THE AMAZING MAIZE MAZE, further cementing the connection between CORN and MAIZE in purchasers' minds.

i.e., a conflation of the words "maize," "maze" and "amazing." Even though the pun is constructed slightly differently in the two marks, it is the pun itself that purchasers who encounter the two marks at different times are likely to recall, rather than any slight difference in construction of the pun. The presence of the pun in both marks contributes to the confusing similarity of the marks. For all of these reasons, we find that applicant's mark and opposer's mark, when viewed in their entireties, are similar rather than dissimilar.<sup>8</sup>

There is no evidence in the record of any third-party uses of similar marks in connection with similar services, a fact which weighs in opposer's favor in our likelihood of confusion analysis under *du Pont*.

Opposer claims that its mark is famous, due to substantial unsolicited national media coverage of its mazes over the years and due to its own advertising and promotional efforts. After careful review of opposer's evidence on this issue,<sup>9</sup> however, we cannot conclude that

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<sup>8</sup> We reject applicant's argument, at page 7 of its brief, that the marks can be distinguished because applicant always uses its trade name in conjunction with its mark. Our likelihood of confusion determination must be made on the basis of applicant's mark as it appears on the drawing page of the application, because that is the mark applicant seeks to register. See, e.g., *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, n.4 (Fed. Cir. 1993).

<sup>9</sup> It appears from the record that opposer's multi-acre mazes, said to be the world's largest, have been featured in reports in various national media, including on television programs such as

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opposer's mark is a famous mark. Opposer's mazes appear to be a successful attraction, drawing nearly 500,000 visitors between the years of 1993 and 1999, but the evidence of record does not persuade us that opposer's mark, per se, is a famous mark that should be afforded an expanded scope of protection. *Cf. Kenner Parker Toys, Inc. v. Rose Art Industries, Inc.*, 963 F.2d 350, 22 USPQ2d 1453 (Fed. Cir. 1992).

Opposer contends that instances of actual confusion between opposer's and applicant's respective marks and services have occurred. Opposer's evidence on this issue is largely anecdotal and hearsay in nature, however, and we accord it no weight in our likelihood of confusion analysis. Opposer also argues that applicant adopted its mark in bad faith and with the intention of trading on opposer's goodwill. Applicant disputes this charge. We have carefully considered the testimony and evidence on this issue, and we are not persuaded of any bad faith adoption by applicant.

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"Good Morning America" and the "Today Show" and in national publications such as The New York Times, The Wall Street Journal, USA Today, National Geographic and People Magazine. The content of the television reports is not apparent from the record; many, if not most, of the print articles make at least passing reference to the mark THE AMAZING MAIZE MAZE. Opposer currently operates mazes at ten locations across the country, and opposer's annual advertising and promotional expenses are said to average \$40,000 per maze. There is no evidence as to opposer's market share in the walk-through maze industry, nor is the overall size of that industry apparent from the record.

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We have reviewed all of the evidence of record pertaining to the *du Pont* evidentiary factors, and we conclude that a likelihood of confusion exists. The parties' respective marks, while not identical, are sufficiently similar that confusion is likely to result from their contemporaneous use in connection with the parties' identical services, which we presume are offered in the same trade channels to the same classes of purchasers. This is especially so in view of the fact that the services are inexpensive, and in view of the apparent absence of any use by third parties of similar marks in connection with similar services. Although we have found that opposer's mark is not famous, that there is no evidence of actual confusion, and that applicant did not adopt its mark in bad faith, those facts are insufficient to sustain a finding of no likelihood of confusion in this case, given the substantial weight of the evidence on the other *du Pont* factors which, as discussed above, favor opposer in this case.

In summary, we find that opposer has established both its priority and the existence of a likelihood of confusion, and that opposer accordingly is entitled to prevail on its Section 2(d) claim.

Decision: The opposition is sustained.