

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF THE TTAB JAN. 28, 00  
U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Tractech, Inc.  
v.  
American Axle & Manufacturing, Inc.

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Opposition No. 109,261  
to application Serial No. 75/243,706  
filed on January 31, 1997

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Lawrence E. Laubscher, Sr. of Laubscher & Laubscher for  
Tractech, Inc.

Lisabeth H. Coakley of Harness, Dickey & Pierce, P.L.C. for  
American Axle & Manufacturing, Inc.

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Before Seeherman, Chapman and Bucher, Administrative  
Trademark Judges.

Opinion by Chapman, Administrative Trademark Judge:

An intent-to-use application has been filed by American  
Axle & Manufacturing, Inc. to register the mark shown below

for "automobile parts for land vehicles, namely,  
differentials and lightweight propeller shafts" in  
International Class 12.

Tractech Inc. has opposed the application, alleging that since long prior to January 31, 1997, opposer and its predecessors have used the trade name and trademark TRACTECH in the manufacture, sale and/or distribution of "differentials for land vehicles and related goods"; that by virtue of continuous and extensive use, opposer's trade name and trademark TRACTECH has become distinctive of opposer's goods, indicating the source of said goods to be opposer; and that applicant's mark, when used on or in connection with its goods, would so resemble opposer's previously used trade name and trademark as to be likely to cause confusion, mistake, or deception.<sup>1</sup>

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<sup>1</sup> Opposer also pled a "family" of marks (four registrations-TRUE-TRAC, TOUCHTRAC, ELECTRAC and DETROIT TRUETRAC, and one then-pending application, which has since registered-SURETRAC), some for differentials and some for electronic traction control systems. Additionally, opposer pled likelihood of confusion between applicant's mark and each mark in opposer's asserted family. In the notice of opposition, opposer stated that status and title copies of the four pleaded registrations were attached. However, only two such copies were attached, specifically for Registration Nos. 990,100 (TRUE-TRAC) and 1,808,433 (DETROIT TRUETRAC). (We note that the two registrations for which we do not have status and title copies both expired in 1998 under Section 9 of the Trademark Act.)

In its brief on the case opposer did not assert either a "family of marks" or likelihood of confusion as to each separate mark alleged by opposer. Thus, we consider that opposer has dropped both its claim of a family of marks and its claim of likelihood of confusion as to each of opposer's asserted marks. In any event, the record in this case does not include evidence sufficient to sustain either of these claims. See *J & J Snack Foods Corp. v. McDonald's Corp.*, 932 F.2d 1460, 18 USPQ2d 1889 (Fed. Cir. 1991); *Witco Chemical Co. v. Whitfield Chemical Co.*, 418 F.2d 403, 164 USPQ 43 (CCPA 1969); *Hester Industries Inc. v. Tyson Foods Inc.*, 2 USPQ2d 1646 (TTAB 1987); and *Dan River, Inc. v. Apparel Unlimited, Inc.* 226 USPQ 186 (TTAB 1985).

Applicant denied the salient allegations of the notice of opposition. Applicant also asserted several "affirmative and special defenses," including a claim that the terms "trac" and "tech"<sup>2</sup> (and their phonetic equivalents) are weak and entitled to very narrow protection, and a claim that opposer's marks are descriptive and are not distinctive.<sup>3</sup>

The record consists of the pleadings; the file of opposed application; the two status and title copies of pleaded registrations attached to opposer's notice of opposition; the testimony, with exhibits, of Ralph McGee, opposer's president and CEO; applicant's notice of reliance on (i) copies of third-party registrations, (ii) copies of the assignment records for opposer's four pleaded registrations, and (iii) opposer's answers to applicant's first set of interrogatories, its answers to applicant's first set of requests for admissions, and its corrected answer to applicant's request for admissions No. 4;<sup>4</sup> and the parties' stipulation into the record of a 1996 search report ordered by applicant for the term TRAKRITE, and a copy of

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<sup>2</sup> Although applicant's affirmative defense (paragraph 9) referred to "RITE" instead of "TECH," the Board presumes that applicant intended the word "TECH."

<sup>3</sup> To whatever extent applicant intended to pursue any of its other pleaded affirmative defenses, the record does not include sufficient evidence to sustain any such defenses.

<sup>4</sup> Applicant's notice of reliance also included a copy of a letter from opposer's attorney to applicant's attorney. However, this is not proper subject matter for submission into the record pursuant to a notice of reliance.

applicant's advertisement appearing in the October 1998 magazine Ward's AutoWorld.<sup>5</sup>

Both parties have filed briefs on the case. Neither party requested an oral hearing.

Tractech, Inc. identifies a company formed in 1979 as a successor to earlier companies (e.g., Detroit Automotive). Tractech, Inc. was acquired by and operated as a separate division of another company, and in 1996 the current opposer was incorporated as Tractech Inc. Opposer principally manufactures differential gear sets primarily for use in construction equipment, heavy-duty trucks and military vehicles. (Opposer also sells centrifugal clutches and specialized brake products.) Differentials are typically part of the powertrain, and "they accommodate the transfer of torque from one side of a vehicle to another side of the vehicle or from the front to the rear of a vehicle." (McGee dep., p. 63). Opposer's products enhance traction, and the name "Tractech" was adopted by opposer's predecessor because it is a contraction of the terms "traction technology." (McGee dep., p. 107).

Opposer's differentials cost from \$200 to \$600 each. Opposer sells these goods to axle manufacturers (such as

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<sup>5</sup> Opposer had filed a notice of reliance, but the notice was unnecessary because it referenced only matters already in the record. Although some of the material was not properly the subject of a notice of reliance, all of it was otherwise properly made of record, so all of it forms part of the record herein.

applicant and Dana Corporation) and to wholesale distributors, the latter of which in turn sell to the retail market. The ultimate purchasers and consumers of these products are anyone "from a shade tree mechanic all the way up to a sophisticated engineer." (McGee dep., p. 100).

Opposer's predecessors-in-interest, using the trade name "Tractech, Inc." began selling differentials in 1979, and sales have been continuous under that trade name. There is clear evidence of opposer's use of TRACTECH and/or TRACTECH INC.<sup>6</sup> as a trade name, such as in several brochures dated from 1979 through 1997, advertisements in magazines from 1995, 1996 and 1997, shipping labels, and letterhead stationery.

Opposer exhibits at various trade shows for construction and heavy equipment, and it also exhibits at the Specialty Equipment Market Association (SEMA) for the after market. Opposer advertises its involved goods in magazines such as 4 Wheel and Off-Road, 4WD & Sport Utility, 4X4 Mechanix, Construction Equipment, and Diesel Progress. The only advertising figures of record are \$320,000 for 1996, \$430,000 for 1997 and \$430,000 (estimated) for 1998. There are no sales figures of record.

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<sup>6</sup> Subsequently, we will refer to opposer's trade name as TRACTECH. Whether opposer's trade name and the uses thereof are "TRACTECH" or "TRACTECH INC." has no effect on our decision on likelihood of confusion.

Applicant filed its intent-to-use application on January 31, 1997 for the mark \_\_\_\_\_ for automobile parts for land vehicles, namely, differentials and lightweight propeller shafts. Prior to filing the application, applicant obtained a full search on the term "TRAKRITE." None of opposer's pending or registered marks appeared therein. Although the record shows that applicant has commenced use of its mark, we have no information regarding the amount of sales, applicant's customers or the like.

Opposer contends that it has used the term TRACTECH for differentials as part of its trade name, as a technical trademark, and through use analogous to trademark use. (See opposer's brief, p. 8). Applicant acknowledges that opposer uses the term as a trade name to identify opposer as a corporate entity (applicant's brief, p. 15); however, applicant disputes that opposer has used TRACTECH as either a technical trademark or through use analogous to trademark use (applicant's brief, pp. 19-21).

We turn first to opposer's claim of common law trademark and trade name rights in the term TRACTECH. Applicant asserts as an affirmative defense that opposer's mark/trade name is descriptive, and has not acquired distinctiveness. In its brief on the case, applicant contends that opposer has failed to prove that its

unregistered mark and trade name TRACTECH is either inherently distinctive or has acquired distinctiveness for automotive differentials, and thus, opposer has not established rights in a term on which opposer can base a Section 2(d) claim.

Under the case of *Otto Roth & Co. v. Universal Foods Corp.*, 640 F.2d 1317, 209 USPQ 40 (CCPA 1981), a plaintiff opposing registration of a trademark on the ground of likelihood of confusion with the plaintiff's own unregistered term cannot prevail unless the plaintiff shows its term is distinctive of its goods, either inherently, or through acquired distinctiveness, or through "whatever other type of use may have developed a trade identity." *Otto Roth*, supra at 43. See also, *Towers v. Advent Software Inc.*, 913 F.2d 942, 16 USPQ2d 1039 (Fed. Cir. 1990).

We have carefully reviewed the relevant evidence of record on this point, and we find opposer's unregistered term TRACTECH to be inherently distinctive, albeit merely suggestive of the goods. In the context of the goods involved herein, specifically, differentials for land vehicles, "trac" may be derived from the word "traction" (in both parties' marks), but it is only suggestive of "traction." Applicant itself has recognized (at least in the context of its own mark) that "trac" is only suggestive of the goods. (Applicant's brief, p. 7). Based on the

evidence in this record, we cannot conclude that purchasers would immediately understand the letters or term "trac" as simply an abbreviation of the word "traction." Whether or not "tech" would be perceived as "technology," applicant has not established that the combination term TRACTECH is merely descriptive of differentials for land vehicles. Rather, we find the unregistered term TRACTECH is a suggestive term which is inherently distinctive, and opposer need not establish that the term has acquired distinctiveness. In view of this, we need not reach the question of whether opposer has established acquired distinctiveness.

The record clearly establishes opposer's continuous use of the trade name TRACTECH (and/or TRACTECH INC.) for differentials since prior to applicant's filing date of January 31, 1997. As indicated in Section 2(d) of the **Trademark Act**, an opposer's prior use of a term as a trade name is sufficient to establish priority.<sup>7</sup> See *Martahus v. Video Duplication Services Inc.*, 3 F.3d 417, 27 USPQ2d 1846 (Fed. Cir. 1993). See also, 3 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition §20:16 (4th ed. 1999).

We turn then to the issue of likelihood of confusion.

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<sup>7</sup> There is no real dispute as to opposer's prior trade name use; rather, the parties dispute whether opposer has proven either technical trademark use or use analogous to trademark use of TRACTECH. In view of our decision on the issue of likelihood of confusion, *infra*, whether or not opposer is able to establish technical trademark use or use analogous to trademark use, the result herein would still be the same. Accordingly, we see no need to include a lengthy discussion of these issues.

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Our determination of this issue is based on an analysis of all the probative facts in evidence that are relevant to the factors bearing on likelihood of confusion. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

Opposer contends that there is a likelihood of confusion because of the similarity of the marks, the similarity of the goods, the similarity of the trade channels, and the fame of opposer's trade name and trademark, TRACTECH.

Applicant concedes that there is a similarity between the goods, i.e., differentials, and that some similarity in the channels of trade exists. However, applicant argues that the marks convey different commercial impressions; that opposer's mark is weak as shown by third-party uses and registrations; that the purchasers of the goods are sophisticated; that there is no evidence of actual confusion; and that applicant adopted its mark in good faith. (Applicant's brief, p. 6).

Applicant's goods are identified as "automobile parts for land vehicles, namely, differentials and lightweight propeller shafts." Although it is not totally clear, a fair reading of this identification would be that it refers to differentials for automobiles. Opposer's testimony and evidence shows that its primary use of the trade name

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TRACTECH is for differentials for heavy-duty trucks, construction equipment and military vehicles. But it is also clear that opposer's differentials are sold for sport utility vehicles. Thus, there is at least some overlap in the kinds of vehicles on which these differentials are used. The goods are, at least in part, identical; and the channels of trade would be, in part, the same.

Regarding the purchasers, opposer has established that its principal business is differentials for heavy equipment. But the record also shows that opposer attends trade shows and advertises in magazines directed to the after market, i.e., off-road vehicles. Even if we assume that most of the purchasers are sophisticated (i.e., engineers), nonetheless, clearly there is an after market for these goods. Opposer has established common law trade name use for the products with respect to both, and applicant's identification of goods is not limited as to the purchasers in any way. Thus, we must assume that the goods could be purchased by all usual purchasers, from engineers to "shade tree mechanics." See *Canadian Imperial Bank of Commerce, National Association v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987); *In re Smith and Mehaffey*, 31 USPQ2d 1531 (TTAB 1994); and *In re Elbaum*, 211 USPQ 639 (TTAB 1981).

Turning to a consideration of the involved marks, we must compare applicant's mark and opposer's trade name in

their entireties. See *Opryland USA Inc. v. The Great American Music Show Inc.*, 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1992).

The fact that applicant's marks and opposer's trade name share a common term ("trac") does not necessarily mean that the marks as a whole project the same image or impression. See *Olay Company, Inc. v. Avon Products, Inc.*, 178 USPQ 502 (TTAB 1973). This is especially true where applicant's mark is presented in the special form previously reproduced in this decision. Specifically, the element RITE is separately capitalized and stands out. Moreover, the word RITE is completely dissimilar from the word TECH. The words RITE and TECH have extremely different meanings and impressions--RITE connotes "correct" or "suitable," while TECH connotes something technical in nature.

Applicant has introduced twenty third-party registrations in International Class 12, all of which include the term "trac" (or a phonetic equivalent thereof). These marks include TRAC-LOK<sup>8</sup>, HYDRATRAK<sup>9</sup>, and POWERTRAX<sup>10</sup>, all for differentials for land vehicles. Of course, third-party registrations are not evidence of use of the marks shown therein, or that the public is familiar with them. But they may be used to indicate that a commonly registered

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<sup>8</sup> Registration No. 1,742,249.

<sup>9</sup> Registration No. 1,932,632.

<sup>10</sup> Registration No. 2,205,169.

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element has a suggestive (or descriptive) meaning for particular goods such that the differences in other portions of the marks may be sufficient to render the marks as a whole distinguishable. See *Aries Systems Corp. v. World Book Inc.*, 23 USPQ2d 1742, footnote 15 (TTAB 1992).

Moreover, there is evidence of third-party use of the term "trac" in trademarks for differentials. During cross examination, opposer's witness, Ralph McGee, testified that he was aware of differential manufacturers other than applicant that use "trac" or a phonetic equivalent as part of their marks in connection with their products, such as GOLDTRAX. (Dep., p. 79). He also testified that he was aware of Dana Corporation's use of the term TRAC-LOK for differentials. (Dep., p. 81). When there is the presence of a common element in marks extensively used by entities unrelated as to source, purchasers may not rely upon such elements as source indicators but they will look to other elements as a means of distinguishing the source of the goods. See *Helene Curtis Industries Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618, 1622 (TTAB 1989).

The mere fact that opposer's trade name and applicant's mark both include "trac" is not enough for a finding of likelihood of confusion, given the weakness or suggestiveness of "trac" and the specific differences in TECH and RITE. In this case opposer's trade name and

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applicant's trademark, as a whole, are different in sound and appearance, and they convey different meanings and commercial impressions.

Accordingly, we find confusion is not likely. See *Stouffer Corporation v. Health Valley Natural Foods Inc.*, 1 USPQ2d 1900 (TTAB 1986) (LEAN LIVING and LEAN CUISINE, both for food products, held not confusingly similar); *Electronic Water Conditioners, Inc. v. Turbomag Corporation*, 221 USPQ 162 (TTAB 1984) (TURBO-MAG and ELECTRO-MAG, both for water conditioning units for electromagnetically treating water and removing scale, held not confusingly similar); *American Standard Inc. v. Scott & Fetzer Company*, 200 USPQ 457 (TTAB 1978) (AQUA STREAM for faucets and AQUAMIX, AQUAMETER, and AQUARIAN II, all for faucets, as well as AQUASEAL for valves, et al., held not confusingly similar); and *Fort Howard Paper Company v. Marcal Paper Mills, Inc.*, 189 USPQ 305 (TTAB 1975) (SOF-PAC for toilet tissue and SOF-KNIT for paper towels and toilet tissue and SOF-NAP for paper napkins held not confusingly similar).

In reaching this conclusion, we have considered opposer's contention that its trade name TRACTECH is famous. It bases this assertion on use since 1979, and advertising of over \$1.1 million in the last three years, with "corresponding substantial annual sales" (opposer's brief, p. 10). The record shows only that opposer has used its

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trade name for about twenty years. There is no evidence of sales in the record; and opposer's advertising figures for 1996-1998 are for differentials, and thus could include money spent not only on advertising products sold under opposer's trade name, but also for differentials sold under opposer's various other trademarks. This record falls far short of establishing that opposer's trade name is famous.

We find that, based upon a consideration of all relevant du Pont factors, confusion as to source is not likely between applicant's mark and opposer's trade name, when used on the involved goods.

Decision: The opposition is dismissed.

E. J. Seeherman

B. A. Chapman

D. E. Bucher  
Administrative Trademark Judges,  
Trademark Trial and Appeal Board