

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB MARCH 16, 00

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Brentwood Industries, Inc.
v.
Moore Supply Company, Inc.

Opposition No. 105,710
to Application No. 74/528,802
filed on May 24, 1994

Roberta Jacobs-Meadway of Panitch, Schwarze, Jacobs & Nadel
for opposer.

James B. Brady of Weintraub & Brady for applicant.

Before Cissel, Hanak and Walters, Administrative Trademark
Judges.

Opinion by Walters, Administrative Trademark Judge:

Brentwood Industries, Inc. filed its opposition to the
application of Moore Supply Company, Inc. to register the
mark BRENTWOOD for "HVAC equipment, namely, furnaces, heat
pumps, water heaters, and air conditioning units and

related components, namely, a-coils, blowers, line sets, and condensers" in International Class 11.¹

As grounds for opposition, opposer asserts that if applicant's mark were applied to applicant's goods, it would so resemble opposer's previously used mark BRENTWOOD for "the manufacture and sale of HVAC components" as to be likely to cause confusion, under Section 2(d) of the Trademark Act.

Applicant, in its answer, denied the salient allegations of the claim and asserted that it adopted its mark in good faith; that the parties' goods do not travel in the same trade channels; and that the parties' goods are sufficiently different to avoid any likelihood of confusion.²

The Record

The record consists of the pleadings; the file of the involved application; various specified responses to interrogatories, document requests, and requests for admissions, copies of third-party registrations, and excerpts of articles from publications and periodicals, all

¹ Application Serial No. 74/528,802, filed May 24, 1994, based upon an allegation of a bona fide intention to use the mark in commerce in connection with the identified goods.

² While identified as "affirmative defenses," these statements are simply amplifications of applicant's denials.

made of record by the parties' respective notices of reliance; the testimony deposition by opposer of Palle Rye, opposer's vice president, with accompanying exhibits; and the testimony deposition by applicant of Rhex Moore, applicant's president, with accompanying exhibits. Both parties filed briefs on the case, but a hearing was not requested.

The Parties and Products

Preliminarily, we note that both opposer and applicant agree that "HVAC" is an acronym for "heating, ventilating and air conditioning." See also, the definition of "HVAC" in *The Random House Dictionary of the English Language*, unabridged (2d ed. 1987). The same dictionary further defines "air conditioning" as "1. A system or process for controlling the temperature, humidity and, sometimes, the purity of the air in an interior, as of an office, theater, laboratory, or house, especially one capable of cooling. 2. An air conditioning system or unit"; and defines a "cooling tower" as "*Energy* - a usually cylindrical structure, sometimes of very great size, in which heat is extracted from water that has been used for cooling, as in a nuclear reactor."³

³It is settled that the Board may take judicial notice of dictionary definitions. See, e.g., *Hancock v. American Steel and Wire Co. of New Jersey*, 203 F.2d 737, 97 USPQ 330, 332 (CCPA 1953) and *University of*

Opposer's vice president, Mr. Palle Rye, testified about the nature of opposer's business, stating that opposer principally manufactures plastic products for a variety of applications. Although, in the early 1980s, opposer changed its tradename from Brentwood Plastics to its current name, Brentwood Industries, to "reflect that [opposer does] not necessarily manufacture plastic products; [opposer is] designing and selling a variety of products."

Mr. Rye testified that the products opposer manufactures include custom products for companies such as Mack Trucks and Amtrak; wheelbarrows; medical packaging; products for use in connection with wastewater and water treatment; and component products for use in cooling towers.⁴ Opposer maintains three distinct sales organizations, one for its custom products, including its wheelbarrows and medical packaging, one for its wastewater and water treatment products, and one for its cooling tower

Notre Dame du Lac v. J.C. Gourmet Food Imports Co., Inc., 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

⁴ These products include mist or drift eliminators for cooling towers, evaporative surface media, and inlet louvers. It is not entirely clear from this record whether some of these products manufactured by opposer are for uses other than in wastewater and water treatment or as components for cooling towers. However, it is clear that these are not products used in air conditioners or air cooling systems that do not utilize cooling towers. Thus, clarification of this point is not critical to our determination and would not affect our decision herein.

products. The latter two groups have their own engineers, research and development, and support staffs; and Mr. Rye stated that "product orders in these two groups range from \$100 to \$3.5 million."

Mr. Rye reported opposer's total sales annually as approximately \$45 million for 1997 and 1998. Eighty percent of these sales were in the U.S. and three quarters of opposer's overall sales were for surface media products used for cooling towers and/or wastewater and water treatment. Mr. Rye asserted that opposer has 99% of the U.S. market for surface media products, and indicated that opposer's competitors include Marley Cooling Tower, Amone Cooling Tower, and C. E. Shepherd. Mr. Rye described opposer's surface media products as "providing cooling whereby the water is sprayed over the surface and air has gone through it and you generate an evaporation whereby the water is cooled."

Opposer is a member of the Cooling Tower Institute, a trade organization of cooling tower builders, rebuilders, users and component manufacturers. Opposer manufactures cooling tower components that it sells principally to manufacturers of cooling towers ("OEM's") and to rebuilders and repairers of cooling towers. These businesses, in turn, provide, rebuild and repair cooling towers for end

users, for whom a cooling tower is part of a larger system. The end users of cooling towers include businesses in the utility industry, such as Houston Power and Light, businesses in the chemical industry, such as Exxon and duPont, businesses in the firing industry, and very large commercial centers, such as Rockefeller Center. Opposer ships its cooling tower components directly to the OEM or, in the case of repairing and rebuilding, it often ships directly to the job site, where the rebuilder or repairer installs the component.

Opposer has used the Brentwood tradename in connection with its products since the company's inception in 1965; and, in particular, has used BRENTWOOD as a trademark in connection with "HVAC products" since 1974. Opposer has a number of trademarks that it uses in connection with specified products. However, for at least the past five years, it has also used its BRENTWOOD trademark in the form shown below in connection with all of its products on the packaging for those products.

Mr. Rye stated that the BRENTWOOD name and mark does not appear on the actual component products; and that some of its components are not visible once installed by the OEM, although some of its components may be at least partially visible. He indicated that if a problem with a cooling tower is experienced by the end user, the user would be likely to contact the provider of the system of which the cooling tower is a part, or, in some circumstances, the manufacturer of the cooling tower; but that it is unlikely the end user would contact opposer.⁵

Mr. Rye stated that opposer's components do not have any application for single-family residences, and they would be used only in an apartment building HVAC system of sufficient size to warrant incorporating a cooling tower. He noted that opposer's products are used only in cooling systems, not in heating systems. Mr. Rye stated that systems incorporating very large or multiple cooling systems are too large to be considered "HVAC." Although he was unsure of the exact amount, he indicated that approximately half of opposer's cooling tower business could be considered HVAC.

⁵ Although Mr. Rye stated that a manager of a building that had a cooling system incorporating a cooling tower containing opposer's components might contact opposer for a replacement part, this statement appears to be speculative. Mr. Rye could name no single instance where this had occurred.

Mr. Rye stated that third parties, such as Carrier, York and Trane, sell both residential and commercial HVAC equipment; and that this would include HVAC equipment from air conditioners and heat pumps up to larger systems, which could include cooling towers. In this regard, Mr. Rye indicated that these companies are unlikely to manufacture their own cooling towers. Mr. Rye stated that these companies are not competitors of opposer and that, in fact, York and Carrier are customers of opposer when they design for others systems that incorporate cooling towers.

Mr. Rye reiterated that opposer does not manufacture furnaces, furnace components, heat pumps, water heaters or air conditioners; and that companies that do manufacture the aforementioned products, such as Luxaire, Evcon, Nordyne, Rheem, Frigidaire, Tappan, and White Westinghouse, are not opposer's competitors.

Applicant's president, Rhex Moore, testified that applicant is a wholesale distributor of heating and cooling products and mobile home supplies, stating, "we sell furnaces and air conditioners" for single family homes and mobile homes.

Applicant has operated its business since 1974 selling the products of various manufacturers, and, although its application is based on a bona fide intention to use its

mark in commerce, applicant has applied the BRENTWOOD trademark as a private label to some of its products since late 1993.⁶ Mr. Moore testified that applicant has the BRENTWOOD products manufactured for it and has its label applied to the products. In relation to selling its BRENTWOOD products, applicant's competitors are manufacturers of residential furnaces, for example, Evcon, Luxaire, Trane and Janitrol.

Applicant indicated that its goods are sold to end users in single family and mobile homes by distributors of heating and air conditioning equipment and accessories and hot water heaters; and that these goods are installed by licensed mechanical contractors, plumbing companies, liquid propane companies, natural gas companies and manufactured housing dealers.

Applicant intends to advertise and promote its BRENTWOOD products to dealers through "road sales" persons, advertising in industry publications, such as *HVAC Insider*, and at manufactured housing shows.

⁶ Mr. Moore stated that applicant previously purchased BRENTWOOD furnaces from a manufacturer, Lear Siegler, that has since gone out of business. Applicant subsequently chose the trademark BRENTWOOD for its private label products, but applicant is not a successor in interest to the trademark rights of Lear Siegler.

Analysis

The evidence clearly establishes opposer's priority of use of BRENTWOOD as a tradename since 1974 and as a trademark since prior to applicant's earliest use of BRENTWOOD in 1993. Applicant does not appear to contest this issue, as it has presented no argument in this regard.

Our determination of likelihood of confusion under Section 2(d) must be 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. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). Key considerations in this case are the similarities between the marks, the similarities between the goods and services, and the channels of trade. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We consider, first, the marks. Both opposer and applicant agree that, in relation to the parties' goods, BRENTWOOD is an arbitrary mark and there is no evidence to the contrary in the record.

We note that while we must base our determination on a comparison of the marks in their entireties, we are guided, equally, by the well established principle that, in articulating reasons for reaching a conclusion on the issue

of confusion, "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties." *In re National Data Corp.*, 732 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). Although the BRENTWOOD portion of opposer's mark always appears in the aforementioned logo form as part of its tradename, we find that BRENTWOOD is the dominant portion of the mark. The other wording in opposer's tradename is common, merely descriptive terminology and opposer's address is merely informational. With respect to the design element, when both words and a design comprise the mark, the words are normally accorded greater weight because the words are likely to make an impression upon purchasers that would be remembered by them and would be used by them to request the goods. *In re Appetito Provisions Co.*, 3 USPQ2d 1553, 1554 (TTAB 1987); and *Kabushiki Kaisha Hattori Tokeiten v. Scuotto*, 228 USPQ 461, 462 (TTAB 1985). See also: *Giant Food, Inc. v. Nation's Food Service, Inc.*, 710 F.2d 1565, 218 USPQ 390 (Fed. Cir. 1983).

Applicant's mark is identical to the dominant portion of opposer's mark. Thus, we find that the overall

commercial impressions of the parties' marks are substantially similar.

It is well established that when the marks at issue are the same or nearly so, the goods in question do not have to be identical to find that confusion is likely. As we stated in *In re Concordia International Forwarding Corp.*, 222 USPQ 352, 356 (TTAB 1983), ". . . the greater the degree of similarity in the marks, the lesser the degree of similarity that is required of the products or services on which they are being used in order to support a holding of likelihood of confusion." It is sufficient that the goods are related in some manner and that their character or the circumstances surrounding their marketing are such that they are likely to be encountered by the same people in situations that would give rise to the mistaken belief that the producer was the same. *In re International Telephone and Telegraph Corp.*, 197 USPQ 910 (TTAB 1978).

With respect to the goods of the parties, we first address applicant's suggestion, made for the first time in its brief, that it would be willing to amend its identification of goods to limit the channels of trade or the nature of the goods, citing Trademark Rule 2.133(b). However, we will not consider this "suggestion," as applicant did not make a timely motion to amend its

identification of goods and specify the nature of the proposed amendment. The Board will not, *sua sponte*, amend applicant's identification of goods. Further, an unconsented motion to amend, which could affect the issues involved in the proceeding, must have been made prior to trial to give the other party fair notice; unless we could consider the issue to have been tried by express or implied consent, which is not the case herein. See *Trademark Trial and Appeal Board Manual of Procedure*, Section 514.03. Thus, we consider the nature of applicant's goods as recited in the application.

We note that we do not consider the goods of the parties to be related simply because such goods comprise HVAC equipment and components, since the meaning of this acronym is very broad - "heating, ventilating and air conditioning." The mere fact that both parties goods may fall into the same broad category or field does not, *per se*, render the parties' goods, trade channels or customers sufficiently related to warrant a conclusion of likelihood of confusion. See *Astra Pharmaceutical Products, Inc. v. Beckman Instruments, Inc.*, 718 F.2d 1201, 220 USPQ 786, 790 (1st Cir. 1983); and *Electronic Design & Sales, Inc. v. Electronic Data Systems Corp.*, 954 F.2d 713, 21 USPQ2d 1388 (Fed. Cir. 1992).

Further, the question of likelihood of confusion in this case must be determined based on an analysis of the mark as applied to the goods recited in applicant's application, rather than what the evidence shows applicant's goods to be, compared to what the evidence shows opposer's goods to be. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987).

Applicant's goods, as identified, include "air conditioning units" and components therefor. With reference to the dictionary definitions of "air conditioning" and "cooling tower," we conclude that an air conditioning unit could be any size, large or small; and that an air conditioning unit could incorporate cooling towers if it is sufficiently large, or such a unit could be incorporated into systems that also utilize cooling towers. The record contains no evidence to the contrary. We also presume that applicant's goods are sold in all of the normal channels of trade to all of the usual purchasers for goods of the type identified. *See Canadian Imperial Bank v. Wells Fargo, supra.*

There is nothing in the record that indicates any relationship between applicant's recited goods and

opposer's custom products, wheelbarrows, medical packaging, or water and wastewater treatment products.

However, looking at the evidence regarding opposer's goods, we find that opposer's goods pertaining to cooling towers⁷ are likely to be sold to the same purchasers for use in the same cooling systems as goods encompassed by applicant's identified "air conditioning units." Applicant's evidence and argument that the purchasers of the respective products are different and that the goods move in different trade channels pertain to the small-sized HVAC equipment applicant currently sells, and we make no determination with respect to that limited subset of applicant's goods as identified. But we can reasonably conclude that the goods identified in the application encompass a broader range of goods, as indicated above, and that a not insignificant subset of these goods is likely to travel through the same or similar trade channels as, and to the same purchasers of, opposer's cooling tower products.

⁷ As previously noted, the record is not clear about whether opposer's products for water and wastewater treatment, or for other uses, may be for cooling products or systems other than products for cooling towers. To the extent that there may be such products, this discussion applies equally to these products, which, in any event, are cooling/evaporative products and/or components for large industrial or commercial systems.

Applicant's argument that the purchasers of such goods are knowledgeable, sophisticated persons is likewise unavailing. Not only is there no evidence in the record regarding the sophistication and knowledge of purchasers, or the care with which purchasing decisions are made, but we note that knowledgeable and sophisticated purchasers are not immune from confusion in relation to the source of these goods when the marks are as similar as are these marks. *See, In re General Electric Company*, 180 USPQ 542 (TTAB 1973).

With regard to applicant's assertion that neither party is aware of any instances of actual confusion occurring as a result of the contemporaneous use of the marks of applicant and opposer, we note that applicant's use has been for only a relatively short period of time, in a limited geographic area, and on a limited subset of the goods encompassed by its identification of goods. Thus, the opportunity for instances of confusion has been low. Moreover, the test under Section 2(d) is not actual confusion but likelihood of confusion. *See, In re Kangaroos U.S.A.*, 223 USPQ 1025, 1026-1027 (TTAB 1984); and *In re General Motors Corp.*, 23 USPQ2d 1465, 1470-1471.

Applicant argues that it acted in good faith in adopting its BRENTWOOD mark, and the evidence supports this

conclusion. However, applicant's good faith is not a defense in this case. By choosing this mark, applicant has fallen short of its duty as the newcomer to avoid even approaching in similarity the previously used mark of another in the same field of commerce, as encompassed by the applicant's identification of goods. *Nina Ricci S.A.R.L. v. E.T.F. Enterprises Inc.*, 889 F.2d 1070, 12 USQP2d 1901 (Fed. Cir. 1989).

Therefore, we conclude that in view of the substantial similarity in the commercial impressions of applicant's mark, BRENTWOOD, and opposer's mark, BRENTWOOD INDUSTRIES, INC. and design, their contemporaneous use on the goods of opposer and the goods set forth in the application is likely to cause confusion as to the source or sponsorship of such goods.

Decision: The opposition is sustained.

R. F. Cissel

E. W. Hanak

C. E. Walters
Administrative Trademark Judges,
Trademark Trial and Appeal Board