

Hearing:
February 8, 2000

Paper No. 24
Bottorff

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB JULY 6, 00

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **Northeastern Plastics, Inc.**

Serial No. 75/025,478

Michael A. Grow and Elizabeth Cohen of Arent Fox Kintner Plotkin & Kahn, PLLC for Northeastern Plastics, Inc.

James A. Rauen, Trademark Examining Attorney, Law Office 103 (Michael A. Szoke, Managing Attorney)

Before **Walters, Wendel and Bottorff**, Administrative Trademark Judges.

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

Applicant seeks registration of the mark MECHANIX CHOICE, in typed form, for goods identified in the application as "jumper cables."¹ The Trademark Examining Attorney refused registration under Trademark Act Section

¹ Serial No. 75/025,478, filed July 24, 1997. The application was filed on the basis of intent-to-use under Trademark Act Section 1(b). Applicant filed an Amendment to Allege Use during prosecution of the application, alleging therein February 1996 as the date of first use of the mark anywhere and first use of the mark in commerce.

2(d), 15 U.S.C. §1052(d), citing, as a bar to registration of applicant's mark, the previously-registered mark²

MECHANICS CHOICE, which is for goods identified, in the registration, as:

Metal goods for automotive and industrial use - namely, nuts, bolts and screws; bins and cabinets; casters; chains and chain parts, namely, turnbuckles, shackles and harness snaps; clamps; cotter pins; dowel pins; nails; fittings for pipe and hose; grab handles; metal hanger straps; hood catches; hooks; keys; locks; clevis pins; lynch pins; roll pins; rivets; rods; and washers [all in Class 6];

Lubricants and multi-purpose greases for automotive and industrial use; and penetrating oils [all in Class 4];

Chemicals for automotive and industrial use - namely, chemical waterproof and rustproof sealants; gasket strippers; battery terminal coatings; belt dressings; adhesives; engine starting fluids [all in Class 1];

Paints and protective coatings for automotive and industrial use - namely, enamels and rustproof coatings [all in Class 2];

Cleaners for automotive and industrial use - namely, cleaners for glass, engines, batteries, and machinery; penetrants for removing rust; and degreasers [all in Class 3].

Applicant and the Trademark Examining Attorney filed main briefs, and applicant filed a reply brief. An oral

² Registration No. 1,262,075, issued December 27, 1983. Affidavits under Sections 8 and 15 accepted and acknowledged.

hearing was held, at which both applicant's counsel and the Trademark Examining Attorney appeared.³ We affirm the refusal to register.⁴

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).

³ At the oral hearing, applicant's counsel requested reconsideration of the Board's September 16, 1999 order denying applicant's September 9, 1999 request for suspension of the appeal and remand of the application to the Trademark Examining Attorney for consideration of additional evidence proffered by applicant. The Board denied applicant's oral request for reconsideration, and informed applicant that any request for reconsideration must be made in writing. No such written request for reconsideration having been received, the Board's September 16, 1999 order stands. The Board has not considered the evidence submitted by applicant on September 9, 1999.

⁴ We also note that, in response to the Trademark Examining Attorney's Section 2(d) refusal, applicant attempted to amend its application to one seeking registration on the Supplemental Register. The Trademark Examining Attorney rejected the proposed amendment on the ground that applicant's mark had been refused registration under Section 2(d), and thus was ineligible for registration on the Supplemental Register under the terms of Trademark Act Section 23. The Trademark Examining Attorney subsequently made his refusal to register on the Supplemental Register final. Neither applicant nor the Trademark Examining Attorney has addressed this issue in the briefs on appeal. Although applicant never formally withdrew the proposed amendment, applicant has argued in its briefs on appeal that its mark is inherently distinctive. We infer therefrom that applicant no longer is contending that its mark should be registered on the Supplemental Register, and have deemed applicant to have withdrawn its request for amendment to that register. In any event, our decision on the Trademark Examining Attorney's Section 2(d) refusal would be the same whether applicant was seeking registration on the Principal Register or on the Supplemental Register.

The first likelihood of confusion factor to consider in this case is whether the respective marks MECHANIX CHOICE and MECHANICS CHOICE, when viewed in their entireties in terms of appearance, sound, meaning and overall commercial impression, are similar or dissimilar. We find that the marks are identical in terms of sound and meaning, and almost identical in appearance. Indeed, the only point of dissimilarity between the two marks is applicant's substitution of the phonetically equivalent letter "X" for the letters "CS" in the word MECHANICS or MECHANIX.

We are not persuaded by applicant's arguments that the presence of the letter "X" in its mark, and the absence of that letter from registrant's mark, is sufficient to distinguish the marks in terms of their overall commercial impressions. Rather, we find that applicant's mark is merely an essentially inconsequential misspelling of registrant's mark, and that the marks are sufficiently similar, when viewed in their entireties, to create a likelihood of confusion if used on commercially related products. *Cf., e.g., In re Research Trading Corp.*, 793 F.2d 1277, 230 USPQ 49 (Fed. Cir. 1986)(ROPELOCK confusingly similar to ROPELOK); *Trak Incorporated v. Traq Incorporated*, 212 USPQ 846 (TTAB 1981)(TRAK confusingly

similar to TRAQ and design); *In re Mack*, 197 USPQ 755 (TTAB 1977)(MAC and design confusingly similar to MACK and design); and *Textron Inc. v. Thor Electronics Corp.*, 173 USPQ 753 (TTAB 1972)(TEXTRON confusingly similar to TECTRON).

We turn next to a consideration of the relationship between the goods identified in applicant's application, i.e., "jumper cables," and the various goods identified in the cited registration. The following general principles apply to this determination. It is not necessary that these respective goods be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is sufficient that the goods are 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 producer or that there is an association or connection between the producers of the respective goods. See *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991); *In re International Telephone & Telegraph Corp.*, 197 USPQ 910 (TTAB 1978). Moreover, the greater the degree of similarity between the parties' marks, the lesser

the degree of similarity required in the parties' goods to support a finding of likelihood of confusion, and where the parties' marks are essentially identical, there need be only a viable relationship between their respective goods in order to find that a likelihood of confusion exists.

See In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993); *In re Concordia International Forwarding Corp.*, 222 USPQ 355 (TTAB 1983).

In this case, we find that applicant's goods and the goods identified in the cited registration are sufficiently related that confusion is likely to result from use of confusingly similar marks on the respective goods. The Trademark Examining Attorney made of record fifteen third-party registrations, each of which includes in its identification of goods both jumper cables and one or more of the goods listed in the cited registration. This evidence supports a finding that applicant's goods and the registrant's goods are of a type which may emanate from a single source. *See In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993); *In re Mucky Duck Mustard Co., Inc.*, 6 USPQ2d 1467 (TTAB 1988). Additionally, the Trademark Examining Attorney has made of record excerpts from a mail order catalog from JC Whitney, an automotive

products supplier ("Your Special Project Source!").⁵ This catalog offers for sale both jumper cables and various of the goods identified in the cited registration, further demonstrating the existence of a commercial relationship between the respective goods.

We have carefully considered applicant's arguments in support of its contentions that its goods are unrelated to the goods cited in the registration, and that the respective goods are sold in different trade channels to different customers, but we are not persuaded. Rather, based on the evidence made of record by the Trademark Examining Attorney, we find that applicant's jumper cables are marketed in the same trade channels and to the same classes of customers as are many of the goods identified in the cited registration, and that these types of goods may emanate from a single source.

In particular, we reject applicant's suggestion that there is a clear demarcation between purchasers of the respective products, i.e., between professional mechanics who would purchase registrant's goods and general consumers who would purchase applicant's jumper cables. Neither

⁵ At the oral hearing, applicant's counsel objected to our consideration of this catalog on the grounds that it lacked foundation and/or context. We overrule the objection, and have accorded this evidence its proper probative value. See generally TBMP §1208.

applicant's identification of goods nor the identification of goods in the cited registration contains any limitations as to classes of purchasers or channels of trade, and we accordingly presume that the respective products are marketed in all normal trade channels and to all normal classes of purchasers for such goods. See *In re Elbaum*, 211 USPQ 639 (TTAB 1981). Professional mechanics and garages certainly are among the normal purchasers and users of jumper cables, just as general consumers, who also may be home mechanics and "do-it-yourselfers," are among the normal purchasers and users of many, if not all, of the goods identified in the cited registration. See generally *In re Jeep Corp.*, 222 USPQ 333 (USPQ 1984) and cases cited therein.

Thus, we find that applicant's goods and registrant's goods are sufficiently commercially related that confusion is likely to result if they are offered for sale under the confusingly similar marks involved in this case.

We likewise are not persuaded by applicant's argument that the cited registered mark is weak and entitled only to a limited scope of protection in our likelihood of confusion analysis.⁶ Under the sixth *du Pont* evidentiary

⁶ Indeed, applicant goes so far as to argue in its reply brief (improperly, in the context of this ex parte proceeding) that

factor, evidence showing that there are a number of similar marks in use on similar goods can weigh against a finding of likelihood of confusion in appropriate cases. However, applicant has failed to present competent evidence of any such third-party use, and this *du Pont* factor accordingly is of no avail to applicant in this case. The third-party registrations applicant has made of record in this case do not support applicant's contention, inasmuch as they are not evidence that the marks depicted therein are actually in use or that purchasers are familiar with them in the marketplace. See, e.g., *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992); *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693 (CCPA 1976).

Moreover, applicant identifies only two of those third-party registrations, i.e., SOUTHWEST AEROSERVICE THE MECHANIC'S CHOICE, and #1 NUMBER ONE CHOICE OF TOP MECHANICS, as being for marks which include both the word MECHANICS and the word CHOICE, and we note that the former of those registrations covers goods (aircraft components

registrant's mark is not inherently distinctive, notwithstanding the fact that the cited mark was registered on the Principal Register without any disclaimer or Section 2(f) claim of acquired distinctiveness. Likewise, it is immaterial to our decision herein that there is no evidence that registrant's mark has been widely advertised, or even used in commerce. Applicant's reliance on the absence of such evidence is misplaced.

and engines) which are not related to those involved in this case. Contrary to applicant's argument, the fact that these two quite different third-party marks might coexist on the register does not suffice to prove that registrant's mark MECHANICS CHOICE is so weak or diluted that applicant's essentially identical mark MECHANIX CHOICE should be allowed to coexist with it on the register.

Thus, while registrant's mark might be deemed to be somewhat suggestive, in view of the common meanings of the words of which it is composed, we cannot agree with applicant's contention that the scope of protection to be afforded the registered mark is so limited that applicant's nearly identical mark, used on goods which have been demonstrated to be commercially related to the goods identified in the registration, should be registered.

Finally, applicant argues that confusion is not likely because applicant is unaware of any instances of actual confusion having occurred despite applicant's and registrant's contemporaneous use of their respective marks since 1996. However, we find that the alleged absence of actual confusion is not particularly persuasive in this case, much less determinative. The period of time during which the alleged contemporaneous use has occurred is relatively slight. We have no evidence in the record

regarding respective sales and advertising figures, or regarding the geographic scope of use of the respective marks. Thus, we have no basis for concluding that any significant opportunity for actual confusion has arisen, and we cannot conclude that the alleged absence of actual confusion is entitled to any significant weight in our likelihood of confusion analysis in this case. See *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768 (TTAB 1992).

In conclusion, we have carefully considered all of the evidence in the record pertaining to the relevant *du Pont* likelihood of confusion factors, as well as applicant's arguments with respect thereto. In view of the high degree of similarity between applicant's mark and the registered mark and the demonstrated commercial relationship between applicant's goods and the goods identified in the cited registration, we find that confusion is likely to result from applicant's use of its mark on its identified goods, and that registration of applicant's mark accordingly is

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barred under Trademark Act Section 2(d).

Decision: The refusal to register is affirmed.

C. E. Walters

H. R. Wendel

C. M. Bottorff

Administrative Trademark Judges
Trademark Trial and Appeal Board