

7/30/02

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

Paper No. 14
Bottorff

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

BFS Brands, LLC¹
v.
Hercules Tire & Rubber Company

Opposition No. 118,201
to application Serial No. 75/618,610
filed on January 11, 1999

Peter G. Mack of Foley & Lardner for BFS Brands, LLC.

Donald R. Fraser of MacMillan, Sobanski & Todd LLC for
Hercules Tire & Rubber Company.

Before Hohein, Bucher and Bottorff, Administrative
Trademark Judges.

Opinion by Bottorff, Administrative Trademark Judge:

Applicant Hercules Tire & Rubber Company

("applicant") seeks registration on the Principal
Register of the mark SIGNET WINTER TRAX (in typed form;
WINTER disclaimed) for "vehicular tires."²

¹ By change of name from Bridgestone/Firestone Research, Inc.,
recorded in the Assignment Branch at Reel 2401, Frame 0692.

² Serial No. 75/618,610, filed January 11, 1999. The
application was filed as an intent-to-use application; an

Opposition No. 118,201

Registration has been opposed by BFS Brands, LLC ("opposer"), on the ground that applicant's mark, as applied to applicant's goods, so resembles opposer's mark WINTERTRAX, previously used by opposer on vehicle tires and not abandoned, as to be likely to cause confusion, to cause mistake, or to deceive, and that registration of applicant's mark accordingly is barred under Trademark Act Section 2(d), 15 U.S.C. §1052(d).³ Applicant filed an answer by which it denied the allegations of the notice of opposition which are essential to opposer's claim.

The evidence of record consists of the pleadings herein, the file of the opposed application, the testimony deposition of opposer's witness Philip J. Pasci (and exhibits thereto), the stipulated testimony of opposer's witness Michael Mileski (and exhibit attached thereto), and opposer's notice of reliance on certain of applicant's responses to opposer's interrogatories. Applicant submitted no evidence.

Amendment to Allege Use was filed on July 26, 1999, alleging April 1, 1999 as the date of first use anywhere and the date of first use in commerce.

³ Opposer's notice of opposition also alleges, as a separate ground of opposition, that applicant has not used the unitary mark depicted on the drawing page of the application. Opposer has not presented any evidence, nor any argument in its brief, in support of this allegation. Accordingly, we deem opposer to have waived this pleaded ground of opposition, and we give it no further consideration.

Opposition No. 118,201

Opposer filed a brief on the case, but applicant filed no brief. No oral hearing was requested. We sustain the opposition.

The undisputed evidence of record establishes that opposer has continuously used the mark WINTERTRAX on vehicle tires since August 1997, a date prior to the earliest date upon which applicant can rely, i.e., the January 11, 1999 application filing date. In view thereof, we find that opposer has established its standing to bring this opposition proceeding, as well as its Section 2(d) priority.

Our likelihood of confusion determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the likelihood of confusion factors set forth in *In re E. I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

Opposition No. 118,201

Based on the testimony of opposer's witnesses and the exhibits attached thereto, and on the identification of goods in applicant's application, we find that the parties' goods are identical, i.e., passenger vehicle tires. In view of the identity of goods, and in view of the absence of any restrictions in applicant's identification of goods as to trade channels or classes of purchasers, we further find that the parties' respective goods move in the same trade channels, and are marketed to the same classes of purchasers. These facts weigh in favor of a finding of likelihood of confusion.

We also find that applicant's mark SIGNET WINTER TRAX and opposer's mark WINTERTRAX are confusingly similar in their overall commercial impressions, when the marks are compared in their entireties in terms of appearance, sound and connotation. The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See Sealed Air Corp.*

Opposition No. 118,201

v. Scott Paper Co., 190 USPQ 106 (TTAB 1975). Where, as in the present case, the marks would appear on virtually identical goods, the degree of similarity between the marks which is necessary to support a finding of likely confusion declines. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ 1698 (Fed. Cir. 1992).

Applying these principles to the present case, we find that opposer's mark WINTERTRAX and the WINTER TRAX portion of applicant's mark are identical in terms of sound and connotation, and essentially identical in terms of appearance; the presence of a space between WINTER and TRAX in applicant's mark, and the absence of such space in opposer's mark, are inconsequential for purposes of our comparison of the two marks. The similarity in appearance is further enhanced by the fact that both marks use the same misspelling of the word TRACKS, i.e. TRAX.

Likewise, the presence of the apparent house mark SIGNET in applicant's mark does not suffice to eliminate the confusing similarity between the parties' marks. WINTERTRAX, or its equivalent WINTER TRAX, is sufficiently distinctive that applicant's addition of a house mark will not avoid a likelihood of confusion.

Opposition No. 118,201

See, e.g., In re Christian Dior, S.A., 225 USPQ 533 (TTAB 1985), and cases cited therein. Purchasers familiar with applicant's SIGNET WINTER TRAX mark for tires, upon encountering opposer's WINTERTRAX tires, will be likely to assume that there is a source or sponsorship connection between the two.

Thus, given the identical nature of the goods, trade channels and classes of customers, and the similarity of the marks in terms of their overall commercial impressions, we find that a likelihood of confusion exists in this case, and that registration of applicant's mark is barred under

Opposition No. 118,201

Trademark Act Section 2(d).

Decision: The opposition is sustained, and registration to applicant is refused.