

**THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB**

Hearing:  
January 7, 2009

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February 17, 2009

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re The Boler Company

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Serial No. 77059048

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Rodney L. Skoglund of Renner, Kenner, Grieve, Bobak, Taylor & Weber for The Boler Company.

Dannean J. Hetzel, Trademark Examining Attorney, Law Office 106 (Mary I. Sparrow, Managing Attorney).

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Before Cataldo, Walsh and Bergsman, Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

The Boler Company ("applicant") filed an intent-to-use application on the Principal Register for the mark QUAANTUM, in standard character form, for "trailer suspension systems, incorporating wheel end systems," in Class 12.

The Trademark Examining Attorney refused to register applicant's mark under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. §1052(d), on the ground that applicant's mark is likely to cause confusion with the registered mark

QUANTUM, in standard character form, for "tires," in Class 12.<sup>1</sup>

Our determination of likelihood of confusion 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 issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). See also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (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, 29 (CCPA 1976) ("The 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").

A. The similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.

We turn first to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entirety as to appearance, sound,

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<sup>1</sup> Registration No. 3042761, issued January 10, 2006.

connotation and commercial impression. *In re E. I. du Pont De Nemours & Co.*, *supra*. In a particular case, any one of these means of comparison may be critical in finding the marks to be similar. *In re White Swan Ltd.*, 9 USPQ2d 1534, 1535 (TTAB 1988); *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1042 (TTAB 1988).

In comparing the marks, we are mindful that 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 so that confusion as to the source of the goods and services offered under the respective marks is likely to result. *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd unpublished*, No. 92-1086 (Fed. Cir. June 5, 1992). The proper focus is on the recollection of the average customer, who retains a general rather than a specific impression of the marks. *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

The applicant's mark QUAANTUM is virtually indistinguishable from the registered mark QUANTUM. The only difference between the two marks is applicant's use of the double letter "A" in the middle of its mark. If a consumer even noticed the use of the double "A," he/she would likely recognize it as a mere variation of the word "Quantum," or as a typographical error.

Applicant contends that its use of the double letter "A" is significant because applicant owns three other registrations that include a double letter "A":

1. Registration No. 1898081 for the mark INTRAAX for "axle suspension assemblies for heavy duty land vehicles";
2. Registration No. 2134996 for the mark VanTraax for "suspension systems for land vehicles"; and,
3. Registration No. 2925975 for the mark TIREMAAX for a "tire inflation system."<sup>2</sup>

Accordingly, applicant asserts that consumers will associate applicant's QUAANTUM mark with its previously registered marks.

[A]n average purchaser of a trailer suspension system is familiar and knowledgeable with the industry and the types of suspension systems available

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<sup>2</sup> Copies of the registrations were made of record in applicant's August 2, 2007 response.

for tractor trailers.<sup>3</sup> Thus, given that Applicant already has marks for its other suspension systems or assemblies that employ a "AA" construct in the marks INTRAAX and VANTRAAX, an average purchaser will be aware of those trademarks and will know that the QUAANTUM trademark is from the same source as the INTRAAX and VANTRAAX goods. To say otherwise, would be to assert that average purchasers are not aware of the other types of suspension systems they would put on tractor trailers.<sup>4</sup>

There are two problems with applicant's argument. First, absent evidence of actual use of applicant's previously registered marks, they are entitled to little weight in our analysis. Copies of applicant's previously registered marks are not evidence that the marks are in use on a commercial scale or that the public has become familiar with them. See *Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462, 463 (CCPA 1973) (the purchasing public is not aware of registrations reposing in the U.S. Patent and Trademark Office); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988).

Second, applicant is essentially asking us to find that it has a family of marks incorporating the double letter "A." In essence, applicant contends that it is the

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<sup>3</sup> Applicant's description of goods is not limited to "tractor trailers." The import of this fact is discussed in our analysis of the similarity or dissimilarity and nature of the goods.

<sup>4</sup> Applicant's Brief, pp. 11-12.

owner of a group of different marks that incorporate the double letter "A" that have been used in such a way that consumers would recognize all the different double letter "A" marks used in connection with trailer suspension systems as emanating from a single source. See *J & J Snack Foods Corp. v. McDonald's Corp.*, 932 F.2d 1460, 18 USPQ2d 1889, 1891 (Fed. Cir. 1991). However, applicant did not submit any evidence to support its theory.

In view of the foregoing, we find that the marks are similar in terms of appearance, sound, connotation and commercial impression.

B. The similarity or dissimilarity and nature of the goods described in the application and registration.

Applicant is seeking to register its mark for "trailer suspension systems, incorporating wheel end systems." However, in its brief, applicant asserted that it sells suspension systems for tractor trailers.<sup>5</sup> In this regard, the likelihood of confusion is determined on the basis of

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<sup>5</sup> Applicant's Brief, p. 6. At oral argument, applicant's counsel confirmed that the QUAANTUM suspension system is proposed for use in connection with a tractor trailer. A "tractor trailer" is defined as "a combination trucking unit consisting of a tractor ["a short truck with a driver's cab but no body, designed for hauling a trailer or semitrailer"] hooked up to a full trailer or semitrailer." Random House Dictionary of the English Language (Unabridged), p. 2005 (2<sup>nd</sup> ed. 1987). The Board may take judicial notice of dictionary evidence. *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co.*, 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

the goods and services as they are identified in the application at issue. *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981); *In re William Hodges & Co., Inc.*, 190 USPQ 47, 48 (TTAB 1976). See also *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 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").

As the Court of Customs and Patent Appeals, the predecessor of our primary reviewing court, explained in *Tuxedo Monopoly, Inc. v. General Mills Fun Group, Inc.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981):

Here, appellant seeks to register the word MONOPOLY as its mark without any restrictions reflecting the facts in its actual use which it argues on this appeal prevent likelihood of confusion. We cannot take such facts into consideration unless set forth in its application.

Likewise, in this case, we must also analyze the similarity or dissimilarity and nature of the goods based on the description of the goods set forth in the

application. In other words, we may not limit applicant's trailer suspension systems to tractor trailer suspension systems. By the same token, we cannot limit or restrict the tires listed in the cited registration. Therefore, we must construe registrant's tires as encompassing tires for trailers.

The Examining Attorney contends that "the goods are similar in nature in that both are related automotive parts. Registrant's tires are used on land vehicles, as are applicant's goods."<sup>6</sup> To properly analyze the relationship of the goods, we must first discuss what they are. The relevant products are defined below:

1. "Automotive" means "pertaining to the design, operation, manufacture or sale of automobiles." "Automobiles" are "passenger vehicles designed for operation on ordinary roads and typically having four wheels and a gasoline or diesel internal-combustion engine."<sup>7</sup> Because applicant is seeking to register its mark for a trailer suspension system, automotive parts are not relevant to the issue before us.<sup>8</sup>

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<sup>6</sup> Examining Attorney's Brief, unnumbered page

<sup>7</sup> Random House Dictionary of the English Language (Unabridged), p. 141.

<sup>8</sup> The Examining Attorney did not submit any evidence showing a connection or relationship between trailer parts and automotive parts.



2. A "trailer" is defined as "a large van or wagon drawn by an automobile, truck, or tractor, used esp. in hauling freight by road."<sup>9</sup>

3. A "suspension system" is defined as "the arrangement of springs, shock absorbers, hangers, etc. in an automobile, railway car, etc. connecting the wheel-suspension units or axles to the chassis frame."<sup>10</sup>

4. A "vehicle" is defined as "any means in or by which someone travels or something is carried or conveyed; a means of conveyance or transport . . . a conveyance moving on wheels, runners, tracks of the like, as a cart, sled, automobile, or tractor."<sup>11</sup> Accordingly, a trailer is a vehicle.

5. Neither the Examining Attorney, nor the applicant, defined or explained the meaning of a "wheel end system."<sup>12</sup> In its request for reconsideration, applicant

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<sup>9</sup> Random House Dictionary of the English Language (Unabridged), p. 2007.

<sup>10</sup> Random House Dictionary of the English Language (Unabridged), p. 1917. See also the WIKIPEDIA entry attached to the October 3, 2007 Office Action.

<sup>11</sup> Random House Dictionary of the English Language (Unabridged), p. 2109.

<sup>12</sup> At oral argument, applicant's counsel explained that a "wheel end system" comprises all the components for attaching the wheel to the suspension system. However, arguments made at oral hearing must be based on the evidence of record at the time the appeal was filed. An oral hearing may not be used to introduce evidence. TBMP §1216 (2<sup>nd</sup> ed. rev. 2004). See also *In re Caterpillar*, 43 USPQ2d 1335, 1337 (TTAB 1997) (exhibits proffered at the oral hearing were not considered). Accordingly,

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attached an advertisement published in the December 2007 issue of *Heavy Duty Trucking* magazine for "Hendrickson Quaantum FX For Vocational Trailers."<sup>13</sup> The advertisement provides the following information:

The Quaantum FX melds suspension components, including extended service brakes and wheel ends, air springs and shock absorbers to work as part of a cohesive, long-life unit.

We find this description of applicant's products sufficient to corroborate applicant's explanation at the oral hearing that a wheel end system comprises all of the components for attaching the wheel to the suspension system.

The Examining Attorney submitted 11 third-party registrations that cover, *inter alia*, both tires and suspension systems as evidence that such products are a type that may emanate from a single source. *In re Infinity Broadcasting Corp.*, 60 USPQ2d 1214, 1217-1218 (TTAB 2001). However, only two of the registrations include trailer suspension systems and tires:

1. Registration No. 3116346 for the mark BUILT FOR OFF-ROAD; and,

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applicant's explanation is not evidence, and it was not considered.

<sup>13</sup> Applicant claimed ownership of the house mark HENDRICKSON. (Applicant's March 27, 2008 request for reconsideration, p. 2).

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2. Registration No. 3032748 for the mark  
TRAILER PRO.

One other registration was for "land vehicle parts," including tires and suspension systems: Registration No. 2696675 for the mark GRABATRAK. The remaining registrations were for automotive suspension systems and one for bike and motorcycle suspension systems. Because there was no evidence that the marketing of trailer suspension systems and tires is similar to the marketing of automotive suspension systems and tires, the registrations involving automobiles, bikes and motorcycles do not have any probative value.<sup>14</sup>

The Examining Attorney also submitted excerpts from a number of websites purportedly "demonstrating these goods

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<sup>14</sup> Applicant contends that the TRAILER PRO registration does not have any probative value because the specimen of use submitted in that application did not show the mark used with either tires or suspension systems. (Applicant's August 2, 2007 Response). TRAILER PRO was registered for numerous products in Class 12. If more than one item of goods is specified in an application in one class, it is not necessary to have a specimen for each product. TMEP §904.01(a) (5<sup>th</sup> ed. 2007). Accordingly, we cannot draw any negative inference from the specimens filed in that application.

Applicant also asserts that the registrations for the TRAILER PRO and BUILT FOR OFF-ROAD marks do not have any probative value because "Applicant was unable to find any evidence that the cited marks . . . are actually used on either tires or suspension systems." (Applicant's August 2, 2007 Response). However, applicant did not provide any corroborating evidence such as copies of the relevant websites.

marketed and/or sold through the same retail outlets.”<sup>15</sup> In fact, there were only two websites that showed trailer suspension systems and tires sold by the same retailer (wholesaletrailersupplies.com and centrevilletrailer.com). However, these websites do not show any trailer parts, including suspension systems, and tires sold under the same mark. Moreover, even if the websites for the automotive retailers were relevant, they do not show suspension systems and tires being sold under the same mark.

Based on this evidentiary showing (*i.e.*, three third-party registrations covering both trailer or vehicle suspension systems and tires and two websites for retail sales services, including trailer suspension systems and tires), we do not find that the Examining Attorney met her burden of proving that purchasers encountering trailer suspension systems and tires under the same or similar marks would conclude that they originate from the same source.

C. The similarity or dissimilarity of likely-to-continue trade channels and classes of consumers.

The Examining Attorney relies on the third-party registrations and websites discussed in the previous section to support her argument that trailer suspension

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<sup>15</sup> October 3, 2007 and April 27, 2008 Office Actions.

systems and tires move in the same channels of trade and are sold to the same classes of consumers. Applicant, however, argues that the evidence is insufficient to prove that the products move in the same channels of trade and are sold to the same classes of consumers. Because this factor deals with how and to whom the products are sold, we find that the two websites for retail sales services, including trailer suspension systems and tires, demonstrate that trailer suspension systems and tires are sold through the same channels of trade and are sold to the same consumers.

- D. The conditions under which and buyers to whom sales are made, i.e., "impulse" vs. careful, sophisticated purchasing.

Applicant contends that purchasers of trailer suspension systems are knowledgeable purchasers, and that the Examining Attorney has provided no evidence to the contrary. Applicant argues that relevant purchasers exercise a high degree of care for the following reasons:

Trailer suspension systems are custom designed and carefully crafted for various trailer models and applications. They must be purchased by those knowledgeable in the field of trailer construction and repair. The typical consumer is primarily a purchasing agent for trailer manufacturers. The suspension system must be carefully selected based upon a number of factors, including the make,

model, and intended use of the trailer.  
Thus, the consumer must be  
sophisticated and exercise a high  
degree of care in making the purchase.<sup>16</sup>

Applicant's argument is corroborated in part by the  
information in the *Trailer411.com* website.<sup>17</sup>

When choosing your [trailer] suspension  
system you are going to need to make a  
few considerations.

1. Trailer Size . . .
2. Capacity Options . . .
3. Number of Axles . . . You also  
need to consider the type of cargo you  
will be hauling. . . .

\* \* \*

The key is that you match the right  
trailer suspension with your specific  
application.

This *du Pont* factor focuses on the degree of care  
consumers use in purchasing the products at issue. For our  
purposes, the issue of consumer care relates to the degree  
to which consumers consider the marks, as well as any other  
information regarding source. Thus, we analyze consumer  
care based on the role trademarks play in the decision  
making process and how relevant consumers react to the  
QUAANTUM and QUANTUM trademarks. In considering the role

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<sup>16</sup> Applicant's Brief, p. 18.

<sup>17</sup> October 3, 2007 Office Action.

of consumer care in the likelihood of confusion analysis, we must determine whether the products at issue are sold under circumstances to insure care in discerning the source of the goods. *Industrial Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 UPQ 386, 387 (CCPA 1973).

In this regard, applicant did not explain how trademarks affect the purchasing decision. However, we are convinced that purchasers of trailer suspension systems, as well as trailer suspension systems incorporating wheel end systems, will exercise a high degree of care before purchasing applicant's products. A trailer suspension system is an unusual and complex product. Therefore, the purchase thereof involves considerable planning and a reasonably focused need for the product. It will be bought and sold by knowledgeable people. Undoubtedly, it will be a relatively expensive purchase. Accordingly, we believe that consumers will exercise a high degree of care in selecting a trailer suspension system, and consequently pay attention to the source of the product.

While any trailer owner may purchase tires for the trailer, the only overlap in customers would be the careful, sophisticated purchasers of applicant's products. Only the purchasers of trailer suspension systems would be exposed to both marks. Therefore, we find that the degree

of care likely to be exercised by purchasers of trailer suspension systems and tires does not support a finding of likelihood of confusion.

E. The number and nature of similar marks in use on similar goods.

Applicant argues that QUANTUM is a weak mark entitled to only a narrow scope of protection. In this regard, application points out that the word "Quantum" is the subject of over 1,000 marks in the Trademark Office database and that "there are 136 current marks in which "QUANTUM" is the full mark, and 116 of these are live registrations."<sup>18</sup> In addition, applicant submitted copies of four third-party registrations for the mark QUANTUM for wheelchairs, boats, truck accessories, and bicycles.<sup>19</sup>

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<sup>18</sup> Applicant's Brief, p. 19. Applicant submitted the hit list from the searches in its August 2, 2007 Response. The hit lists are not proper evidence of third-party registrations. To make registrations of record, soft copies of the registrations or the electronic equivalent thereof (*i.e.*, printouts or electronic copies of the registrations taken from the electronic search records of the USPTO) must be submitted. *Raccioppi v. Apogee Inc.*, 47 USPQ2d 1368 (TTAB 1998); *In re Smith & Mehaffey*, 31 USPQ2d 1531, 1532 n.3 (TTAB 1994); *Weyerhaeuser Co. v. Katz*, 24 USPQ2d 1230 (TTAB 1992); *In re Hub Distributing, Inc.*, 218 USPQ 284 (TTAB 1983). Moreover, third-party use is relevant only to the extent that it establishes that the consuming public is exposed to similar marks on similar goods. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 1373, 73 USPQ2d 1689, 1693 (Fed. Cir. 2005). Because the hit lists do not display the goods and services, they do not have any probative value.

<sup>19</sup> Applicant's March 27, 2008 request for reconsideration.



As indicated in Section A, absent evidence of actual use, third-party registrations have little probative value because they are not evidence that the marks are in use on a commercial scale or that the public has become familiar with them. See *Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 177 USPQ at 463. See also *In re Hub Distributing, Inc.*, 218 USPQ at 285.

[I]t would be sheer speculation to draw any inferences about which, if any of the marks subject of the third party (sic) registrations are still in use. Because of this doubt, third party (sic) registration evidence proves nothing about the impact of the third-party marks on purchasers in terms of dilution of the mark in question or conditioning of the purchasers as their weakness in distinguishing source.

*In re Hub Distributing, Inc.*, 218 USPQ at 286.

In view of the foregoing, applicant's argument that the mark QUANTUM is a weak mark entitled to only a narrow scope of protection is not well taken.

F. Balancing the factors.

Because the record fails to show that the goods on which the marks will be used are similar, and because the relevant consumers will exercise a high degree of care in purchasing the products at issue, we find that the marks and the goods would not be encountered under circumstances likely to give rise to the mistaken belief that they

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originate from the same source. Accordingly, we find that applicant's registration of the mark QUAANTUM for "trailer suspension systems, incorporating wheel end systems" is not likely to cause confusion with the registered mark QUANTUM for tires. We hasten to point, however, that on a different and more complete record, we might arrive at a different result.

Decision: The refusal to register is reversed.