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**THIS DISPOSITION  
IS NOT CITABLE AS PRECEDENT  
OF THE T.T.A.B.**

Paper No. 9  
CEW

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Omega Foods Inc.

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Serial No. 75/660,935

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Francis M. Pinckney of Kennedy, Covington, Lobdell & Hickman for Omega Foods Inc.

Lisa Marie Leizear, Trademark Examining Attorney, Law Office 101 (Jerry Price, Managing Attorney).

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Before Cissel, Hanak and Walters, Administrative Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

Omega Foods Inc. has filed an application to register BAR-B-Q KING as a trademark for "barbecue restaurant services."<sup>1[1]</sup> The application includes a disclaimer of BAR-B-Q apart from the mark as a whole.

The Trademark Examining Attorney has finally refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so

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<sup>1[1]</sup> Serial No. 75/660,935, in International Class 42, filed March 15, 1999, based on use in commerce, alleging first use and use in commerce as of June 30, 1961.

resembles the mark BARBECUE KING, previously registered for barbecue sauce,<sup>2[2]</sup> that, if used on or in connection with applicant's services, it would be likely to cause confusion or mistake or to deceive.

Applicant has appealed. Both applicant and the Examining Attorney have filed briefs, but an oral hearing was not requested. We affirm the refusal to register.

Our 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 Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); and *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein.

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<sup>2[2]</sup> Registration No. 1,171,514 issued September 29, 1981, to Standex International Corporation a.k.a. Barbecue King Corporation, in International Class 30. The registration includes a disclaimer of BARBECUE apart from the mark as a whole. [Sections 8 and 15 declarations accepted and entered, respectively.]

Considering, first, the marks, we note that applicant does not address the issue of the similarities in the marks, apparently conceding that the marks are substantially similar. Regardless, we have considered the marks and agree with the Examining Attorney that the marks are identical in terms of sound and connotation. The marks are very similar in terms of appearance and, further, applicant's BAR-B-Q is equivalent to the word "barbecue." Thus, we find that the commercial impression of applicant's mark is substantially similar to the commercial impression of the registered mark.

Turning to consider the goods and services involved in this case, we note that the question of likelihood of confusion must be determined based on an analysis of the services recited in applicant's application vis-à-vis the goods recited in the registration, rather than what the evidence shows the goods or services actually are.

*Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). See also, *Octocom Systems, Inc. v. Houston Computer Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1992); and *The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ2d 1715 (TTAB 1991). Further, it is a general rule that goods or services need not be identical or even competitive in order

to support a finding of likelihood of confusion. Rather, it is enough that goods or services are related in some manner or that some circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used therewith, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each parties' goods or services. *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991), and cases cited therein.

The Examining Attorney contends that applicant's barbecue restaurant services are closely related to registrant's barbecue sauce products, arguing that consumers familiar with applicant's restaurant are likely to believe, upon encountering registrant's barbecue sauce, that this product comes from or is sponsored by applicant. In support of this position, the Examining Attorney submitted numerous excerpts of articles from the LEXIS/NEXIS database referring to restaurants that separately market and sell their barbecue sauces, both at the respective restaurant and at retail food establishments. The Examining Attorney also notes that the menu submitted by applicant includes a statement touting

its barbecue sauce in connection with its "BAR-B-Q TRAY" special entree.<sup>3[3]</sup>

Applicant does not dispute or otherwise discuss the Examining Attorney's evidence. Applicant simply states that "restaurant services and a container of barbecue sauce are sufficiently different from one another that there would be no likelihood of confusion between the respective marks"; and that "customers who go to applicant's restaurant to purchase barbecue for consumption would, upon coming into contact with a bottle or jar of barbecue sauce at a food store, not be likely to make any association between the restaurant and the food product normally sold through food chains."

We find that the evidence in this case supports the conclusion that applicant's restaurant services are closely related to registrant's goods.

Therefore, we conclude that in view of the substantial similarity in the commercial impressions of applicant's mark, BAR-B-Q KING, and registrant's mark, BARBECUE KING, their contemporaneous use on the closely related goods and services involved in this case is likely to cause confusion as to the source or sponsorship of such goods and services.

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<sup>3[3]</sup> The menu states, under the menu selection, "Served with *Famous Bar-B-Q King Sauce*, Bar-B-Q Beans, Cole Slaw, Hushpuppies" (italics in original).

*Decision:* The refusal under Section 2(d) of the Act  
is affirmed.

