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THE TTAB

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
2900 Crystal Drive
Arlington, Virginia 22202-3513

Drost

Opposition No. 112,383

Daniels Pull Plow, Inc.

v.

Biggs Manufacturing, Inc.

and

P.O.R. Incorporated¹
(Joined as party defendant)

Before Quinn, Walters and Drost, Administrative Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

P.O.R. Incorporated (applicant) filed an application to register the mark SPEEDHITCH (typed drawing) for "vehicle towing accessories, namely hitches and ball mounts" in International Class 12.²

Daniel Pull Plow, Inc. (opposer) has opposed the registration of applicant's mark on the ground that

¹ P.O.R. Incorporated filed a declaration in which it states that it acquired the rights to this trademark application by assignment from Hitchquick, Inc. The declaration further states that Hitchquick, Inc. was assigned rights in this trademark application by Biggs Manufacturing, Inc.

² Serial No. 75/331,895, filed July 28, 1997, alleging a date of first use and a date of first use in commerce of December 17, 1996.

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applicant's mark is likely to cause confusion with its unregistered mark SPEEDHITCH for a mechanism that attaches a rear snow plow to the back of a vehicle.

On July 31, 2000, opposer filed a motion for summary judgment claiming that there were no material facts in dispute. It alleged that the marks are identical; the goods are the same; the channels of trade are the same; and it has priority of use. In regard to the goods, opposer alleges that:

Applicant's application is for hitches and ball mounts. Daniels also sells hitches. The parties' goods are the same (hitches) and are used for the same purpose (for towing). Under these circumstances, where the marks are identical and the goods are the same, confusion is likely.

Motion, p.2.

On August 28, 2000, applicant filed an opposition to opposer's motion for summary judgment. Applicant does not dispute opposer's priority. Opposition, p.1 ("While P.O.R. has no basis for disputing opposer's priority date of first use of SPEEDHITCH in connection with its products, P.O.R. maintains that genuine issues of material exist as to the issue of likelihood of confusion"); Opposition, p.2 ("P.O.R. has no basis for objecting to the entry of partial summary judgment on the issue of priority in this opposition proceeding").

Applicant alleges that there are material facts in dispute because:

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However, even a cursory glance at the parties' product literature shows very different products. Daniels is in the business of selling rear-mounted snow plows for four-wheel drive vehicles and offers its SPEEDHITCH device as a means for mounting the plows to the vehicles. Nowhere does Daniels' product literature show or discuss use of Daniels' products for trailers or trailering. Applicant sells a ball and hitch to be attached to vehicles specifically for the purpose of towing trailers. Nowhere does the product literature show or discuss use of P.O.R.'s hitch with a snow plow.

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Applicant further argues that opposer's product is not a substitute for a trailer hitch as is its product, that its customers and channels of trade are different, that there is a lack of actual confusion, and that there are other hitch marks registered that have a similar connotation.

Furthermore, applicant's declarant states that "Daniels' SPEEDHITCH product consists of a mount that is attached to a hitch that is already mounted to a vehicle, and is not itself a hitch." Porter declaration, p.3.

Opposer responds that applicant's goods are not limited to a particular type of hitch in the identification of goods in its application. The dictionary definition supports a broader definition of the word "hitch." Opposer also points out that the same dealers that sell snow plows also sell hitches. Opposer also argues that:

[P]urchasers of Daniels' SPEEDHITCH are also likely to purchase hitches because the Daniel SPEEDHITCH is designed to be used in connection with a hitch. 'The Daniels Pull Plow fits virtually any 4WD vehicle equipped with a 2" receiver-type-hitch. Thanks to the patented SPEEDHITCH™, hook-up is fast and easy.

Reply, pp.4-5.

MOTION FOR SUMMARY JUDGMENT

The Board may grant summary judgment for opposer "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); NCTA v. American Cinema Editors, 937 F.2d 1572, 19 USPQ2d 1424, 1427 (Fed. Cir. 1991). The nonmoving party, applicant in this case, "need only present evidence from which a jury might return a verdict in [its] favor." American v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986). All reasonable inferences to be drawn from the facts must be viewed in the light most favorable to the nonmoving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

LIKELIHOOD OF CONFUSION

Because applicant concedes that opposer has priority (Opposition, p.2), the issue in this case is whether opposer's mark SPEEDHITCH when used on its mechanism that mounts a rear snow plow to a vehicle is confusingly similar to applicant's mark SPEEDHITCH for goods identified as "vehicle towing accessories, namely hitches and ball mounts." Inasmuch as this is a likelihood of confusion case, we analyze this issue in light of the factors set out

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in In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 1361, 177 USPQ 563, 567 (CCPA 1973). Not all of the du Pont factors are applicable in every case. In re Dixie Restaurants, 105 F.3d 1405, 1406, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997).

In this case, the first factor that we consider is whether the marks are similar. Both applicant's mark and opposer's mark consist of the identical word SPEEDHITCH. Applicant's mark is depicted in a typed drawing and opposer's mark is commonly used without any special styling. Applicant admits that this factor favors opposer. Opposition, p.7.

Next, we look at the relatedness of the goods. In re Concordia Int'l Forwarding Corp., 222 USPQ 355, 356 (TTAB 1983) ("If the marks are the same or almost so, it is only necessary that there be a viable relationship between the goods or services in order to support a holding of likelihood of confusion."). To determine whether the goods are related, we must look to the identification of goods as they are defined in the application. See Octocom Systems, Inc. v. Houston Computers Services Inc., 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record

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may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed"). See also Canadian Imperial Bank of Commerce v. Wells Fargo Bank, 811 F.2d 1490, 1493, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987) ("it was [applicant] that sought to register its mark for the broad range of services, and it is on that basis that the Board correctly determined the likelihood of confusion issue"); Paula Payne Products v. Johnson Publishing Co., 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) ("Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods").

While applicant's goods are identified broadly as "vehicle towing accessories, namely hitches and ball mounts," it bases many of its arguments against granting the motion for summary judgment on the differences between the goods as actually used:

Looking first at the parties' products, paragraph 5 of the Daniels Declaration describes the products of both parties as "hitches." Yet, the exhibits submitted by the parties show the products to be very different. As shown by the product literature attached hereto as Exhibit 1, P.O.R.'s product literature is a hitch to be attached to vehicles specifically for the purpose of towing trailers. The product literature pictures trailers being towed and discusses the difficulties generally encountered in hitching a trailer to a vehicle using a traditional ball hitch mount. Nowhere does the product literature discuss use of P.O.R.'s hitch with a snow plow.

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Porter Declaration, pp.2-3.

While applicant's goods may be used more narrowly than defined in the application, we are bound to consider the goods as so defined in the application. Therefore, the fact that applicant may only be using its hitches for towing trailers does not restrict its identification of goods that is not so limited. Indeed, applicant's hitches include hitches that could be used to attach a rear snow plow to a vehicle.

On the other hand, opposer has not introduced any evidence that it has any application or registration for its mark. Therefore, because reasonable inferences must be viewed in the light most favorable to the nonmoving party, for the purposes of this motion we will consider opposer's goods to be only for a mechanism for attaching a rear snow plow to a vehicle. Opposer's goods are described as follows: "DANIELS™ PULL PLOW - As you can tell by the name of this product, Daniels Pull Plow is a rear mounted plow for heavy duty trucks." Snow Fighter's Quarterly, Summer 1993, p.17. In effect, opposer's plow is towed or pulled by the truck to increase the plowing efficiency of the front plow. The evidence also establishes that opposer's SPEEDHITCH product is used with a hitch. "The plow is attached to your vehicle at three points, including insertion into your 'Reese' type hitch. This unique design

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allows you to 'pull-up, hitch-up and pull-out" in a matter of minutes." Id.

The Daniels Pull Plow fits virtually any 4WD vehicle equipped with a 2" receiver-type hitch. Thanks to the patented **SPEEDHITCH™**, hook up is fast and easy.

Simply connect the **SPEEDHITCH™** to the truck's standard 2" receiver-type hitch and connect the hydraulic hoses.

The plow is connected at three points. The two drawbar arms are connected to two "ears" (which are welded onto the receiver hitch) while the third arm is connected to the horizontal tube on the **SPEEDHITCH™**.

Opposer's Ex. 3(b), p.4.

We must now determine, based on these goods, whether the goods are related. Applicant argues that:

Daniels is in the business of selling rear-mounted snow plows for four-wheel drive vehicles and offers its **SPEEDHITCH** device as a means for mounting the plows to the vehicles. Nowhere does Daniels' product literature show or discuss use of Daniels' product for trailers or trailering. Applicant sells a ball and hitch to be attached to vehicles specifically for the purpose of towing trailers. Nowhere does the product literature show or discuss use of P.O.R.'s hitch with a snow plow.

Thus the parties' products are actually quite different. P.O.R. sells a trailer hitch that is intended to be an alternative to more conventional trailer hitches. Such hitches are used for towing trailers. In contrast, the sole purpose of Daniels' product is to provide a means for attaching its Daniels Pull Plow to snow-removal vehicles. The product is not a substitute for a trailer hitch, as is P.O.R.'s product.

Opposition, p.7.

As noted earlier, the thrust of applicant's argument is that its goods as actually used are substantially different from opposer's goods. However, nothing in its

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identification is incompatible with applicant producing other hitches in addition to trailer hitches. Clearly, opposer's literature demonstrates that a hitch is necessary to attach its rear-mounted plow to a four-wheel drive vehicle. If a four-wheel drive owner purchased a pull plow with a SPEEDHITCH brand mechanism for mounting a plow to a vehicle, the person would need a hitch to actually attach the plow to the vehicle. There would be a likelihood of confusion when this person encountered SPEEDHITCH brand hitches.

Applicant also argues that "since the record shows that Daniels has used SPEEDHITCH only in connection with snow plow mounts, the board should assume for purpose of this motion that Daniels' snow plow mounts are sold by snow plow dealers." Opposition, p.8. Thus, applicant tries to severely limit the channels of trade of applicant's and opposer's goods. There are several flaws with applicant's arguments. First, there is no evidence that snow plow retailers only sell snow plows. Second, even if there were such a limited retailing group for snow plows, it would not be a reasonable inference to assume that these retailers would sell nothing but snow plows. It would be logical that these exclusively snow plow dealers would also sell the hitch necessary to attach the plow to the vehicle. Third, even if we were to assume that snow plow dealers did not

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sell hitches, when the purchaser of a snow plow with a SPEEDHITCH mounting means went to a retailer who sold the hitches that are needed to attach the plow to the vehicle and the customer encountered SPEEDHITCH hitches, they would likely believe that the hitch came from the same source as the rear plow mounting means.

Customers of the goods as defined in the application and opposer's mechanism for mounting a rear snow plow overlap. Again, while applicant argues that currently its goods are sold by hardware and automotive retailers, there is nothing in its identification of goods to limit the channels of trade to those retailers. Thus, we must assume that the goods are sold through all channels of trade for those goods. "[A]n application with an identification of goods having no restriction on trade channels obviously is not narrowed by testimony that the applicant's use is, in fact, restricted to a particular class of purchasers."

Octocom, 16 USPQ2d at 1788 (affirming Board's granting of opposer's motion for summary judgment). Even drawing inferences most favorable to applicant, we find that the channels of trade and purchasers for hitches and means for mounting snow plows to vehicles would not be distinct.

In addition to its arguments concerning the relatedness of the goods, applicant argues that it is unaware of any actual confusion despite the fact that the parties have been

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selling their goods simultaneously since 1996. Of course, it is unnecessary to show actual confusion in establishing likelihood of confusion. Giant Food, Inc. v. Nation's Foodservice, Inc., 710 F.2d 1565, 218 USPQ 390, 396 (Fed. Cir. 1983); J & J Snack Foods Corp. v. McDonald's Corp., 932 F.2d 1460, 18 USPQ2d 1889, 1892 (Fed. Cir. 1991).

Obviously, one factor that may contribute to the lack of actual confusion is the fact that applicant is not using its mark on goods as broadly as defined in its application. To reiterate, we are constrained to consider likelihood of confusion on the basis of the applicant's identified goods and not only in the limited capacity in which applicant has shown its goods to be used.

Applicant also asks the Board to take judicial notice of a listing of third-party registrations that it says demonstrate "the number of similar marks in use on similar goods." Opposition, p.10. We do not take judicial notice of registrations. In re Duofold, Inc., 184 USPQ 638, 640 (TTAB 1974). However, opposer has not objected to this evidence and, therefore, we will consider the listing, but it is not persuasive. We do not see how the fact the Office has registered HITCH-N-RUN, HASTY HITCH, FREEDOM HITCH, EASY HITCH, EASY-HITCH, OR INSTA-HITCH for goods identified as hitches, mounting units and racks supports its argument that SPEEDHITCH for vehicle towing accessories namely hitches and

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ball mounts and SPEEDHITCH for a mechanism for mounting a rear snow plow to a vehicle are not confusingly similar. The registrations do not support the registration of applicant's identical mark in view of opposer's mark. If applicant's point is that the mark SPEEDHITCH is weak, even a weak mark is entitled to protection when the identical mark is used on closely related goods. In re Colonial Stores, 216 USPQ 793, 795 (TTAB 1982).

Applicant also notes that the purchases of snow plows and trailer hitches are not made on impulse and that greater care is exercised in purchasing this equipment than a magazine or a candy bar. For purposes of summary judgment, we assume that is true, but it does not demonstrate that there is a material fact that precludes the grant of summary judgment. Certainly, even sophisticated purchasers would likely be confused when the identical marks are used on closely related goods like applicant's and opposer's goods. See Octocom, 918 F.2d at 942, 16 USPQ2d at 1787.

Finally, applicant's other arguments, that there is no evidence of expanded recognition of opposer's mark on other products or that there is no evidence of either parties' use of their mark as a house mark or as part of a family of marks, do not preclude the grant of opposer's motion for summary judgment.

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Having considered all the evidence and the pleadings, we conclude that applicant's mark when used on the goods described in the application is confusingly similar to opposer's mark when used on its goods.

Decision: Opposer's motion for summary judgment is granted. The opposition is sustained, judgment is entered against applicant, and registration to applicant is refused.