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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Todson, Inc.

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Serial No. 76451248

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Myron Amer for Todson, Inc.

Elissa Garber Kon, Trademark Examining Attorney, Law Office  
116 (Meryl Hershkowitz, Managing Attorney).

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Before Seeherman, Hanak and Bottorff, Administrative  
Trademark Judges.

Opinion by Hanak, Administrative Trademark Judge:

Todson, Inc. (applicant) seeks to register in typed  
drawing form BRUTE for "bicycle locks." The intent-to-use  
application was filed on September 3, 2002.

Citing Section 2(d) of the Trademark Act, the  
Examining Attorney has refused registration on the basis  
that applicant's mark, as applied to bicycle locks, is  
likely to cause confusion with the mark THE BRUTE,  
previously registered in typed drawing form for "locks."  
Registration No. 1,039,107.

When the refusal to register was made final, applicant  
appealed to this Board. Applicant and the Examining

Attorney filed briefs. Applicant did not request a hearing.

In any likelihood of confusion analysis, two key, although not exclusive, considerations are the similarities of the marks and the similarities of the goods or services. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.").

Considering first the marks, we find that they are essentially identical. Words such as "the" and "a" have little source identifying significance. Applicant has merely taken the clearly dominant portion of the registered mark (THE BRUTE) and adopted it as its mark. Moreover, both applicant's mark and the registered mark are depicted in typed drawing form. This means that the registration for THE BRUTE "is not limited to the mark depicted in any special form," and hence we are mandated "to visualize what other forms the mark might appear in." Phillips Petroleum Co. v. C.J. Webb Inc., 442 F.2d 1376, 170 USPQ 35, 36 (CCPA 1971). Registrant is entirely free to depict the subordinate word THE on one line in small lettering and the dominant word BRUTE in much larger lettering on a second

line. When so depicted, registrant's mark would be virtually identical to applicant's mark.

Thus, the first Dupont "factor weighs heavily against applicant" because applicant's mark is virtually identical to the registered mark. In re Martin's Famous Pastry Shoppe, Inc., 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984).

Turning to a consideration of applicant's goods and the goods of the cited registration, we note that because the marks are virtually identical, their contemporaneous use can lead to the assumption that there is a common source "even when [the] goods or services are not competitive or intrinsically related." In re Shell Oil Co., 922 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993). However, in this case we find that applicant's goods and registrant's goods are legally identical. Registrant's broad description of goods (locks) covers locks of all types, including applicant's bicycle locks.

Hence, given the fact that the marks are virtually identical and the goods are legally identical, confusion is not only likely, but it is inevitable.

Two final comments are in order. First, applicant argues at page 2 of its brief that the identification of goods in the cited registration (locks) "is not specific,

definite or clear." Applicant then points to a brochure put out by registrant which indicates that registrant makes "high security locks for home, business, industry and government," and that these include "safe locks, vault locks, time locks, and specialty padlocks." To begin with, this is but one of registrant's brochures. We have no way of knowing whether registrant has other brochures which may indicate that it manufactures bicycle locks. However, more importantly, applicant's argument constitutes an impermissible attack in an ex parte proceeding upon the cited registration by attempting to limit its description of the goods. In re Dixie Restaurants, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

Second, as a corollary argument, applicant argues at page 3 of its brief that when there is an "improper identification" of goods in the cited registration, this Board is free to consider extrinsic evidence (presumably registrant's brochure) to determine the meaning of registrant's identification of goods (locks). In this regard, applicant cites the case of In re Trackmobile Inc., 15 USPQ2d 1152, 1154 (TTAB 1990). Applicant totally misreads Trackmobile. That case stands for the proposition that if the cited registration contains terms of art not readily understood by members of the Board, applicant is

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free to present extrinsic evidence explaining the meaning of these terms of art. In this case, we have a situation that is the exact opposite of that in Trackmobile. Here the description of registrant's goods is an extremely common, easily understood term, namely, "locks."

Decision: The refusal to register is affirmed.