

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB AUG. 31, 99

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **David Livingston**

Serial No. 75/055,484

Bruce E. O'Connor and Faye L. Mattson of **Christensen O'Connor
Johnson & Kindness** for **David Livingston**.

Allison S. Berman, Trademark Examining Attorney, Law Office 104
(**Sidney I. Moskowitz**, Managing Attorney).

Before **Hohein, Bucher** and **Bottorff**, Administrative Trademark
Judges.

Opinion by **Hohein**, Administrative Trademark Judge:

David Livingston has filed an application to register
the mark "TRUE TRAC" for "watercraft, namely, inboard and
outboard motorized boats and single-rider or two-rider
recreational jet boats".¹

Registration has been finally refused under Section
2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that

¹ Ser. No. 75/055,484, filed on February 9, 1996, which alleges a bona
fide intention to use the mark in commerce.

applicant's mark, when applied to his goods, so resembles the mark "TRAC 14" and design, which is registered, as shown below,

for "catamarans,""² as to be likely to cause confusion, mistake or deception.³

Applicant has appealed. Briefs have been filed,⁴ but an oral hearing was not requested. We affirm the refusal to register.

² Reg. No. 1,211,469, issued on October 5, 1982, which sets forth dates of first use of August 28, 1980; affidavit §8 accepted and affidavit §15 filed. As stated in the registration, "[t]he design portion of the mark comprises a fanciful representation of the numeral '14'." Such numeral is disclaimed.

³ Although registration was also finally refused on the basis of Reg. No. 1,590,760, which issued--with a claim of ownership of Reg. No. 1,211,469--on April 10, 1990 for the mark "TRAC" for, *inter alia*, "sailboats, specifically of the catamaran type, and structural and component parts therefor," it is noted that such registration had already been cancelled pursuant to the provisions of Section 8 of the Trademark Act, 15 U.S.C. §1058, and thus it will not be given further consideration.

⁴ Applicant, with his initial brief, submitted "a preliminary trademark search" report listing information, retrieved from the "TRADEMARKSCAN" commercial database, concerning ten "registrations for marks ... for goods associated with boating that incorporate the word 'track' or its phonetic equivalents 'trac' or 'track.'" The Examining Attorney, in her brief, has properly objected to consideration of such evidence as untimely under Trademark Rule 2.142(d). Moreover, it should be pointed out that a mere listing of information concerning third-party registrations is insufficient to make such registrations of record. *See, e.g., In re Duofold Inc.*, 184 USPQ 638, 640 (TTAB 1974). The proper procedure, instead, is to submit either copies of the actual registrations or the electronic equivalents thereof, i.e., printouts of the registrations which have been taken from the Patent and Trademark Office's own computerized database. *See, e.g., In re Consolidated Cigar Corp.*, 35 USPQ2d 1290, 1292 (TTAB 1995) at n. 3; *In re Smith & Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994) at n. 3 and *In re Melville Corp.*, 18 USPQ2d 1386, 1388-89 (TTAB 1991) at n. 2. In any event, we hasten to add that even if such evidence properly formed part of the record, it would make no difference in the disposition of this appeal inasmuch as seven of the ten registrations are owned by

Turning first to consideration of the respective goods and the conditions of their sale, applicant asserts that "motorboats and sailboats are completely separate and distinct segments of the boating industry." Applicant further contends that "[w]atercraft, whether it be Appellant's boats and jet skis or registrants' [sic] catamarans, are relatively expensive[,] costing anywhere from \$1,000 and up," and that such goods "are discretionary purchases which are not frequently replaced." In view thereof, applicant maintains that the average purchasers of the respective goods are discriminating purchasers and that they "will exercise such care in the purchase of a boat, a jet ski or a catamaran, so as to virtually eliminate the possibility of confusion as to the origin of the goods".

The Examining Attorney, on the other hand, has made of record, in support of her position that applicant's inboard and outboard motorized boats and recreational jet boats are closely to registrant's catamarans,⁵ over a dozen use-based third-party

the same party, thereby dispelling applicant's argument that numerous third-parties have adopted and registered marks containing the terms "TRACKER," "TRAC" or "TRAK," and none of the third-party marks is as similar overall to the cited "TRAC 14" mark as is applicant's "TRUE TRAC" mark.

⁵ We judicially notice, in this regard, that a "catamaran" is typically a type of twin-hulled sailboat. For instance, Webster's New World College Dictionary (1997) at 220 defines such term in relevant part as "1 a narrow log raft or float propelled by sails or paddles 2 a boat, specif. a racing sailboat, with two parallel hulls, built in the style of such a float," while The Random House Dictionary of the English Language (2d ed. 1987) at 325 lists such term in pertinent part as "1. a vessel, usually propelled by sail, formed of two hulls or floats held side by side by a frame above them." 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) and University of 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).

registrations for marks which, in each instance, are registered not only for various kinds of motorized boats, such as power boats, motor boats, speed boats, pleasure boats or yachts, but also for sailboats or catamaran hull type boats. Although such registrations are not evidence that the different marks shown therein are in use or that the public is familiar with them, they nevertheless have some probative value to the extent that they serve to suggest that the goods listed therein are of a kind 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 view thereof, and since it is obvious that sailors of catamarans or other sailboats may also be owners and/or operators of motorized boats, having for instance learned their early seamanship skills while piloting the former, we concur with the Examining Attorney that applicant's various watercraft and registrant's catamarans are closely related goods which would be sold through the same channels of trade to the identical classes of purchasers. Moreover, while such goods would typically not be inexpensive and thus would rarely be subject to impulse purchase, the fact that many boat owners may arguably be knowledgeable and discriminating consumers when it comes to buying a catamaran or a motorized boat or recreational jet boat does not mean that they necessarily are highly sophisticated or otherwise knowledgeable in the field of trademarks or that they are immune from confusion as to source or sponsorship. See, e.g., Wincharger Corp. v.

Rinco, Inc., 297 F.2d 261, 132 USPQ 289, 292 (CCPA 1962); In re Decombe, 9 USPQ2d 1812, 1814-15 (TTAB 1988); and In re Pellerin Milnor Corp., 221 USPQ 558, 560 (TTAB 1983). Instead, confusion as to source or sponsorship would be likely to occur if such closely related goods were to be sold under the same or substantially similar marks.

Turning, therefore, to consideration of the marks at issue, applicant asserts in particular that "the addition of the term 'true' to the term 'trac' differentiates the sound and appearance of the resulting mark TRUE TRAC from the previously registered ... [mark] TRAC 14 ... so as to prevent consumer confusion." Applicant also contends that, in view of the "most pertinent definition" of the word "track," which an accompanying copy of a portion of The American Heritage College Dictionary (3d ed. 1997) lists at 1432 as meaning "an intended or proper course,"⁶ the cited "TRAC 14" and design mark is highly suggestive because:

One of the primary goals of sailing is to set a course and stay on that course. Although marks containing the word "track," or its phonetic equivalent "trac," may not be actually descriptive of a particular course for sailing, they are highly suggestive.

....

Inasmuch as "a highly suggestive mark is entitled to narrow protection," applicant insists that, "[g]iven the highly suggestive nature of the mark TRAC, Appellant's mark TRUE TRAC,

⁶ Since, as noted previously, the Board may properly take judicial notice of dictionary definitions, we have considered such evidence even though it is untimely under Trademark Rule 2.142(d) inasmuch as it was not submitted until applicant filed his reply brief.

like registrant's mark TRAC 14 [and design,] is sufficiently different in sight, sound, and meaning so as to prevent confusion between the marks.

Finally, applicant urges that, just as the presence of the term "girl" in the mark "VARGA GIRL" for calendars was held adequate, in *In re Hearst Corp.*, 982 F.2d 493, 25 USPQ2d 1238, 1239 (Fed. Cir. 1992), to avoid a likelihood of confusion with the mark "VARGAS" for calendars, "the term 'true' is an important feature of the [applicant's] mark and should be given fair weight when analyzing the [respective] marks in their entirety." Thus, when considered in their entireties, applicant maintains that the commercial impression of its "TRUE TRAC" mark is not so similar to that of registrant's "TRAC 14" and design mark that confusion is likely.

We agree with the Examining Attorney, however, that the respective marks are substantially similar in sound, appearance, connotation and commercial impression. As the Examining Attorney points out, in articulating reasons for reaching a conclusion on the issue of likelihood 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 [that] the ultimate conclusion rests on consideration of the marks in their entireties." *In re National Data Corp.*, 753 F.3d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). For instance, "that a particular feature is descriptive ... with respect to the involved goods or

services is one commonly accepted rationale for giving less weight to a portion of a mark" 224 USPQ at 751.

Here, as the Examining Attorney observes, the term "14" in registrant's "TRAC 14" and design mark has been disclaimed and, whether such term is regarded as being merely descriptive of the length of registrant's catamarans or is simply a model or grade designation, it is the term "TRAC" which constitutes the primary, source-distinguishing feature of the mark. Such term is also the principal source-indicative element of applicant's "TRUE TRAC" mark, given the fact that the word "true," we judicially notice, means among other things "real; genuine; authentic".⁷ Thus, to prospective purchasers of watercraft who are familiar with or have otherwise encountered the "TRAC 14" and design mark in connection with registrant's catamarans, it would be reasonable to believe that the mark "TRUE TRAC," when used in connection with applicant's inboard and outboard motorized boats and/or single-rider or two-rider recreational jet boats, designates additions to or new lines of boats from the same source.

Plainly, the term "TRAC" in each of the marks at issue looks and sounds the same and, even assuming that, when used in connection with boats, such term has a suggestive significance as indicating an intended or proper course of navigation, the connotation thereof is still substantially the same in each mark.

⁷ See, e.g., Webster's New World College Dictionary (1997) at 1435 and The Random House Dictionary of the English Language (2d ed. 1987) at 2029.

Overall, the marks "TRUE TRAC" and "TRAC 14" and design, while distinguishable on a side-by-side basis,⁸ nevertheless project such a substantially similar commercial impression that prospective consumers are likely to perceive applicant's mark as simply a variant of registrant's mark.

In consequence thereof, consumers familiar with registrant's mark "TRAC 14" and design mark for "catamarans" would be likely to believe, upon encountering applicant's substantially similar mark "TRUE TRAC" for "watercraft, namely, inboard and outboard motorized boats and single-rider or two-rider recreational jet boats," that such closely related goods emanate from, or are otherwise sponsored by or affiliated with, the same source. Actual and prospective customers, as previously indicated, would be especially likely to view applicant's "TRUE TRAC" boats as a new or additional product line from the producer of the catamarans marketed under registrant's "TRAC 14" and design mark.

Decision: The refusal under Section 2(d) is affirmed.

G. D. Hohein

⁸ A side-by-side comparison, however, is not the proper test to be used in determining the issue of likelihood of confusion since it is not the ordinary way that consumers will be exposed to the marks. Rather, it is the similarity of the general overall commercial impression engendered by the marks which must determine, due to the fallibility of memory and the consequent lack of perfect recall, whether confusion as to source or sponsorship is likely. The proper emphasis is thus on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks or service marks. See, e.g., *In re United Service Distributors, Inc.*, 229 USPQ 237, 239 (TTAB 1986); and *In re Solar Energy Corp.*, 217 USPQ 743, 745 (TTAB 1983).

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D. E. Bucher

C. M. Bottorff
Administrative Trademark Judges,
Trademark Trial and Appeal Board