

THIS DISPOSITION IS NOT
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U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Amteco, Inc.

Serial No. 75/086,733

Glenn K. Robbins, II of Robbins & Robbins for Amteco, Inc.
Julia Hardy Cofield, Trademark Examining Attorney, Law
Office 105 (Thomas G. Howell, Managing Attorney).

Before Simms, Hanak and Bucher, Administrative Trademark
Judges.

Opinion by Bucher, Administrative Trademark Judge:

Amteco, Inc., a Missouri corporation, filed an
application for registration of the mark "LOX-RUST" for
"rust preventative coatings and primers in the nature of
paint."¹

The Trademark Examining Attorney issued a final
refusal to register based upon Section 2(d) of the
Trademark Act, 15 U.S.C. §1052(d), on the ground that
applicant's proposed mark, "LOX-RUST," when used on these

¹ Serial No. 75/086,733, in International Class 2, filed
April 10, 1996, based upon an allegation of a *bona fide* intention
to use the mark in commerce.

rust preventative paints, so resembles the registered mark, "LOX-SEAL," as applied to, "clear and pigmented coatings for use primarily in the automotive industry," as to be likely to cause confusion, or to cause mistake, or to deceive.²

Applicant has appealed the final refusal to register. Briefs have been filed, but applicant did not request an oral hearing. We reverse the refusal to register.

The Trademark Examining Attorney takes the position that the term "LOX" is the dominant, first word of both marks. Throughout, she contends that with this phonetic spelling, this word has to be considered a strong, arbitrary portion of both marks. To the extent the products are different, she argues that consumers will conclude these are "companion products." As to the goods, she holds fast to the presumption that applicant's seemingly broad identification of coatings and primers must be deemed to include registrant's more narrowly directed type of coatings. She argues that one must assume the trade channels are the same and dismisses claims placed into the record in the form of declarations describing a very different marketplace reality.

By contrast, applicant argues that when the two marks are correctly considered in their entireties, they are completely different. Arguing that the common word "LOX" is highly suggestive of a quality of the goods, applicant argues further that there can be no likelihood of confusion since the words "RUST" and "SEAL" are completely different words. As to the goods, applicant argues that its goods are limited to a single-coat product applied directly to heavy steel for the purpose of rust treatment and prevention. On the other hand, applicant points out from the identification of goods in the cited registration that registrant's products are targeted to the automotive industry. In their affidavits, applicant's experts claim that registrant's sealer/coatings will likely be the second of three coats used on automobile bodies (to seal the body after the application of a sandable primer but before the eventual finish), seemingly unrelated to rust prevention. In this connection, applicant argues that a coating for rust prevention on heavy steel structures will move in completely different channels of trade than paints flowing to the automobile industry. Applicant has also supplied the file with evidence of the words "LOX" and "LOCKS" in

² Registration No. 2,020,862 issued on December 3, 1996. The registration sets forth dates of first use of December 20, 1995.

numerous third-party registrations in the coating and paint field, supporting applicant's contention that this term is at the very least, suggestive in this field.

In the course of rendering this decision, we have followed the guidance of In re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 1362, 177 USPQ 563, 567-68 (CCPA 1973), that sets forth the factors which, if relevant, should be considered in determining likelihood of confusion.

When considering the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression, we find the word "locks" to be suggestive and frequently registered in the field of paints, primers and other coatings. Merchants and manufacturers of paints and coatings have regularly chosen marks suggesting that as the paint penetrates into the pores of the underlying material, it "locks" itself in, and/or "locks" corrosion out. While the variant in spelling (e.g., "lox" instead of "locks") is used somewhat less frequently than the original spelling, the word "lox" is certainly not a term unique to applicant and registrant in the broad area of paint products. Furthermore, we must compare in their entireties the marks "LOX-RUST" and "LOX-SEAL." It is true that both marks begin with the same word "LOX," followed by a hyphen, and each mark then contains a

four-letter word -- "rust" or "seal." Despite these obvious similarities, we find both marks to be suggestive marks in this field, having contrasting sounds and obvious visual differences.

As to the similarity or dissimilarity and nature of the goods as described in the application and registration, registrant's goods are for use primarily in the automotive industry while applicant's goods stress rust prevention. Given the myriad types of specialized paints and coating available in the marketplace, we feel safe presuming on this record that the goods as identified are not interchangeable products.

Applicant has criticized the Trademark Examining Attorney for failing to rebut the declarations it submitted for the record. These declarants claim that, in reality, the goods of applicant and those of registrant are quite different types of coatings, having disparate applications. As a result, applicant would have us conclude that there is a dissimilarity in the established, likely-to-continue trade channels. However, these asserted differences are not reflected in applicant's identifications of goods (e.g., the identification was not amended to something in the nature of "rust preventative ... paint for bridges and heavy steel structures"). Hence, in this *ex parte* context,

we cannot agree with applicant that its rust preventative coatings will move in channels of trade totally separate from paints marketed to the automobile industry. Under a consideration of the du Pont factors, we may well be influenced, for example, by a well drafted consent agreement, or an amendment to the identification of goods setting forth a limitation narrowing the possible channels of trade. However, we cannot conclude that the channels of trade are different based only upon these submissions. In this context, we must presume, as the Trademark Examining Attorney correctly contends, 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, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). At the very least, in looking at this total record in an *ex parte* context, applicant's declarations notwithstanding, we have to assume as a matter of law that persons within the automotive industry who purchase paints and coatings comprise a common set of potential consumer of the goods of applicant and of registrant.

Although as noted above, there may be overlapping channels of trade, given the limitations in registrant's

goods, we conclude that the overlapping buyers herein are careful, sophisticated purchasers.

In looking at the number and nature of similar marks in use on similar goods, "lox," "lok," "lock" and "locks" appear as prefixes and suffixes on a variety of coatings, sealants, cleaners, etc. This coexistence on the registry at least suggests to us that consumers are able to make distinctions among composite marks containing the word "lox" (and the other variations in phonetic spelling for "lock(s)") as used in connection with a variety of liquid coatings.

Hence, given the difference between these suggestive marks, combined with the fact that the respective marks will be used on slightly different types of goods, moving to relatively sophisticated purchasers, we conclude that the chances for likelihood of confusion are *de minimus*.

Decision: The refusal to register is hereby reversed.

R. L. Simms

E. W. Hanak

D. E. Bucher

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Judges, Trademark Trial and
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