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Mailed: August 4, 2006

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Lutz GmbH Maschinenbau

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Serial No. 79000985

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Richard R. Alaniz of Black Lowe & Graham, PLLC for Lutz GmbH Maschinenbau.

Lana H. Pham, Trademark Examining Attorney, Law Office 115 (Tomas V. Vlcek, Managing Attorney).

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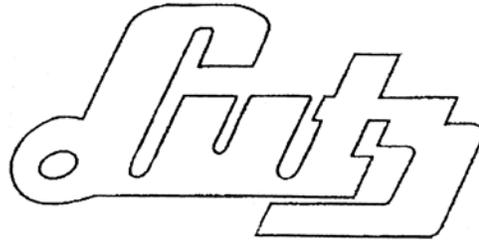
Before Holtzman, Rogers and Drost, Administrative Trademark Judges.

Opinion by Holtzman, Administrative Trademark Judge:

An application has been filed by Lutz GmbH Maschinenbau to register the mark shown below for goods which were amended to read: "power-driven woodworking machines, including circular saws, table saws, band saws, planing machines, and wood splitters, for cutting and shaping lumber; stone cutting

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machines" in International Class 7.<sup>1</sup>



The trademark examining attorney has refused registration under Section 2(d) of the Trademark Act on the ground that applicant's mark, when applied to applicant's goods, so resembles the mark LUTZ (in typed or standard character form),<sup>2</sup> and the mark LUTZ SINCE 1904 and design (shown below),<sup>3</sup> both for "hand tools and parts thereof, namely, scrapers, razor blades, utility knives, utility hook blades, corner utility blades, wire scratch brushes, file handles, file cleaners, files and screw drivers" (in Class 8), as to be likely to cause confusion. Both cited registrations are owned by the same entity.

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<sup>1</sup> Application Serial No. 79000985, filed January 15, 2004 under Section 66(a) of the Trademark Act. The application originally included goods in Classes 8, 11 and 40. Classes 11 and 40 were subsequently deleted from the application.

<sup>2</sup> Registration No. 2052128, issued April 15, 1997 under Section 2(f) of the Trademark Act; Sections 8 and 15 accepted and acknowledged, respectively.

<sup>3</sup> Registration No. 2354041, issued May 30, 2000; "SINCE 1904" is disclaimed.



In addition, the examining attorney has issued a requirement for an acceptable identification of goods on the basis that the word "including" in the present identification of goods is indefinite. The examining attorney suggested that applicant replace the word "including" with the more definite wording "namely" or "consisting of."

When the refusal and the requirement were made final, applicant appealed. Briefs have been filed. An oral hearing was not requested.

We note that applicant, in its reply brief, amended its identification of goods to substitute the word "namely" for the word "including" in accordance with the examining attorney's suggestion. The identification now reads: "power-driven woodworking machines, namely, circular saws, table saws, band saws, planing machines, and wood splitters, for cutting and shaping lumber; stone cutting machines." Accordingly, the requirement for an acceptable identification of goods is deemed satisfied, and the appeal on this issue is moot.

We turn then to the question of likelihood of confusion. 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, including the similarities of the marks and the similarities of the goods. In re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

With respect to the marks, applicant argues that "Lutz" is a common surname, presumably in the belief that the registered marks are only entitled to a narrow scope of protection; and that the marks are different in appearance. The examining attorney argues that the marks are highly similar in that they each feature the word LUTZ and that LUTZ is the dominant and most significant portion of each mark. The examining attorney contends that although "Lutz" may be a surname it is also a dictionary term, and she has submitted a listing from *The American Heritage Dictionary of the English Language, Third Edition* (1992) defining "Lutz" or "lutz"<sup>4</sup> as "a jump in figure skating in which the skater takes off from the back outer edge of one skate and makes one full rotation before landing on the back outer edge of the other skate."

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<sup>4</sup> In this listing the word "lutz" appears in both capitalized and lower case form.

The closest of the registered marks to applicant's mark LUTZ (stylized) is the typed word LUTZ in Registration No. 2052128 and we will focus on this registration.<sup>5</sup> The two marks are identical in sound, both consisting of the identical word, LUTZ. Similarity in sound alone has been held sufficient to support a finding of likelihood of confusion. See *Krim-Ko Corp. v. Coca-Cola Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968). In addition, these marks also have the same meaning, whether that meaning is as a surname or a dictionary word, and the marks create similar commercial impressions.

The only difference in the two marks is the stylized display of the word LUTZ in applicant's mark. However, this difference is not sufficient to distinguish one mark from the other as it does not significantly affect the commercial impression created by LUTZ alone. It is the word LUTZ itself, rather than the particular display of the word, that is more likely to have a greater impact on purchasers and be remembered by them. See, e.g., *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997). See also *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987). In addition, because registrant's mark is registered in typed drawing form, we must consider all

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<sup>5</sup> If there is no likelihood of confusion as between applicant's mark and the registered mark in typed form, then there is no likelihood of confusion as between applicant's mark and registrant's LUTZ and design mark.

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reasonable manners in which registrant could depict its mark. Phillips Petroleum v. C.J. Webb, 442 F.2d 1376, 170 USPQ 35, 36 (CCPA 1971); and INB National Bank v. Metrohost, 22 USPQ2d 1585, 1588 (TTAB 1992). We recognize that a typed drawing for LUTZ only affords protection for all reasonable manners of presentation, not all possible forms no matter how extensively stylized. See Jockey International Inc. v. Mallory & Church Corp., 25 USPQ2d 1233 (TTAB 1992). Nevertheless, registrant could reasonably depict its mark in a wide variety of typefaces or fonts, including a display very similar to the stylized display of applicant's mark. See, e.g., Cunningham v. Laser Golf Corp., 222 F.3d 943, 55 USPQ2d 1842, 1847-48 (Fed. Cir. 2000) (typed drawings are not limited to any particular rendition of the mark). See also Phillips Petroleum v. C.J. Webb, 442 F.2d 1376, 170 USPQ 35 (CCPA 1971).

Applicant's apparent argument that LUTZ, as a surname, is only entitled to a narrow scope of protection is not persuasive. Registrant's mark may be registered under Section 2(f), but it is registered on the Principal Register and is entitled to a presumption of strength at least equal to any registration on the Principal Register. Applicant has presented no evidence that LUTZ is commonly used in the relevant field or is otherwise weak and entitled to only a limited scope of protection.

We turn then to a consideration of the goods. Applicant argues that confusion is unlikely "due to the difference in the exact nature of the respective goods" and "in view of the functionality, cost and complexity" between the respective goods. In particular, applicant contends that the goods are "functionally at best only remotely related to the registrant's goods"; that applicant's goods are directed to "sophisticated wood-working and stone-cutting consumers and commercial contractors" and are used "to accomplish sophisticated demands"; that applicant's goods "are substantially more complex...involving multiple moving parts and requiring greater skill and knowledge to operate safely";<sup>6</sup> and that applicant's goods "are generally not subject to an impulse buy" and "generally cost in the hundreds of dollars." Applicant argues that in contrast to its own goods, registrant's goods are small hand-held tools "costing on the low end of the spectrum"; that they are "not sophisticated tools subject to some prior knowledge of use"; and that they are "likely to be purchased as impulse buys, small-project related buys." Applicant also argues, noting registrant's claimed date of first use of 1904, that there has been no actual confusion during the nine-year period in which

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<sup>6</sup> The exhibit attached to applicant's reply brief, consisting of what applicant describes as an advertisement for its goods, is untimely and has not been considered.

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both applicant and registrant have been marketing their goods under the respective marks.

It is true that applicant's and registrant's goods are specifically different. However, it is well settled that goods need not be similar or competitive in nature to support a finding of likelihood of confusion. See *Helene Curtis Industries Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618 (TTAB 1989). It is sufficient if the respective goods are related in some manner and/or that the conditions surrounding their marketing are such that they would be encountered by the same persons under circumstances that could, because of the similarity of the marks used thereon, give rise to the mistaken belief that they emanate from or are associated with, the same source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993).

Notwithstanding the differences in the goods, applicant's power-driven woodworking machines, which include circular saws, table saws, band saws, and planing machines, on the one hand, and registrant's hand tools, which include scrapers and screwdrivers, on the other, are related, complementary products. Items from both groups of tools can be used to perform complementary functions on the same woodworking projects, including home repair and home improvement projects. The examining attorney has submitted use-based, third-party registrations showing, in each instance, a mark that is registered for both woodworking

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machinery and at least one of the items identified in the application: Registration No. 1409200 for the mark KUNZ lists scrapers among the hand tools for woodworking, and screw drivers, as well as power-operated tools for woodworking, namely metallic planes; and Registration No. 1507793 for the mark PNI and design lists hand-operated cutting tools, namely, knives, as well as "machines for boring and drilling holes in wood" and "machines and machine tools for cutting and turning wooden objects."

Although third-party registrations are not evidence of use of the marks in commerce, they serve to suggest that the respective goods are of a type which may emanate from the same source.<sup>7</sup> See *In re Albert Trostel & Sons Co.*, *supra*, and *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467 (TTAB 1988).

The Internet evidence made of record by the examining attorney shows that goods such as registrant's screwdrivers and applicant's power saws in fact emanate from the same source. For example, *www.homedepot.com* sells both MILWAUKEE screwdrivers as well as MILWAUKEE band saws and circular saws, DEWALT screwdrivers as well as DEWALT band saws and circular saws, and MIKITA screwdrivers as well as MIKITA table saws. The website of

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<sup>7</sup> We note applicant's argument with respect to the third-party registrations that "[i]n today's business environment conglomerate companies sell very broad ranges of goods and services, companies making household appliances also manufacture jet engines and medical equipment." However, these registrations do not cover diverse ranges of goods. They cover related categories of goods and accordingly are evidence that purchasers would expect these types of goods to emanate from the same source.

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*www.blackanddecker.com* offers both BLACK & DECKER screwdrivers as well as circular saws.

The examining attorney has also submitted evidence showing the related and complementary nature of screwdrivers and woodworking machines. An article on woodworking from *www.inthewoodshop.org*, directed to homeowners, "do-it-yourselfers" and professionals, states that screwdrivers are necessary to maintain woodworking equipment:

...wrenches, screwdrivers, nut drivers, and socket sets are necessary items in order to maintain your woodworking machinery in usable condition. You can't adjust or dismantle a Stanley No. 5 Jack plane without a flat blade screwdriver.

As indicated on the page from *www.thomasregisterdirectory.com*, screwdrivers are considered woodworking tools: "We supply a broad range of screwdrivers including wood working screwdrivers...." In addition, an article from *www.factsfacts.com/MyHomeRepair*, states that basic tools for the new homeowner for home repair include screwdrivers and table saws (with more advanced tools being circular saws) "for almost any lumber or plywood cutting you need to do."

It is also clear that the respective goods are sold in the same channels of trade, including retail home improvement outlets such as the websites for The Home Depot (*www.homedepot.com*), Lowes (*www.lowes.com*), and Ace Hardware (*www.acehardware.com*); and that these products would be sold to the same classes of

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purchasers, including ordinary homeowners and "do-it-yourself" consumers. See, for example, the excerpts mentioned above from *www.factsfacts.com/MyHomeRepair* and *www.inthewoodshop.org* and also the website *www.texastool.com* which offers woodworking tools, such as table saws, "for use in both professional and home workshops."

It is true that applicant's power saws require more careful use than goods such as screwdrivers. It is also true that there is a price difference between a screwdriver and, for example, a power-driven circular saw, although the difference may not be as extreme as applicant claims. It can be seen in the printouts from *www.homedepot.com* and *www.lowes.com* that while certain brands or types of circular saws sell for "hundreds of dollars," as applicant contends, there are also those that sell for less than \$100, and some for as little as \$49.00 to \$59.00. Nevertheless, while the higher cost of a power saw and the level of skill required to operate it may affect the care consumers may exercise in selecting one, even sophisticated and careful purchasers of more expensive goods can be confused as to source where, as here, the marks are very similar and are used on related goods.<sup>8</sup> See *In re Research Trading Corp.*, 793 F.2d

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<sup>8</sup> The case of *Arrow Fastener Co. v. Stanley Works*, 59 F.3d 384, 35 USPQ2d 1449 (2d Cir. 1995) on which applicant relies is readily distinguishable from the present case. For one thing, what the court referred to as the "functional distinctions" between the parties' respective small hand-operated staplers and pneumatic staplers,

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1276, 230 USPQ 49, 50 (Fed. Cir. 1986) citing Carlisle Chemical Works, Inc. v. Hardman & Holden Ltd., 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970) ("Human memories even of discriminating purchasers...are not infallible.").

Finally, applicant's claim that there has been no actual confusion is entitled to little weight. While the absence of actual confusion is a factor indicative of no likelihood of confusion, it is meaningful only where the record demonstrates appreciable and continuous use by applicant of its mark in the same markets as those served by registrant under its mark. See *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992). While we have applicant's statement of use of its mark, we have no information as to its sales or advertising expenditures, or the geographic areas served by applicant. Moreover, there is no evidence of any use of the registered mark, let alone information relating to the extent of such use. Cf. *In re General Motors Corp.*, 23 USPQ2d 1465 (TTAB 1992).

In view of the foregoing, we find that purchasers familiar with registrant's hand tools provided under the mark LUTZ, would be likely to believe, upon encountering applicant's very similar

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consisted of more than just the differences in cost of the products and their "complexity." The court specifically found, based on the evidence, that the "significant functional distinctions" were the differences in the buyers for the respective products and the fact that "homeowners do not use pneumatic staplers" and "contractors do not use lightweight small staplers in construction." In the present case, unlike *Arrow*, we have found that the purchasers for the respective products are the same.

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mark LUTZ in stylized form for related power-driven woodworking machines, that the goods originated with or are somehow associated with or sponsored by the same entity.

To the extent that we have any doubt on the issue of likelihood of confusion, such doubt must be resolved in favor of the prior registrant. In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993).

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