

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB

OCT. 28, 99

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Service Station Products Company
v.
C.A. McCourt and Associates

Opposition No. 108,979
to application Serial No. 75/232,479
filed on January 28, 1997

Edward D. Lanquist, Jr. of Waddey & Patterson for Service
Station Products Company.

Mark A. Watkins of Oldham & Oldham Co., L.P.A. for C.A.
Mccourt and Associates

Before Cissel, Bucher and Bottorff, Administrative Trademark
Judges.

Opinion by Bottorff, Administrative Trademark Judge:

Applicant has filed an intent-to-use application
seeking registration of the mark WHEEL GUARD for goods
identified as "tire changing machines."¹ Opposer has
opposed registration, alleging in its notice of opposition

¹ Serial No. 75/232,479, filed January 28, 1997. Applicant has
disclaimed the exclusive right to use WHEEL apart from the mark
as shown.

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that applicant's mark, as applied to applicant's goods, so resembles opposer's previously-used and registered mark ALLOY WHEEL GUARDIAN for "balance weights for vehicle wheels"² as to be likely to cause confusion, to cause mistake, or to deceive. Applicant has filed an answer by which it denies the allegations of the notice of opposition which are essential to opposer's claim.

Opposer and applicant have filed briefs on the case, and opposer has filed a reply brief. No oral hearing was requested.

The record in this case includes certain documents submitted by opposer under notice of reliance, and the parties' stipulation of facts. The relevant documents and stipulated facts shall be discussed below.

Opposer's priority is not in dispute. The parties have stipulated that opposer is the owner of its pleaded Registration No. 1,845,548, that opposer has used its mark in connection with wheel weights since July 19, 1994, and that applicant has used its mark in connection with tire changing machines since February 18, 1997. (Stipulation, Paragraphs 3-5.) Accordingly, we turn to the question of likelihood of confusion.

² Registration No. 1,845,548, issued July 19, 1994. April 19, 1993 is alleged in the registration as the date of first use of the mark anywhere and first use of the mark in commerce. ALLOY WHEEL has been disclaimed apart from the mark as shown.

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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 any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

With respect to the marks, we find that applicant's mark WHEEL GUARD and opposer's mark ALLOY WHEEL GUARDIAN are very similar in terms of appearance, sound, connotation and overall commercial impression. Applicant's mark differs from opposer's mark only in that applicant uses the word GUARD rather than GUARDIAN and has omitted the descriptive term ALLOY. The words GUARD and GUARDIAN, as used in the respective marks and as applied to the respective goods, are essentially identical in terms of connotation. Applicant's arguments to the contrary are not persuasive. GUARD and GUARDIAN might be viewed as being somewhat suggestive as applied to the goods involved in this case, but they suggest essentially the same thing. Moreover, there is no evidence

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that GUARD and GUARDIAN are used by any third party in connection with these types of products.

Nor are we persuaded by applicant's argument that the marks are distinguishable because opposer's mark connotes that opposer's product is to be used only in connection with alloy wheels, while applicant's mark connotes no such limitation as to the type of wheels with which applicant's product might be used. On the contrary, "alloy wheel" is a species of, and encompassed within, the word "wheel," and the connotation of ALLOY WHEEL in applicant's mark is likewise encompassed within the connotation of WHEEL in opposer's mark. In any event, this inconsequential difference in the disclaimed descriptive portions of the respective marks does not suffice to distinguish the marks in terms of their overall commercial impressions.

In short, each of the marks consists of a disclaimed descriptive term, i.e., WHEEL or ALLOY WHEEL, and the word GUARD or its variant, GUARDIAN. Viewed in their entireties, the marks are very similar.

We also find that the parties' respective goods are sufficiently related that the parties' use of their respective marks thereon is likely to result in confusion. It is well settled that goods need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is sufficient that the goods are

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related in some manner or that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons in situations that would give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same producers or that there is an association between the producers of the goods or services. See *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991); *In re International Telephone & Telegraph Corp.*, 197 USPQ 910 (TTAB 1978).

Wheel weights and tire changing machines, while not identical or even competitive products, nonetheless are closely related products which are used together, by the same purchasers, in the process of installing and balancing tires on vehicles. The parties have stipulated that their respective products are sold in the same trade channels and to the same purchasers, i.e., service stations and tire centers. (Stipulation, Paragraphs 1 and 2.) Furthermore, purchasers are likely to assume that wheel weights and tire changing machines might originate from a single manufacturer. Indeed, opposer itself manufactures and sells both types of products. (Exhibit 3 to Opposer's notice of reliance (brochure 000025-32); Stipulation, Paragraph 10.)

In short, the parties' respective goods are sold in the same trade channels to the same purchasers, who use them as

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complementary products and who are likely to be aware that both types of products can originate from a single manufacturer. In view thereof, we find that the parties' goods are sufficiently closely related in the marketplace that confusion is likely to result from the use thereon of similar marks such as those involved in this case.

Applicant also argues that the service stations and tire centers which purchase applicant's and opposer's goods are careful and sophisticated purchasers, especially with respect to applicant's tire changing machines, which cost in excess of \$2500.00. However, we are not persuaded on this record that these purchasers necessarily would be immune to source confusion when faced with the contemporaneous use, on these closely related goods, of the confusingly similar marks involved in this case. *See Refreshment Machinery Incorporated v. Reed Industries, Inc.*, 196 USPQ 840, 843 (TTAB 1977). This is especially so in view of the fact that, as discussed above, these purchasers are likely to be aware that both of these types of products may originate from a single manufacturer.

Finally, applicant argues that neither opposer nor applicant is aware of any instances of actual confusion having occurred during the two years in which the parties have used their marks contemporaneously. Applicant suggests that this absence of actual confusion is entitled to

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significant weight in this case, in view of the fact that opposer, by its own account, is the largest full-line wheel-service equipment manufacturer in North America. We are not persuaded. Applicant's application is based on intent-to-use. The parties have stipulated that applicant has been using its mark on its goods since February 18, 1997, but the record is silent as to the extent of such use. Because we have no evidence as to the extent of applicant's sales and advertising, we cannot conclude that any meaningful opportunity for actual confusion has existed, nor do we accord any significant weight to the absence of evidence of actual confusion in such circumstances. *See Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768 (TTAB 1992).

Having carefully considered all of the evidence of record pertaining to the relevant *du Pont* evidentiary factors, we conclude that a likelihood of confusion exists. In view thereof, and because priority rests with opposer, we find that registration of applicant's mark is barred by Trademark Act Section 2(d).

Decision: The opposition is sustained, and registration to applicant is refused.

R. F. Cissel

D. E. Bucher

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C. M. Bottorff

Administrative Trademark Judges
Trademark Trial and Appeal Board