

8/29/01

**THIS DISPOSITION
IS NOT CITABLE AS PRECEDENT
OF THE T.T.A.B.**

Hearing:
June 12, 2001

Paper No. 13
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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Anton/Bauer, Incorporated

Serial No. 75/659,877

Allen D. Brufsky for Anton/Bauer, Incorporated.

Charles G. Joyner, Jr., Trademark Examining Attorney, Law
Office 112 (Janice O'Lear, Managing Attorney).

Before Simms, Bottorff and Rogers,
Administrative Trademark Judges.

Opinion by Rogers, Administrative Trademark Judge:

Anton/Bauer, Incorporated has filed an intent-to-use application to register MAXX as a trademark for "batteries for use with portable video equipment," in International Class 9. The Examining Attorney has refused registration under Section 2(d) of the Lanham Act, 15 U.S.C. §1052(d). The ground is that applicant's mark, if used in connection with the identified goods, would be likely to cause confusion or mistake or to deceive consumers, in view of

the prior registration¹ of the mark set forth below for "batteries":



When the refusal was made final, applicant appealed. Both applicant and the Examining Attorney have filed briefs and presented oral arguments to the Board. We affirm the refusal.

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). In the analysis of likelihood of confusion for this case, key considerations are the similarities of the marks, the legal equivalence of the identified goods, and the number and

¹ Registration No. 2,127,332 issued January 6, 1998, and lists January 9, 1997 as registrant's date of first use and first use in commerce.

nature of similar marks that have been adopted and used on or in connection with similar goods.

In regard to the goods, applicant has argued that its batteries are of a very specific type and for "a separate market other than normal batteries." Also, applicant argued at the oral hearing that users of its portable video equipment batteries are professionals and highly sophisticated.

Our analysis of the similarity or relatedness of the goods is based on the identifications in the involved application and registration. See Octocom Systems Inc. v. Houston Computers Services Inc., 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990), and Canadian Imperial Bank of Commerce, National Association v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1815-16 (Fed. Cir. 1987). The identification in the registration is not restricted in any way and could include batteries for use with portable video equipment. Moreover, applicant's identification is not restricted to batteries used by professional video equipment operators and must, therefore, be read to include even batteries for use with home video equipment, i.e., equipment that would not necessarily be operated by highly sophisticated users. In short, we find the goods in the cited registration to encompass applicant's goods; and the

channels of trade and classes of consumers would presumptively be the same.

In regard to the sight, sound and meaning of the respective marks, we note that there is the potential for both similarities and dissimilarities in appearance, the marks almost certainly would be pronounced the same, and the marks have the same connotation or meaning.

The addition of an extra "X" to applicant's mark, and the presence of the lightning bolt in registrant's mark, would be visual differences. Nonetheless, because applicant has applied to register its mark in typed form, we must consider the possibility that it could, in actual use, be set forth in the same typeface as that employed by registrant and in a vertical display. Sunnen Products Co. v. Sunex International Inc. 1 USPQ2d 1744, 1747 (TTAB 1987), *citing* Kimberly-Clark Corp. v. H. Douglas Enterprises, 774 F.2d 1144, 227 USPQ 541, 543 (Fed. Cir. 1985).

We find it likely that the marks would be pronounced the same. It is unlikely that consumers would attempt to articulate applicant's "double-x" MAXX differently from registrant's "single-x" MAX. Moreover, we agree with the Examining Attorney that consumers would be more likely to refer to registrant's goods as "MAX" batteries rather than

try and articulate, as a word, the design element of registrant's mark, when calling for registrant's goods.

Finally, we agree with applicant's apparent contention that the term "max," in the context of this case, is highly suggestive of batteries with "maximum" power. It is precisely for this reason that we find the marks to have the same connotation.²

A major point argued by applicant is the existence of four third-party registrations for marks containing the term "max" and covering batteries of one type or another.³ Applicant analogizes this case to that faced by the Board in In re Hamilton Bank, 222 USPQ 174 (TTAB 1984). In that case, an Examining Attorney refused registration of a stylized version of the word KEY based on the prior registration of five KEY-formative marks for various banking services. The applicant therein entered into the record 15 additional registrations for KEY-formative marks,

² At the oral hearing, applicant asserted that the max portion of registrant's mark is descriptive and asserted that the Examining Attorney has overlooked standard dictionary definitions of "max" as meaning "maximum." We disagree with applicant's criticism of the Examining Attorney, as applicant never made any such dictionary definitions of record. Nonetheless, we agree with the notion that both "MAX" and "MAXX," used for batteries, will be perceived as connoting maximum power.

³ Applicant also pointed to an application for a "max" mark for, inter alia, "power supply units," but this application was subsequently amended to delete such goods from the identification.

for various types of banking, lending or financial services. The Board stated:

In the case at hand we are presented with a total of twenty registered marks owned by fourteen different entities which contain the word "KEY" in combination with other word and design elements. Each registration is for some sort of financial service. Most relate specifically to banking services; all are related closely enough so that use of confusingly similar marks to identify the services would create a likelihood of confusion.

It is clear that the term "KEY" has been widely adopted in the financial field. We attribute this to the suggestive quality of the term as applied to such services. ...Because the term "KEY" has been widely adopted and registered and because it may be considered suggestive of the services in this case, it is a weak element in the various marks in which it appears.

... The term has weak trademark significance in this field because of its suggestiveness, which is evidenced by its widespread adoption and registration. In the case at hand the applicant's mark is no more likely to cause confusion with the five cited registered marks than the five cited marks are likely to cause confusion with the fifteen other registered marks which contain the term "KEY."

Id. at 178-79.

Though the *Hamilton Bank* case at least appears to present an apt analogy to the case at hand, we do not find it as analogous to the instant case as does applicant.

First, the number of prior registrations referenced in this case is much lower than the number in *Hamilton Bank*.

Second, three of these four other registrations are for specific, and distinguishable, types of batteries. Third, the marks in all four of these registrations utilize one or more other terms in conjunction with "max". The cited registration, while it does not have another term, has a design element. We disagree with applicant's contention that its addition of a second "X" to its mark is the equivalent of adding, as in the other registrations, another term or design element.

In *Hamilton Bank*, the Board found that the marks in the cited registrations were no more likely to be confused with the applicant's mark than were the marks in the other registrations that were not cited against the applicant. In this case, by contrast, applicant's mark is more likely to be confused with the one previously registered mark that has been cited than with the other four that were not cited. In short, the circumstances in this case are not the same as the circumstances *Hamilton Bank*.

We acknowledge that the existence of four third-party registrations for MAX-formative marks for different types of batteries at first glance appears unusual. We do not pretend to be able to explain the processing and examination of each of the applications which resulted in issuance of these other registrations; nor is it our

responsibility to do so in this appeal from the refusal of the involved application. We are constrained to review the record before us insofar as it bears on the various *du Pont* factors. See In re Nett Designs Inc., 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) ("Needless to say, this court encourages the PTO to achieve a uniform standard for assessing registrability of marks. Nonetheless, the Board (and this court in its limited review) must assess each mark on the record ... submitted with the application."). Having done so, we find that if consumers who are familiar with the cited registrant's MAX and design mark for batteries in general encounter MAXX for a particular type of battery, confusion is likely.

Moreover, even if we consider the third-party registrations as evidence that the cited mark is highly suggestive and somewhat weak, the owner of a registration for a weak mark still is entitled to protection against registration by a subsequent user of a virtually identical mark for legally equivalent goods. See Hollister Incorporated v. Ident A Pet, Inc., 193 USPQ 439 (TTAB 1976).

Under the circumstances of this case, we resolve any doubts regarding the registrability of applicant's mark in

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favor of registrant. See TBC Corp. v. Holsa Inc., 126 F.3d 1470, 44 USPQ2d 1315 (Fed. Cir. 1997).

Decision: The refusal of registration is affirmed.