By Electronic Mail to Ms. Karin Ferriter (karin.ferriter@uspto.gov)
Copy by Facsimile to 571-273-7744

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Margaret J.A. Peterlin
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Deputy Director of the United States Patent and Trademark Office

c/o Mail Stop External Affairs
Director of the United States Patent and Trademark Office
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Re: Written Comments on the Protection of Industrial Designs Proposed Replacement Parts Amendment

Ms Peterlin:

The present submission is the joint written comments of Polaris Industries Inc. and BRP US Inc., in response to the USPTO's Notice of Town Hall Meeting on the Protection of Industrial Designs dated May 28, 2008.

Summary

Polaris Industries Inc. and BRP US Inc. are original equipment manufacturers ("OEM's") of recreational power sports vehicles (*i.e.* snowmobiles, personal watercraft, boats, outboard engines, all-terrain vehicles, karts, motorcycles, and motorized three-wheeled vehicles), primarily for use in power sports, but also as utility vehicles.

Both Polaris Industries Inc. and BRP US Inc. are **against** the proposed amendment that parts destined for the repair of another article of manufacture to restore its original appearance be exempted from infringement of design patents. The proposed amendment is overly broad in that it is not limited to the repair of automotive vehicles (*i.e.* road-use motorized vehicles having 4 or more wheels), which Polaris Industries Inc. and BRP US Inc. understand to be the underlying policy issue giving rise to the consideration of the present proposed amendment. As is explained below, if not so limited, the amendment will cause an unintended and certainly undesirable increase in the cost of recreational power sports vehicles, as well as a decrease in consumer choice in replacement parts for those vehicles.

Polaris Industries Inc. and BRP US Inc. express no opinion as to whether the amendment is appropriate in respect of automotive vehicles.

Background

Polaris Industries Inc. ("Polaris") of Medina, Minnesota is a world leading designer, developer, manufacturer and marketer of POLARIS® snowmobiles, all-terrain recreational, utility and side-by-side vehicles, and VICTORY® motorcycles. Polaris also designs, develops, manufactures and markets parts, accessories, apparel for use with its products in association with the PURE POLARIS® mark. Polaris licenses a range of third-party manufacturers to sell products in association with Polaris' trademarks.

BRP US Inc. of Sturtevant, Wisconsin is part of the Bombardier Recreational Products Inc. group of companies ("BRP"). BRP is a world leading designer, developer, manufacturer and marketer of SKI-DOO® and LYNX® snowmobiles, SEA-DOO® personal watercraft and sport boats, EVINRUDE® and JOHNSON® outboard motors, CAN-AM® all-terrain vehicles and roadsters, and ROTAX® karts and engines. BRP also designs, develops, manufactures and markets parts, accessories, apparel, for use with its products. BRP licenses a range of third-party manufacturers to sell products in association with BRP's trademarks.

BRP and Polaris are vigorous competitors in the various markets in which they sell similar products. However, in view of the importance of the present issue to the recreational power sports vehicle community (OEM's, distributors, dealers, and consumers), they have jointly prepared the present submission.

It is BRP's and Polaris' understanding that most of the other recreational power sports vehicle OEM's, being also automotive vehicle OEM's, are joining a submission to the USPTO in respect of the automotive industry.

Industrial Designs and the United States Recreational Power Sports Vehicle Industry

In the recreational power sports vehicle industry in the United States, OEM's, such as Polaris and BRP, design, engineer, and manufacture the various recreational power sports vehicle models and types, and sell them through their dealer networks. Their dealer networks are comprised of independently owned and operated individual dealerships. The dealerships are not company stores, and generally the OEM's have no ownership interest in them. The dealerships provide maintenance and services for their OEM network's vehicles, irrespective of whether they originally sold that OEM's vehicle or another of that OEM's dealers had sold the vehicle. Owners are not obligated to have their vehicles serviced at the dealership where they purchased the vehicle. There are thousands of BRP dealers and Polaris dealers in the United States today.

Recreational power sports vehicles differ in large part from automotive vehicles in that they are, as their name implies, used for recreational purposes, *i.e.* for power sports. When these vehicles were first introduced, exterior ornamental design was not an important feature. The exterior of these vehicles was boxy and utilitarian. Over time however, with the development of a power sports industry and with changing consumer

taste, an important factor in a purchaser's decision as to which vehicle to purchase became the "look", *i.e.* the ornamental design, of the vehicle. Quite simply, purchasers started to want to buy vehicles that looked "cool" in their eyes. For this reason, the ornamental design of these vehicles has changed over time to become quite artistically complex.

Today's industry has reached the point where OEM's use the ornamental design to distinguish their vehicles from those of other OEM's so as to establish branding of their vehicles. Ornamental vehicle design has become extremely important and there is inherent competition amongst OEM's to make their vehicle appear the "coolest" in consumers' eyes. Further, consumers are more likely to remain loyal to their brand than in respect of an automotive vehicle brand. It is therefore extremely important for an OEM to get the ornamental design of a vehicle right.

The creation of an ornamental design of a vehicle is not without significant cost, both in terms of the number of people it takes to design such a vehicle and the cost of the salaries of such people and the materials involved. For this reason, manufacturers invest large sums of money from their operating budgets and capital expenses in the ornamental design of their vehicles. As an example of how important industrial design is in this industry, in 2008 alone BRP invested several million dollars in the building of a new Design & Innovation center. The design center will be almost 54,000 square feet and will house more than 50 employees dedicated almost exclusively to vehicle ornamental design.

When a new vehicle project is being considered, financial studies are made to ensure that over the project's life the vehicle will be profitable to the company. Currently, the cost of the design of vehicle parts contributing to the ornamental design of the vehicle is spread across the projected number of vehicles themselves to be sold, as well as all the replacement parts for those vehicles projected to be sold.

Given the significant value to an OEM of the ornamental designs of the vehicles, the high cost of creating such designs, and the manner in which vehicle project financial analysis occurs, it is obvious that recreational power sports vehicle OEM's seek to protect their designs through design patents and have done so for some time now. The obtaining of design patent protection in this industry is not a new phenomenon.

Polaris' and BRP's Position Regarding the Proposed Amendment

The current proposal is that parts destined for the repair of another article of manufacture to restore its original appearance ("repair parts") be exempted from infringement of design patents.

It is Polaris' and BRP's understanding that the underlying policy basis for the consideration of such an amendment relates to the automotive industry and the repair of automotive vehicles (*i.e.* road vehicles having 4 or more wheels).

Polaris and BRP express no opinion as to the proposed amendment insofar as it concerns automotive vehicles (or any other article of manufacture other than recreational power sports vehicles). Polaris and BRP do not support this proposed amendment in respect of recreational power sports vehicles.

The number of recreational power sports vehicles sold per year is orders of magnitude less than the number of automotive vehicles sold per year. For example, approximately 75,000 snowmobiles are sold in the U.S. per year versus the millions of passenger cars alone that are sold in the U.S. each year.

The aftermarket industry in respect of recreational power sports vehicles, while it does exist, is different than with respect to the automotive industry. Obviously, as the number of recreational power sports vehicles sold in the U.S. on annual basis is much smaller, so is the number of repair parts that is sold. Therefore there are far fewer aftermarket recreational power sports vehicle parts manufacturers and distributors than there are in respect of automotive parts. Such aftermarketers sell fewer parts in terms of type, model and number, as they need to be able to make a profit in a much smaller market. They therefore concentrate their efforts on only those products that they believe will be profitable. Further, they do not simply make "knock-offs" of OEM parts, they make both similar parts and original replacement parts, *i.e.* parts that will replace the OEM part and fit on the vehicle, but that do not have the same ornamental design allowing a consumer to customize their vehicle. Most recreational power sports vehicle aftermarket part manufacturers are based in North America (particularly in the U.S.) and have a good relationship with the OEM's, as OEM's have long recognized that a healthy aftermarket turning out high quality aftermarket parts is important to the industry as a whole. A good example is that of International Engineering & Manufacturing, Inc. (doing business under the trade name "Woody's") of Hope, Michigan, which has been in the recreational power sports vehicle aftermarket business since 1968.

Given that recreational power sports vehicle OEM's have been protecting the design of repair parts for some time, a balanced relationship has arisen between aftermarket parts manufacturers and OEM's in respect of recreational power sports vehicles. This balance is such that consumers now get the benefits of both the OEM investment in vehicle design and in some cases (depending on the part) aftermarket repair and/or original replacement parts.

At the present time, there is no significant copying or infringement of OEM replacement parts. Rather, there is an appropriate balance between the number of aftermarket supplied repair parts (and the quality of their parts) and OEM supplied repair and original replacement parts. Polaris and BRP believe that this is to the consumer's benefit, and to both of their knowledge there are currently no complaints in the recreational power sports vehicle industry from consumers with respect to availability, quality and pricing of repair parts, either from OEM's or in the aftermarket.

Polaris and BRP believe that the removal of design patent protection in respect of recreational power sports vehicle repair parts is likely to have the effect of upsetting the balance that has existed in this industry for many years in this respect.

If an OEM no longer receives the protection afforded by design patents, the market will likely be flooded with "cheap" copies that are simply "knock-offs" of the original most of which will likely be imported. (Copies of OEM parts can be easily and cheaply made by a process known in the industry as "splashing".[1] The pricing of such parts would obviously not include the design of the parts since the person knocking them off did not have to pay for the design.)

These knock offs will no doubt be of lesser quality and cheaper, and it is likely that they will garner a large portion of the repair market. This compromised quality in certain parts can negatively affect the performance of safety-related systems. More particularly, in the recreational power sports vehicle industry, component parts are often times built into the structural integrity of the vehicle, due to the weight limitations of the vehicle. They are also often designed into such other efficiency related systems such as proper air intake, exhaust and/ or cooling. Thus in an industry already heavily regulated by both state and federal regulations, the OEMs need to protect the emissions, structural integrity of their designs as well as the safety of their vehicles to ensure regulatory compliance and the safety of their customers.

As the OEM's cost of designing these parts will not decrease, this cost will have to be spread across fewer numbers of parts, driving up the cost of OEM repair parts and the new vehicles that bear OEM original parts even more. Eventually very few, if any, repair parts will be purchased from OEM's. Therefore, the cost of design will almost entirely be borne by the new vehicles themselves, significantly increasing the cost of these new vehicles.

Further, since OEM's will in total have fewer of these parts to manufacture, the other fixed costs of part creation and manufacturing will be borne by a fewer number of parts, driving up the cost of these parts even further. This will likely result in less overall vehicles being sold as fewer people will be able to afford them, driving up the cost of new vehicles even further still.

Additionally, forcing the OEM's to incorporate the cost of the design into the vehicles (as opposed to including in the cost of repair parts) is unfair to consumers as it forces every vehicle purchaser to pay an equal (and therefore higher) share of the design costs, as opposed to an individual proportion of the design costs relative to the number of parts that they use (*i.e.* the total of the new parts plus all the repair parts that an individual would use over the vehicle's lifetime). Thus, every new purchaser will be paying the cost differential for these repair parts, whether they ever use them or not. Worst still,

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[1] **As you know, the splashing problem became so severe in the boating industry, that Congress enacted the Vessel Hull Design Protection Act as part of the Copyright statute, although this protection does not extend to ATVs, snowmobiles, motorcycles, and the like.**

they will be paying these costs at the time that they buy the vehicle as opposed to spreading them out over the lifetime of the vehicle, which is currently the case.

Moreover, as was alluded to above, the existence of design patent protection in respect of recreational power sports vehicle repair parts does not in itself preclude the existence of aftermarket parts. Indeed, a flourishing aftermarket parts industry exists today. Obviously, such aftermarket manufacturers have several options available to them. Although a design patent may exist for a particular part of a recreational power sports vehicle, aftermarket part manufacturers may license it and make a part with the same design characteristics, or they may make a replacement part with different design characteristics that still fits the vehicle and pay the OEM nothing. Depending on the choice made by the aftermarketers, this can result in simpler (and therefore usually less expensive) replacement parts, or in aftermarket parts having different (and in many cases more intricate) designs that can radically change the look of a vehicle. The latter option allows for many more different vehicle designs that an OEM could produce and therefore allows consumers to customize their vehicles.

By withdrawing design protection for the OEM repair parts, the current state of the aftermarket will be harmed. As was previously stated, the cheap knock-off parts will likely garner a large part of the market. This will negatively affect the current U.S.-based aftermarket parts manufacturers as they will not be able to compete. The current aftermarket parts manufacturers will simply stop making replacement parts with their own original designs that become uncompetitive price-wise in the market place as a result of the imported splashed parts. This will reduce consumer choice. It will also negatively affect such aftermarketers (as their profits will decrease) to the detriment of the entire recreational power sports vehicle industry. Consumer choice and competition are good for the industry.

In summary, the current situation regarding design patent protection in the recreational power sports vehicle industry is working to the benefit of consumers and "[t]o promote the progress of science and the useful arts...", which is the Article 1, Section 8 constitutional mandate of the patent system. The proposed amendment, by withdrawing protection for designs for replacement parts, does neither. Indeed, in its current form, the proposed amendment is far more likely to harm consumers by increasing overall vehicle ownership expense, reducing the design choices that exist today in the marketplace, hindering the progress of science and the useful arts in the recreational power sports industry and potentially compromise the vehicle's structural integrity, safety and regulatory compliance. It should, in Polaris' and BRP's opinion, not be adopted in its current form. If adopted, it should exclude all recreational power sports vehicles including those used for utility purposes.

Thank you for your time and consideration of these comments.

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