

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

Mailed: September 27, 2011

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re KCK International, Inc.

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Serial No. 77820964

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Felix Wu of the Law Office of Felix Wu for KCK  
International, Inc.

Dawn Feldman Lehker, Trademark Examining Attorney, Law  
Office 111 (Robert L. Lorenzo, Managing Attorney).

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Before Walters, Grendel and Ritchie, Administrative  
Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

KCK International, Inc. has filed an application to register the mark shown below on the Principal Register for "liquid tire puncture sealant used to protect automobile, motorcycle, bicycle and other heavy equipment tires from punctures," in International Class 1.<sup>1</sup> The application includes a disclaimer of SEAL apart from the mark as a whole

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<sup>1</sup> Serial No. 77820964, filed September 4, 2009, based on use of the mark in commerce, alleging first use as of March 5, 2003 and first used in commerce on November 1, 2004.

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and the statement: "The mark consists of the red and blue stylized letters 'permaseal' with the letters 'perma' in blue and 'seal' in red [and] the colors red and blue are claimed as a feature of the mark."

**PermaSeal**

The examining attorney has issued a final refusal to register under Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the standard character mark PERMA SEAL, previously registered for "distributorship services in the field of tire repair materials," in International Class 35,"<sup>2</sup> that, if used on or in connection with applicant's goods, it would be likely to cause confusion or mistake or to deceive.

Applicant has appealed. Both applicant and the examining attorney have filed briefs. We affirm the refusal to register.

We note, first, that applicant has submitted evidentiary material with its brief and the examining attorney has objected to consideration of this material because it is untimely. We agree, and we have given the

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<sup>2</sup> Registration No. 3409831, issued April 8, 2008, to Colorado Automotive Supply and Equipment, Inc.

material no consideration. Moreover, even if we had considered this material, our decision would remain the same.

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). See also *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); and *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

In considering the evidence of record on these factors, "[w]hile it must consider each factor for which it has evidence, the Board may focus its analysis on dispositive factors, such as similarity of the marks and relatedness of the goods." *Han Beauty Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 57 USPQ2d 1557, 1559 (Fed. Cir. 2001). See also *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1357, 192 USPQ 24 (CCPA 1976) ("[t]he 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"); and *In re Azteca Restaurant*

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*Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein.

It is not necessary that the respective goods be identical or even competitive in order to find that they are related for purposes of our likelihood of confusion analysis. That is, the issue is not whether consumers would confuse the goods themselves, but rather whether they would be confused as to the source of the goods. See *Miss Universe L.P. v. Community Marketing Inc.*, 82 USPQ2d 1562, 1568 (TTAB 2007); *In re Rexel Inc.*, 223 USPQ 830, 831 (TTAB 1984).

#### *The Marks*

We turn, first, to the *du Pont* factor focusing on the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. *In re E. I. du Pont De Nemours & Co.*, 177 USPQ at 567. 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.*, 8 USPQ2d 1534, 1535 (TTAB 1988); *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1042 (TTAB 1988).

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 impressions that confusion as to the

source of the goods or services offered under the respective marks is likely to result. *H.D. Lee Co. v. Maidenform Inc.*, 87 USPQ2d 1715 (TTAB 2008). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *In re Association of the United States Army*, 85 USPQ2d 1264, 1269 (TTAB 2007); and *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Furthermore, although the marks at issue must be considered in their entireties, it is well settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

Both marks contain the identical components "Perma" and "Seal." In the registered mark, the two components, Perma and Seal, are separated by a space; however, this insignificant detail is insufficient to distinguish the marks. Applicant's mark merges the two components into a single word; however, the two words remain distinct both because the beginning letters, "P" and "S," are capitalized, and the two components are shown in complementary colors, Perma appears in blue and Seal appears in red. This color and merging of the two components does not distinguish the

marks. Nor do the differences between the marks change the connotation of the marks. To the extent PERMA SEAL is not arbitrary, its meaning is the same in both marks.

Thus, we agree with the examining attorney and we find the marks are substantially similar in terms of appearance, sound, connotation and commercial impression. Applicant makes no argument to the contrary.

*The Goods/Services*

Turning to consider the goods and services involved in this case, we note that the question of likelihood of confusion must be determined based on an analysis of the goods or services recited in applicant's application vis-à-vis the goods or services recited in the registration, rather than what the evidence shows the goods or services actually are. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). See also, *Octocom Systems, Inc. v. Houston Computer Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1992); and *The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ2d 1715 (TTAB 1991). Further, it is a general rule that goods or services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that goods or services are related in some manner or that some circumstances surrounding their marketing are such that they would be likely to be seen by

the same persons under circumstances which could give rise, because of the marks used therewith, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each parties' goods or services. *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991), and cases cited therein; and *Time Warner Entertainment Co. v. Jones*, 65 USPQ2d 1650, 1661 (TTAB 2002).

The question of likelihood of confusion is determined based on the identification of services in the applications vis-à-vis the services as set forth in the cited registration. *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 n.4 (Fed. Cir. 1993); *In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006).

Applicant's identified product is a liquid tire puncture sealant used to *protect* the tires of a variety of vehicles. Applicant contends that its goods, as identified, are limited to a sealant that prevents tire punctures. Registrant's services are "distributorship services in the field of tire repair materials." We note, first, that regardless of applicant's contentions that the registrant's services pertain only to automobiles, registrant's identification is not so limited and would encompass tire repair materials for the same vehicles noted in applicant's identification of goods. Next, we find that "tire repair

materials" encompasses materials used to prevent as well as fix punctures in tires. However, while there is no evidence in the record, even if the language "tire repair materials" does not encompass a sealant used to prevent tires from punctures, it certainly includes a sealant used to repair tire punctures. We do not find a significant distinction between tire repair and prevention. It is only logical that tire puncture repair and prevention materials are closely related. It is reasonable to assume that many purchasers of tire repair materials would also want materials to protect those tires from puncture, as both repair and prevention are aimed at keeping the tires in good condition. Applicant's goods are not limited to any particular trade channels, but customers of registrant's services could reasonably expect to find the closely related tire puncture repair and prevention materials at the same location, in this case, registrant's distributorship. Thus, we find that applicant's goods are closely related to registrant's services and the trade channels for applicant's goods are likely to encompass registrant's services.

Applicant has made a number of arguments that are not well taken. Applicant argues that it is a manufacturer selling internationally, whereas applicant is a single store in Colorado and registrant's use is confined to a small geographic area; that applicant has priority of use of its



mark; and that registrant's mark is weak because it is merely descriptive or highly suggestive. The geographic scope of applicant's goods and registrant's services is immaterial as we are considering only federal registrability, which is national in scope. Whether applicant has priority of use is also immaterial in this ex parte context; rather, such a challenge to the cited registration is appropriately before the Board only in the context of a petition to cancel. Finally, there is no evidence in the record regarding the strength of the marks, so we draw no conclusions in this regard. Rather, in this ex parte context, we are required to consider the registered mark to be valid and we note that even weak marks are entitled to protection.

Neither applicant nor the examining attorney has discussed any of the remaining *du Pont* factors. We note, nonetheless, that none seems to be applicable, inasmuch as we have no evidence with respect to them.

When we consider the record and the relevant likelihood of confusion factors, and all of applicant's arguments relating thereto, we conclude that in view of the substantial similarity in the commercial impressions of applicant's color mark, PERMASEAL, and registrant's mark, PERMA SEAL, their contemporaneous use on the closely related goods and services involved in this case is likely to cause

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confusion as to the source or sponsorship of such goods and services.

*Decision:* The refusal under Section 2(d) of the Act is affirmed.