

THIS DECISION IS NOT
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OF THE TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Mid-USA Cycle Parts, Inc.

Serial No. 78085992

John W. Kepler, III and Brian B. Diekhoff of Polsinelli
Shalton Welte Suelthaus for applicant.

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(Thomas Shaw, Managing Attorney).

Before Hanak, Quinn and Bottorff,
Administrative Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

An application was filed by Mid-USA Cycle Parts, Inc.
to register the mark shown below



("Performance Systems" disclaimed) for "internal combustion
engine parts for motorcycles, namely, pistons, connecting

rods, bushings; crank shafts; emission reduction units for motors and engines namely EGR valves; cam shafts; oil pumps; alternators; generators; electronic ignitions; ignition magnetos; spark plug wires; mufflers; carburetors; [and] anti-noise cowlings."¹

The trademark examining attorney refused registration on the ground of likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), based on the prior registration of the mark POWERHOUSE for "catalytic converters for treating exhaust gases."²

When the refusal to register was made final, applicant appealed. Applicant and the examining attorney filed briefs. An oral hearing was not requested.

Applicant contends that the marks are dissimilar and that the goods are not related and are not sold in the same trade channels. Applicant also asserts that the respective goods are bought by sophisticated purchasers, among whom are skilled mechanics and technicians, who are familiar with applicant's self-described "suite" of POWER HOUSE PERFORMANCE SYSTEMS and design marks for applicant's

¹ Application Serial No. 78085992, filed September 28, 2001, based on a date of first use anywhere and a date of first use in commerce of 1995. The lining in the drawing is for shading purposes only.

² Registration No. 1953266, issued January 30, 1996; combined affidavits under Sections 8 and 15 filed.

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product line. In this connection, applicant claimed ownership of these previously issued registrations, all for the same logo mark as the one sought to be registered herein: Reg. No. 2179897 for "electrical components of motorcycles, namely, batteries, coils, and computer software for determining engine performance as a function of selected engine and valve components"; Reg. No. 2349379 for "internal combustion engine parts for motorcycles, namely, crank cases and exhaust pipes"; and Reg. No. 2672774 for "engines for land vehicles." Applicant also owns a prior registration of the same logo mark as the one involved here, but with the inclusion of the stylized word "PLUS": Reg. No. 2516483 for "electrical components of motorcycles, namely, batteries." Lastly, pursuant to a request to divide filed in the instant application after the refusal in International Class 7 was made final, application serial no. 78975076 was created as a child application; the application matured into Reg. No. 2836697 for "wheel bearings for land vehicles" in International Class 12. In support of its position, applicant submitted excerpts of registrant's Internet website, a patent covering registrant's catalytic converters and a specimen from registrant's registration file, all to show that registrant's goods are large industrial units and are not

designed for use in vehicles. Applicant contends that it is proper to consider this extrinsic evidence inasmuch as registrant's recitation of goods is somewhat unclear due to the omission of the particular use or type of catalytic converter. Further, applicant claims, without any supporting evidence, that motorcycles do not usually include catalytic converters; according to applicant, catalytic converters were invented in response to strict emission control standards passed for automobiles.

The examining attorney maintains that applicant's mark is dominated by the words "POWER HOUSE," and that applicant's mark is similar enough to registrant's mark POWERHOUSE as to be likely to cause confusion among consumers. The examining attorney further contends that the goods are related in that applicant's and registrant's goods, as identified in the cited registration, may be used in vehicles. According to the examining attorney, the goods are presumed to travel in similar trade channels to similar classes of purchasers. There is no need to consider extrinsic evidence relating to registrant's goods, the examining attorney argues, because the respective goods are defined in commonly understood terms. In support of the refusal, the examining attorney submitted copies of third-party applications and a registration showing,

according to the examining attorney, that entities have adopted a single mark for both catalytic converters and a variety of engine parts.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also: *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also: *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

With respect to the marks, we recognize that there are similarities between them in sound, appearance and meaning. The dominant literal portion of applicant's mark, POWER HOUSE, is essentially identical to the entirety of the cited mark, POWERHOUSE. In comparing the marks, however, we must consider the marks in their entireties, and the other prominent, distinguishing features of applicant's mark cannot be ignored. Applicant's mark includes a

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relatively large eagle design. Further, although disclaimed and subordinate to "POWER HOUSE," the additional words "PERFORMANCE SYSTEMS" must also be considered. These features serve, when comparing the marks in their entireties, to distinguish applicant's logo mark from registrant's typed mark. See *In re Electrolyte Laboratories, Inc.*, 929 F.2d 645, 16 USPQ2d 1239 (Fed. Cir. 1990); *In re Bed & Breakfast Registry*, 791 F.2d 157, 229 USPQ 818 (Fed. Cir. 1986); and *Spice Islands, Inc. v. The Frank Tea & Spice Co.*, 505 F.2d 1293, 184 USPQ 35 (CCPA 1974).

Another factor to consider is the laudatorily suggestive nature of the marks. In this connection, we take judicial notice of the dictionary definition of the term "powerhouse": "a building in which mechanical, electrical, or other power is generated; one having or wielding great power." Webster's Third New International Dictionary (unabridged ed. 1993). The respective marks convey the notion that the product sold thereunder is powerful. We find that the suggestiveness of the cited mark limits somewhat the scope of protection to be afforded thereto.

Turning next to the goods, although applicant urges us to consider extrinsic evidence to limit registrant's

catalytic converters to industrial applications, we see no reason to do so. We do not share applicant's view that registrant's identification of goods "catalytic converters for treating exhaust gases" is "somewhat ambiguous."

(Brief, p. 11). Although the identification is a bit broad in that the identification does not include any specific limitation as to application, we see no need to resort to extrinsic evidence to discern the nature of the goods.

Registrant's identification of good is, in our view, clear. See *In re Continental Graphics Corp.*, 52 USPQ2d 1374 (TTAB 1999). Cf. *In re Trackmobile, Inc.*, 15 USPQ2d 1152 (TTAB 1990). In this case, as in every proceeding, we must compare the goods as they are identified in the involved application and registration. See *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993); and *In re Bercut-Vandervoort & Co.*, 229 USPQ 763 (TTAB 1976).

Inasmuch as there is no limitation in registrant's identification of goods, the "catalytic converters for treating exhaust gases" must be presumed to encompass all goods of the type described, and not just large catalytic converters for industrial applications.

Notwithstanding the above presumption, the goods are distinctly different. Although both catalytic converters and internal combustion engine parts for motorcycles might

travel in the same trade channels (e.g., vehicle parts distributorships and stores) to similar classes of purchasers (e.g., both sophisticated mechanics and do-it-yourself consumers), that nexus is too tenuous a connection on which to base a finding of likelihood of confusion, especially in view of the differences between the marks and their suggestiveness.

In order to demonstrate the requisite relatedness of the goods, the examining submitted copies of one third-party registration and seven third-party applications wherein the identifications of goods list both catalytic converters and internal combustion engine parts. Third-party registrations which individually cover a number of different items and which are based on use in commerce serve to suggest that the listed goods are of a type that may emanate from a single source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993). Third-party applications, however, are evidence of nothing more than that the applications were filed on a particular date.

The examining attorney's evidence is, to say the least, sparse. Because only one entity could be found with a registration for both types of goods, we certainly cannot say that consumers would assume that these goods would emanate from the same source. And, as indicated above, the

third-party applications (four of which are intent-to-use applications) are not probative on this point. Even if the applications had matured into registrations, issues would remain as to the probative value of this specific evidence in this case. Of the seven applications, two are based on Section 44 of the Trademark Act, and all but one of the seven applied-for marks appear to be house marks for a wide variety of products. The Office simply has not provided sufficient evidence for us to find that applicant's and registrant's goods are related so that, when sold under the involved marks, consumers would be likely to be confused.

Based on the record before us, we see the examining attorney's assessment of the likelihood of confusion as amounting to only a speculative, theoretical possibility. In sum, in view of the cumulative differences between the marks and the goods sold thereunder, we find that confusion is unlikely to occur in the marketplace.

Decision: The refusal to register is reversed.