

Mailed:

**THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT
OF THE TTAB**

April 8, 2003
Paper No. 9
GDH/gdh

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Daedong Industrial Co., Ltd.

Serial No. 78/081,597

Serial No. 78/081,704

Jennifer Bowman of Ward & Smith, P.A. for Daedong Industrial Co. Ltd.

John T. Lincoski, Jr., Trademark Examining Attorney, Law Office 104 (Sidney I. Moskowitz, Managing Attorney).

Before Quinn, Hohein and Chapman, Administrative Trademark Judges.

Opinion by Hohein, Administrative Trademark Judge:

Ser. Nos. 78/081,597 and 78/081,704

Daedong Industrial Co., Ltd. has filed applications to register the marks "KIOTI"¹ and "KIOTI" and design,² as reproduced below,



for "agricultural and landscaping tractor attachments and tractor-towed agricultural implements, namely, front-end loaders, backhoes, finish mowers, and tillers and replacement parts therefor." As stated in the latter application: "The mark consists, in part, of a stylized depiction of a coyote."

Registration has been finally refused in each case under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's marks, when applied to its goods, so



¹ Ser. No. 78/081 of first anywhere

leges a date , 1993.

² Ser. No. 78/081,704, filed on August 29, 2001, which alleges a date of first anywhere and first use in commerce of June 1, 1995.

Ser. Nos. 78/081,597 and 78/081,704

resemble the mark "COYOTE" and design, as illustrated below, which is registered for "construction equipment, namely, front end loaders and dozers,"³ as to be likely to cause confusion, mistake or deception. As stated in the registration: "The mark consists of the word 'COYOTE' and the depiction of a coyote within the letter 'C'."

Applicant, in each case, has appealed. Briefs have been filed, but an oral hearing was not requested. Because the issue of likelihood of confusion is substantially the same in each instance, the appeals are being treated in a single opinion. We affirm the refusal to register in each case.

The determination under Section 2(d) is based on an analysis of all of the facts in evidence which are relevant to the factors bearing on the issue of whether there is a likelihood of confusion. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 568 (CCPA 1973). However, as indicated in Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976), in any likelihood of confusion analysis, two key considerations are the similarity of the goods and the similarity of the marks.⁴

³ Reg. No. 1,447,133, issued on July 14, 1987, which sets forth a date of first use anywhere and first use in commerce of October 1, 1984; combined affidavit §§8 and 15.

⁴ The court, in particular, pointed out that: "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."

Turning first to consideration of the respective marks, we note the admission in each of applicant's briefs that it "is not disputed by the Applicant" that, as stated in each of the final refusals, "the marks could be pronounced the same." Applicant maintains, nonetheless, that when considered in their entirety, the marks at issue are distinguishable due to differences in spelling and stylization. Specifically, according to applicant:

Applicant concurs with the Examining Attorney's observation that the marks could be pronounced in a way that they have a similar sound. However, the marks have distinctively different appearances. First, the words contain a different number of letters, 5 vs. 6. In addition, only two of the letters, "ot", are common. The other letters, e.g., "K" vs. "C" provide a different visual impression. As a result, a different appearance, connotation and commercial impression is created.

Such distinction, applicant particularly notes with respect to its "KIOTI" mark and registrant's mark, "is further delineated by the fact that the cited mark is a highly stylized mark in which the 'C' is substantially larger than the remaining letters, encompassing a drawing of a coyote on a hilltop, as well as part of the "o" in the mark. The same is likewise the case, applicant contends, with respect to its "KIOTI" and design

mark and registrant's mark. Moreover, because both of those marks are highly stylized, applicant further asserts that:

Applicant's design mark also includes the profile of an animal that is similar to the coyote depicted in the cited mark. However, in applicant's mark, all of the letters are of the same size and are of a font that is entirely different from that used in the cited mark, with the animal in a different location and the word underlined.

Applicant insists that such "design differences" in its "KIOTI" and design mark, along with the "differences in spelling" of both of its "KIOTI" marks and "the unique stylization" of registrant's mark, "would certainly" be taken into account by customers and prospective purchasers of the respective goods and would preclude any likelihood of confusion.

We agree with the Examining Attorney, however, that applicant's marks and registrant's mark overall are highly similar and create substantially the same commercial impression. As the Examining Attorney points out, despite their differences in spelling, the respective marks are phonetic equivalents and, as such, have the same meaning.⁵ Visually, both registrant's

⁵ In this regard we judicially notice, as requested by the Examining Attorney, that The American Heritage Dictionary of the English Language (3rd ed. 1992) defines "coy·o·te (ki-o?te, ki?ot?)" in relevant part as "1. A small, wolflike carnivorous animal ... native to western North America and found in many other regions of the continent. Also called *prairie wolf*." It is settled that the Board may properly take judicial notice of dictionary definitions. See, e.g., *Hancock v. American Steel & Wire Co. of New Jersey*, 203 F.2d 737, 97 USPQ 330, 332 (CCPA 1953); *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594, 596 (TTAB 1982),

Ser. Nos. 78/081,597 and 78/081,704

mark and applicant's "KIOTI" and design mark not only share a prominent design of a howling coyote, but such animal in each case is shown in a profile standing on an edge and facing to the right. Such a design feature, moreover, is particularly significant in applicant's "KIOTI" and design mark since, as noted by the Examining Attorney, it "strongly suggests to consumers that the mark is intended to be the equivalent of the term 'COYOTE' in both pronunciation and connotation."

Consequently, while there are some differences in appearance between the respective marks, with the most noticeable being the difference in spelling and, in the case of applicant's "KIOTI" mark, the absence of the visual pronunciation clue provided by the coyote design in applicant's "KIOTI" and design mark, the marks in their entireties are identical in sound and connotation; they share, in the case of applicant's "KIOTI" and design mark and registrant's "COYOTE" and design mark, virtually the same coyote design element; and the marks at issue engender substantially the same commercial impression. As a result, the contemporaneous use thereof in connection with the same or closely related goods would be likely to cause confusion as to the source or sponsorship of such products.

aff'd, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983); and *Marcal Paper Mills, Inc. v. American Can Co.*, 212 USPQ 852, 860 n. 7 (TTAB 1981).

Turning, then, to consideration of the respective goods, applicant argues that its "agricultural and landscaping tractor attachments and tractor-towed agricultural implements, namely, front-end loaders, backhoes, finish mowers, and tillers and replacement parts therefor" are not related to registrant's "construction equipment, namely, front end loaders and dozers." In particular, while conceding that its goods, as identified, and registrant's goods, as set forth in the cited registration, both include front end loaders, applicant contends that there are "differences between a 'front end loader' as the term is used in connection with construction equipment, and a 'front end loader' as the term is used in connection with attachments that are used on agricultural tractors."

Specifically, applicant asserts that (underlining in original):

.... As shown by the web pages provided to the Examining Attorney in the Request for Reconsideration, the term "front end loader," as the term is used when referring to construction equipment, means a self-contained vehicle that is mounted on rubber tires or on tracks. Such units are used on a regular basis under the strenuous conditions encountered in the construction industry, in the same way as dozers that are also listed in the [identification of goods for the] cited mark ..., and other heavy construction equipment.

The goods sold under applicant's mark are various kinds of attachments that can be mounted onto an agricultural tractor so that

various chores can be performed as needed in agriculture and landscaping. Thus, the "front end loader" attachment of applicant is a relatively low-priced unit that is mounted onto, and removed from, the tractor as needed, and does not have its own chassis or engine. As shown in the materials provided to the Examining Attorney, applicant's "front end loader", as well as other attachments sold under applicant's mark[,] are priced at about \$3,000 to \$4,000, while "front end loaders" sold in the construction industry, even when sold used, have a far greater price.

Applicant accordingly concludes that, "contrary to the Examining Attorney's unsupported statement that 'the goods of the parties are highly related and would be marketed in the same channels of trade,' the goods are in fact highly unrelated, and are sold to different purchasers, i.e., construction businesses, vs. farmers and landscapers."

In addition, applicant maintains that confusion is not likely because:

The buyers of applicant's goods, whether farmers, landscapers or others who use agricultural tractors with various attachments in their business are not going to purchase an attachment for their tractor on "impulse." Instead the buyers are familiar with the function of the attachment, and the suitability for use with the agricultural tractor on which it is to be used. The cost of the attachment, and the impact of an unwise purchase on the buyer's business, dictates this caution, resulting in sophisticated purchases that will take into account even minor differences in trademarks, and certainly the major differences noted above. This

sophistication will likewise be exercised, perhaps to an even greater extent, by purchasers of the significantly more expensive construction equipment [listed in the identification of goods in the registration for] ... the cited mark.

The Examining Attorney, on the other hand, correctly points out that it is well settled that goods need not be identical or even competitive in nature in order to support a finding of likelihood of confusion. Instead, it is sufficient that the goods are related in some manner and/or that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons under situations that would give rise, because of the marks employed in connection therewith, to the mistaken belief that they originate from or are in some way associated with the same entity or provider. See, e.g., Monsanto Co. v. Enviro-Chem Corp., 199 USPQ 590, 595-96 (TTAB 1978); and In re International Telephone & Telegraph Corp., 197 USPQ 910, 911 (TTAB 1978). Here, besides noting that the record contains, inter alia, several use-based third-party registrations for marks which are registered for both "equipment intended for agricultural and landscaping use and ... equipment intended for construction use," including a registration for "power-operated agricultural equipment, namely, ... tillers, ... mowers, ... loaders, ... and replacement parts thereof," on the one hand, and "equipment for

use in construction ..., namely, ... bulldozers, ... [and] loaders," on the other hand,⁶ the Examining Attorney properly observes that applicant's advertising literature and the Internet website excerpts which it submitted with its request for reconsideration of the final refusal show that the goods at issue are indeed closely related in a commercial sense.

Specifically, as the Examining Attorney persuasively argues in his brief, while "applicant has gone to great lengths to discuss differences between the goods and places much emphasis on the different users for whom the goods are intended," the evidence of record demonstrates that "the goods are far more similar and the communities of users are far more intertwined than applicant contends." Among other things, the Examining Attorney accurately points out in this regard that:

First, it must be noted that while the applicant's goods are of a lighter grade than those of the registrant, the goods are intended to perform the same functions, namely, front-end loading and earth-moving.

Second, while applicant's ... goods are attachments for use with tractors, the advertising material made of record shows that the goods are likely to be encountered

⁶ While such registrations admittedly are not evidence that the marks shown therein are in use or that the public is familiar with them, it is well established that they nevertheless have some probative value to the extent that they serve to suggest that the goods listed therein are of the kinds which may emanate from a single source. See, e.g., *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993) and *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 (TTAB 1988) at n. 6.

in the marketplace as a unit. The photos of record show that applicant uses its mark on both the tractors and the attachments. As such, consumers are likely to encounter both of these complementary goods together in the marketplace. Thus, while the goods in this case are attachments, consumers are likely to see the mark used on the integrated tractor-and-loader combination.

Moreover, the line between agricultural use and construction use may not be as stark as applicant contends. The applicant's advertising information demonstrates that it provides a variety of tractors and attachments intended for light to heavier duty.

With respect to the latter, the Examining Attorney notes that, for example, that as stated on page 5 of the brochure for applicant's "Kioti DK Series Tractors":

Kioti manufactures five models of compact tractor because we know that no two jobs are like. So whether you need a basic tractor with just enough power to mow a few acres, or you want a fully-loaded model with a cab and the power to tackle any job - Kioti has the answer.

....
.... And there's a choice of three tire styles - standard agricultural, turf and industrial - to get you through any conditions.

As the Examining Attorney also correctly observes, while "the smaller of the applicant's tractors appear to be intended for homeowners, the upper end of its product range clearly contemplates more rugged uses" by its more heavy duty units. In particular, "[t]he examiner notes that the advertising material

Ser. Nos. 78/081,597 and 78/081,704

made of record by applicant ... suggests a blurring of the lines between 'agricultural and landscaping' front-end loaders and [those for use in] 'construction.'" The same is likewise true with respect to applicant's backhoe attachments, some of which, as indicated in applicant's literature, are capable of digging trenches up to 7½ feet deep.⁷

Thus, as the Examining Attorney properly maintains, "[f]armers, homeowners and landscapers aren't the only intended users of the goods"; rather, such users also include construction contractors. In fact, as indicated in the printout submitted by applicant from the www.farmequipmentunlimited.com/kioti website, its "LB1914 20.5 horsepower 4WD tractor," as "[p]ackaged with a front loader and backhoe, ... is the favorite tool of building contractors all around the nation" in addition to being a tractor which is "great for tilling a garden, brush cutting, and post-hole digging." Furthermore, as shown by applicant's submission of an excerpt from the www.constructionequipment.net website, the "Atlantic Equipment Company," which advertises itself as "The Earth Moving Equipment Specialists," carries as its product lines "Heavy Construction Equipment," "Light Construction

⁷ For instance, applicant's "KB Series Backhoes let you trench up to 90" deep with a bucket dig force of up to 2,875-lbs."

Ser. Nos. 78/081,597 and 78/081,704

Equipment" and "Farming Equipment." Specifically, as stated in the website:

Atlantic Equipment distinguishes itself from other companies by carrying a diverse array of construction equipment, which includes new and used backhoes, dozers, excavators, forestry equipment, cranes, material handlers, lifts, boring machines, skidsteers, farm tractors, accessories and more.

In view of the above, there can be little doubt that, in a commercial sense, applicant's "agricultural and landscaping tractor attachments and tractor-towed agricultural implements, namely, front-end loaders, backhoes, finish mowers, and tillers and replacement parts therefor" are so closely related to registrant's "construction equipment, namely, front end loaders and dozers" that their respective marketing under applicant's "KIOTI" and "KIOTI" and design marks and registrant's "COYOTE" and design mark would be likely to cause confusion as to the origin or affiliation of such goods. While, as applicant further argues, applicant's and registrant's goods would generally be purchased by knowledgeable and sophisticated buyers only after careful consideration, it is well settled that the fact that customers exercise deliberation in choosing the goods at issue "does not necessarily preclude their mistaking one trademark for another" or that they otherwise are entirely immune from confusion as to source or sponsorship. Wincharger

Ser. Nos. 78/081,597 and 78/081,704

Corp. v. Rinco, Inc., 297 F.2d 261, 132 USPQ 289, 292 (CCPA 1962). See also In re Decombe, 9 USPQ2d 1812, 1814-15 (TTAB 1988); and In re Pellerin Milnor Corp., 221 USPQ 558, 560 (TTAB 1983). Because the respective marks are so highly similar and engender essentially the same overall commercial impression, conditions are such that purchasers, despite the care exercised in the selection of applicant's and registrant's goods, could reasonably assume, that the goods at issue emanate from, or are sponsored by or affiliated with, the same entity.⁸ See, e.g., In re Energy Telecommunications & Electrical Association, 222 USPQ 350, 352 (TTAB 1983) [mark "ENTELEC" and design for "association services, namely, promoting the interests of persons and businesses concerned with telecommunications and other electrical control systems for use in the energy related industries" is likely to cause confusion with mark "INTELECT" for "promotion of, planning for and conducting of a series of expositions and exhibitions for the electric industry"; while "the relevant public to which both marks are directed is highly discriminating and would doubtless exercise a high degree of

⁸ To the extent, nonetheless, that the differences argued by applicant may serve to raise any doubt as to our conclusion that the respective marks in their entireties are substantially similar and that the goods at issue are closely related, we resolve such doubt, as we must, in favor of the registrant. See, e.g., In re Hyper Shoppes (Ohio) Inc., 837 F.2d 840, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988); and In re Pneumatiques, Caoutchouc Manufacture et Plastiques Kleber-Columbes, 487 F.2d 918, 179 USPQ 729 (CCPA 1973).

Ser. Nos. 78/081,597 and 78/081,704

care with respect to the identified services," "in view of the substantial phonetic identity of the marks and the very closely related services, it does not seem ... that this factor excludes a likelihood of confusion resulting from the marks' contemporaneous use."]

Decision: The refusal under Section 2(d) is affirmed as to each application.