

Request for Reconsideration after Final Action

The table below presents the data as entered.

Input Field	Entered
SERIAL NUMBER	85201536
LAW OFFICE ASSIGNED	LAW OFFICE 105
MARK SECTION (no change)	
ARGUMENT(S)	
<p>The Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. Section 1052(d), on the basis that the Applicant's mark, TRAILTRAC (the "Applicant's Mark"), when used on or in connection with Applicant's goods, is likely to cause confusion with the registered mark TRAIL TRAC owned by Summit Tire and Battery, Inc. (the "Registrant") and used on vehicle tires ("Registrant's Goods"). Applicant's Mark, on the other hand, is not used on tires but instead on:</p> <ul style="list-style-type: none">· Electronic brake controls for use in snowmobiles, all-terrain vehicles, and utility terrain vehicles, in International Class 9; and· Brake systems for snowmobiles, all-terrain vehicles, and utility terrain vehicles, in International Class 12. <p>The Examining Attorney has rejected registration of Applicant's Mark with respect to those goods specified in International Class 12, namely, brake systems for snowmobiles, all-terrain vehicles, and utility terrain vehicles ("Applicant's Goods").</p> <p>Applicant respectfully asserts that there is no likelihood of confusion between its mark and the Registrant's Mark cited by the Examining Attorney. In this case, the Examining Attorney emphasizes the similarities between the marks without assessing the significant differences in the goods. Even though the marks are similar in sound and appearance, this alone does not compel a finding that</p>	

confusion is likely to occur. *See Therma-Scan v. Thermoscan Inc.*, 63 U.S.P.Q.2d 1659, 1669 (6th Cir. 2002). Instead, many other factors are important in determining whether a likelihood of confusion exists, among which are the following:

1. the conditions under which, and buyers to whom, sales are made;
2. the similarity of the goods or services to which the marks are applied;
3. the similarity of the channels of trade;
4. the similarity of the marks in their entireties;
5. the fame of the prior or registered mark;
6. the number and nature of similar marks; and
7. actual confusion.

See In re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 1361, 177 U.S.P.Q. 563, 567 (C.C.P.A. 1973).

Analysis of the above-stated *du Pont* factors in the present case demonstrates that Applicant's Mark and Registrant's Mark are not confusingly similar. This response addresses the (i) relatedness of the goods; (ii) channels of trade; (iii) sophistication of the consumer; and (iv) existence of third-party marks. These factors clearly demonstrate that there is no likelihood of confusion between Applicant's Mark and the Registrant's Mark and that Applicant's Mark should be approved for publication in its entirety.

I. Distinctive Goods

As mentioned in Applicant's earlier Response filed on August 1, 2011, the practicalities of the commercial world, not mere theoretical relatedness, must determine whether goods are sufficiently related to lead to consumer confusion. There is no monopoly in a mark with respect to all goods or services, and similar or identical marks often co-exist without confusion. *See Quality Inns Int'l v. McDonald's Corp.*, 8 U.S.P.Q.2d 1633 (D.Md. 1988). In determining whether a likelihood of confusion exists, goods are related **only** if they are likely to be encountered by the same consumers under circumstances giving rise to the mistaken belief that the goods originate from, or are associated with, the same source. *See Trademark Manual of Examining Procedure* § 1207.01(a)(i); *see, e.g., On-Line Careline Inc. v. America Online Inc.*, 56 U.S.P.Q.2d 1471 (Fed. Cir. 2000). Indeed, "[w]hen two products are part of distinct sectors of a broad product category, they can be sufficiently unrelated that consumers are not likely to assume the products originate from the same mark." *Checkpoint Systems Inc. v. Check Point Software Technologies Inc.*, 60 U.S.P.Q.2d 1609, 1620 (3rd Cir. 2001). That is

precisely the case here.

Applicant's Goods consist of a braking system designed to improve vehicle performance with greater brake control, stability, steering ability and responsiveness. This is accomplished through hydraulic channels, electronic controls, sensors and software to provide controlled braking technology, similar to ABS (anti-lock braking system) technology widely used in today's automobiles. **See Exhibits A & B.** With the TRAILTRAC braking system, the driver is able to maintain control and prevent wheels from locking as the snowmobile, all-terrain vehicle or utility terrain vehicle slows down.

The stopping distance is reduced, and the driver is able to effectively steer the vehicle. The end result is a significant improvement in vehicle performance and personal safety. **See Exhibit B.** This particular braking system is particularly novel as it can be used on extreme, diverse and unpredictable surfaces, such as rocks or trails. In short, Applicant has introduced a completely advanced and greatly improved braking system to the marketplace.

In contrast, Registrant's Goods are limited to vehicle tires. Tires and specialized braking systems are similar only in that a vehicle includes both tires and brakes, just as a vehicle includes a steering mechanism, seat and thousands of other parts and accessories. Simply because Applicant's and Registrant's goods can both be used in various kinds of vehicles does not mean they are related. Moreover, Registrant's Goods appear to be limited to automobiles. **See Exhibit D.** While the registration simply lists "vehicle tires," it does not include small recreational vehicles such as snowmobiles (which does not even use tires), all-terrain vehicles or utility terrain vehicles. Unless further specified, "vehicles" typically refers to "automobiles." Regardless of whether there is any overlap of "vehicles" between Applicant and Registrant, tires and highly advanced braking systems are not at all the same and are often sold in different channels, to different consumers and are, of course, used for different purposes.

In a similar context, the TTAB rejected a "per se rule that vehicles, vehicle parts and accessories always must be deemed to be related and similar", stating that "no such rule exists." *In re Truckcraft Corporation*, 2003 WL 22273102 (TTAB 2003) (unpublished opinion). In *Truckcraft* the TTAB noted that "the decisions in which such goods were found to be related were based upon the facts that the goods in question **all comprised automotive parts, accessories, and equipment which could be purchased through the same channels of trade ...by the same classes of purchasers ...**". *Id. citing In re Jeep Corporation*, 222 U.S.P.Q. 333, 334 (TTAB 1984) (emphasis added). Based upon these

distinctions the TTAB approved registration of the mark TRUCKCRAFT for “structural parts for trucks, namely, dump truck bodies, truck bed flats, dumper beds, dump truck bed and body inserts for pickup trucks” even though the mark TRUCKRAFT was previously registered for “truck parts, namely brake blocks, oil seals, gearing, rebuilt clutches, water pumps, starts and moister ejectors.” *Id.*

Furthermore, the TTAB has previously approved the use of similar marks on automobiles and on automotive products by different manufacturers. *See In re General Motors Corp.*, 23 U.S.P.Q.2d 1465, (TTAB 1992). In *In re General Motors Corp.* an application to register the mark GRAND PRIX for “automobiles” was approved despite the fact that the identical mark GRAND PRIX was already registered by another manufacturer for (i) “automobile tires”, (ii) “motor vehicle parts—namely, wheels”, (iii) “motor oil” and “filters and oil filters for land vehicles and shock absorbers”, (iv) “automotive vehicle tires”, (v) “mufflers and brake parts for automotive vehicle[s]” and (vi) “automobile parts, namely, drive shafts, boots and velocity joints.” *Id.* at 1466-1467. Though the TTAB agreed with the Examining Attorney that the “respective goods must be considered to be closely related,” it found that confusion between the marks had not occurred in the past and was unlikely to occur in the future. *Id.* at 1468-1470.

If the TTAB found that consumers were able to discriminate between an identical mark used on automobiles and on a variety of automobile parts and accessories, surely consumers can discriminate between vehicle tires and specialty brake systems and controls for snowmobiles, all-terrain vehicles and utility terrain vehicles. In addition, the goods at issue are not sold to the same consumers. Registrant’s Goods are sold to independent tire dealers, who then sell the tires either directly to consumers or to automotive service centers. Applicant’s Goods, however, supply its goods to manufacturers who then incorporate the braking systems into their products. Any tangential relatedness between the goods is thereby ameliorated by the distinct trade channels and purchasers. With different trade channels, classes of consumers, and kinds of goods, the marks at issue should not be deemed confusingly similar and should be able to coexist without confusion.

II. Distinctive Trade Channels

Even if one finds the goods related in some way, the question is whether consumers would be confused as to the source of the goods. “Where the parties have different customers and market their

goods or services in different ways, the likelihood of confusion decreases.” *Therma-Scan Inc. v. Thermoscan Inc.*, 3 U.S.P.Q.2d 1659, 1666 (6th Cir. 2002) (explaining that this factor assists in assessing what actually happens in the marketplace); *see also Electronic Design & Sales, Inc. v. Electronic Data Systems Corp.*, 954 F. 2d 713, 21 U.S.P.Q. 2d 1388 (Fed. Cir. 1992) (holding no likelihood of confusion between the mark E.D.S. for computer services and the mark EDS for power supplies and battery chargers because sales were made in separate trade channels to different consumers, despite some overlap in markets). In other words, where trade channels are distinct and do not lead to the same purchasers, confusion is unlikely. *See Homeowners Group, Inc. v. Home Mktg. Specialists, Inc.* 18 U.S.P.Q. 2d 1587 (6th Cir. 1991).

The TTAB has held that goods sold in different channels in the automotive industry are unlikely to cause confusion. *Vetronix Corporation v. American Financial Warranty Corporation*, 2004 WL 240311 (TTAB 2004) (unpublished opinion). In *Vetronix* the TTAB held that the mark “MASTERTECH Vehicle Protection Program” used on vehicle service contracts covering mechanical breakdown was not likely to cause confusion with the mark “MASTERTECH” used on hand held testers of automobile electronic systems because the former was marketed to automobile salespeople while the latter was marketed to mechanics doing the repairs. *Id.*

In this case, it is unlikely that consumers would have the mistaken belief that the goods at issue emanate from a common source because Applicant and Registrant employ totally different trade channels. Applicant is part of the automotive supply chain for the manufacture of the consumer product, which, in this case, consist of snowmobiles, all-terrain vehicles and utility terrain vehicles. Its customers consist of manufacturers while Registrant sells its goods to independent tire dealers, who then sell to automotive service centers or the end consumer. **See Exhibits C & D.** Independent tire dealers specialize in tires and have nothing to do with the manufacture of brakes, much less highly specialized braking systems such as the one sold by Applicant in connection snowmobiles, all-terrain vehicles or utility terrain vehicles. Subsequent purchasers of Registrant’s Goods, such as automotive service centers, are not purchasers of Applicant’s Goods. Because there is no cross-over among the trade channels or consumers, it is unlikely that the applicable consumers would likely ever know that similar marks are used by Applicant and Registrant. The relevant consumers simply do not have contact with

both Applicant's and Registrant's Goods.

In a situation very similar to the current one, the Federal District Court of Minnesota approved registration of the mark "El Tigre" for use on snowmobiles by one manufacturer even though it was already registered for use on automobile tires and minibikes by another manufacturer. *See J.C. Penney Company, Inc. v. Arctic Enterprises, Inc.*, 375 F.Supp. 913, 915 (D. Minn. 1974). The court first held that because "El Tigre" was simply the Spanish translation of "The Tiger", it was suggestive, not fanciful or arbitrary, and therefore a weak trademark, noting that "hundreds of different marketed products use the tiger mark and tiger design." *Id.* at 914. The court found that, because (i) the "demographics and characteristics" of the average snowmobile purchaser and minibike purchaser were different, (ii) there was a substantial difference in selling price for snowmobiles, tires, and minibikes, (iii) the products were "markedly dissimilar", and (iv) the products were sold in separate markets, there would be no likelihood of confusion. *Id.* at 915. The court elaborated on the different channels through which the products were sold, noting that while the tires and minibikes were sold in "automobile centers and through catalogs," the snowmobiles were sold through approximately 1750 authorized dealers, and finally stating that the products "customarily are not sold in the same marketplace." *Id.* Finally, the court also noted that the tires and minibikes were "normally" sold with both the mark "El Tigre" and a J.C. Penny housemark while the name Arctic Cat was used in connection with the "El Tigre" mark on snowmobiles. *Id.*

The distinction between snowmobiles and tires is no more than the distinction between advanced braking systems and vehicle tires. If consumers can distinguish between identical marks on snowmobiles and tires, then they could certainly distinguish between similar goods on vehicle tires and braking systems for snowmobiles, all-terrain vehicles, and utility terrain vehicles. Additionally, as in *J.C. Penney Company, Inc.*, neither Applicant's Mark nor Registrant's Mark is a house brand. Applicant's Mark will often be advertised and marketed together with the mark "Hayes," while Registrant's Mark would likely be promoted in connection with "Summit." **See Exhibit D.** Such use, along with the specialized and distinct trade channels, will prevent any risk of confusion.

III. Sophisticated and Discriminating Purchasers

A likelihood of confusion is determined, among other factors, by evaluating the "reasonably

prudent” purchaser’s mistaken belief that the goods originate from, or are associated with, the same source. See *McCarthy on Trademarks and Unfair Competition*, § 23:91(4th ed. 1996). “When consumers exercise heightened care in evaluating the relevant products before making purchasing decisions, courts have found there is not a strong likelihood of confusion.” *Checkpoint Systems Inc. v. Check Point Software Technologies Inc.*, 60 U.S.P.Q.2d 1609, 1617 (3rd Cir. 2001). For example, in *Information Resources Inc. v. X*Press Information Services*, 6 U.S.P.Q.2d 1034 (TTAB 1988), the TTAB found no likelihood of confusion between computer-related goods and services where the goods and services involved were expensive and purchased with care and thought.

In this case, the relevant consumers are discriminating purchasers for specialized products. Registrant sells its products to independent tire dealers, who look to buy quality tires that sell well to consumers, are easy to market and result in few consumer complaints. End consumers of tires are shopping to replace existing tires and are concerned about quality, safety and price. As any driver knows, purchasing new tires is not a light or inexpensive purchase. Consumers are highly selective knowing that poor tires could cause a blowout, which has the potential to result in a serious car accident.

Consumers of Applicant’s Goods, on the other hand, consist of manufacturers who are also highly selective of the brakes and braking systems used to manufacture the end product. Applicant’s Goods have the potential to drastically improve the braking performance of snowmobiles, all-terrain vehicles and utility terrain vehicles, which can then improve the rider’s safety. Incorporating Applicant’s Goods in its products has the potential of truly differentiating its products among others in the marketplace since both vehicle performance and personal safety can be dramatically improved. Purchasing Applicant’s Goods are not casual purchases but rather done with significant knowledge of the braking system and vehicle performance.

In both cases, these are sophisticated purchasers looking for specific products and brands of quality that will improve performance and safety. For that reason, the purchasers are highly selective, careful with their purchases and not likely to be confused easily. These kinds of consumers do not expect the same company to manufacture or sell both tires and advanced braking systems.

IV. Third Party Marks

Although third party use is not relevant with respect to the issue of infringement, courts consider such use in determining likelihood of confusion. *Warhol Enterprises, Inc. v. Time Inc.*, 700 F. Supp. 760, 9 U.S.P.Q. 2d 1141 (Fed. Cir. 1988). Third-party registrations are useful if they tend to demonstrate that a mark, or a portion thereof, is suggestive or descriptive of certain goods and hence is entitled to only a narrow scope of protection. *See TMEP § 1207.01(c)(iv)*. A mark that is commonly used in connection with particular goods or services is less likely to be associated with a single source. *See e.g., J.C. Penney Company, Inc. v. Arctic Enterprises, Inc.*, 375 F.Supp. 913, 915 (D. Minn. 1974) (discussed above with respect to the “El Tigre” mark).

Applicant notes that the word “trail” is frequently used as a mark by third parties in connection with vehicles, parts and accessories. In fact, a brief check of USPTO records reveals a significant number of marks that use or incorporate the word “trail” relate to vehicles, parts and accessories. For example:

- TRAIL TOUGH, Reg. No. 4,049,426, for parts and accessories for four wheel drive vehicles, owned by Linda R. Bradshaw;
- TRAIL TUFF, Reg. No. 2,839,067, for custom manufactured components for off road vehicles, namely, bumpers, owned by Blender Products, Inc.;
- TRAIL BLAZER, Reg. No. 3,255,601, for all-terrain vehicles for off-road use only and structural parts therefore, owned by Polaris Industries Inc.;
- TRAILBLAZER, Reg. No. 2,629,101 for travel trailers and fifth wheel trailers, owned by Thor Tech, Inc.;
- TRAILBLAZER, Reg. No. 2,257,873, for motor vehicles, namely, sport utility vehicles, engines thereof and structural parts therefore, owned by General Motors LLC;
- TRAIL MASTER, Reg. No. 1,660,726, for suspension components for pick-up trucks, vans and recreational vehicles; namely, lift kits steering stabilizers, shock absorbers and leaf springs, owned by Trailmasters Products, Inc.;
- TRAIL MASTER, Reg. No., 3,083,191, for all terrain-vehicle tires, owned by Carlisle Intangible Company;
- TRAILMASTER, Reg. No. 1,371,217, for passenger road vehicles, namely vans, pickups and suburbans, and conversions thereof, owned by Trail Master Vehicles, Inc.;
- TRAIL-BREAKER, Reg. No. 3,027,796, for motorized two-wheel, cross-country passenger and cargo vehicle in the nature of a heavy duty motorcycle, owned by Rokon International, Inc.;
- TRAILBREAKER, Reg. No. 2,377,522, for vehicle tires, owned by Polymer Enterprises Corp;
- TRAIL RUNNER, Reg. No. 3,357,464, for recreational vehicles, namely, fifth wheel trailers and travel trailers, owned by Heartland Recreational Vehicles, LLC;
- TRAIL RUNNER, Reg. Nos. 3,378,902 and 2,046,071, for power transmission belts for land vehicles, owned by The Gates Corporation;
- TRAILRIDER, Reg. no. 3,080,897, for recreational vehicles, namely, travel trailers and fifth wheels, owned by Skyline Corporation;
- TRAILDRIVER, Reg. No., 3,966,026, for motor vehicles, namely, automobiles,

trucks, vans, sport utility vehicles and structural parts therefor, owned by Tag—The Accessory Group;

- TRAILAIR, Reg. No., 3,298,010, for land vehicle suspension parts, namely, equalizers, owned by Lippert Components Manufacturing, Inc.;
- TRAILAIR, Reg. No. 2,494,388, for vehicle hitches, owned by Lippert Components Manufacturing, Inc.;
- TRAIL SLAYER, Reg. No. 3,471,313, for suspension systems for sport utility vehicles, owned by Linda R. Bradshaw;
- TRAILTECH, Reg. No. 2,540,650, for motorcycle and all terrain vehicle computers, and sensor cables and mounting fittings sold together as a unit, owned by Trail Tech, Inc.;
- TRAILTECH, Reg. No. 2,408,552, for vehicles, namely, flat deck trailers, cargo trailers, transporters and truck decks, owned by Trailtech Inc.;
- TRAILTANK, Reg. No. 3,440,248, for oversized fuel tanks designed and produced for snowmobile recreational vehicles, owned by Creation Composites, LLC;
- TRAIL BOSS, Reg. No., 3,367,905, for recreational vehicles, namely, campers, owned by RV Manufacturing Enterprises, LLC;
- TRAILBLOC, Reg. Nos. 3,185,268 and 3,155,717, for continuously variable transmission for all types of land vehicle engines and motors, owned by Investissements CVTech Inc.;
- TRAIL TRACER, Reg. No. 3,199,667, for tires, excluding bicycle tires and tricycle tires, owned by TBC Trademarks, LLC;
- TRAILCART, Reg. No. 3,74,0152, for vehicles, namely, non-motorized all terrain vehicles, namely, human-powered four-wheeled cycles, owned by TrailCart GmbH;
- TRAIL JAMMER, Reg. No. 3,153,781, for kits for increasing vehicle engine performance, namely, an engine control module and a throttle body and air intake system for use wherewith, owned by Edge Products, LLC;
- TRAILMANOR, Reg. No., 3,970,029, for recreational vehicles, namely, campers, fifth wheel trailers, towable trailers, travel trailers, owned by Carol J. Hulsey;
- TRAIL GUIDE, Reg. No. 3,248,365, for hand held global positioning navigation system with vehicle mounted docking station, owned by Chrysler LLC;
- TRAIL ARMOR, Reg. No. 3,070,209, for body cladding for trucks and sport utility vehicles, owned by Bushwacker, Inc.;
- TRAIL RATED, Reg. No. 2,975,740, for motor vehicles, namely, sport utility vehicles; and structural parts and engines therefore, owned by Chrysler LLC;
- TRAIL RATED, Reg. No., 2,872,653, for motor vehicles, namely, sport utility vehicles, and structural parts therefore, owned by Chrysler Group LLC;
- TRAILOW, Reg. No., 3,855,613, for recreational vehicles, namely, towable trailers, owned by Ezee Trailers Limited;
- TRAILREADY, Reg. No. 3,328,858, for accessories for offroad vehicle body protection, namely, bumpers, specialty offroad wheels, bead locks, brush guards, skid plates, rocker panel covers, owned by TrailReady Products, LLC;
- TRAILFINDER, Reg. No., 3,644,027, for tires for all terrain vehicles, owned by The Reinalt-Thomas Corporation;
- TRAILCON, Reg. No. 2,959,089, for truck trailers and cargo trailers, owned by TrailCon Leasing Inc.;
- TRAILPORT, Reg. No. 3,318,960, for trailers, namely automobile trailers fused as secure permanent vehicle ports and as traveling vehicle ports, owned by Advanced Trailer Concepts, Inc.;
- TRAIL SHIELDS, Reg. No. 2,937,310, for adhering protective and decorative covers

for outer surfaces of off-road vehicles, owned by Truck Shields, LLC;

- TRAIL CLAW II, Reg. No. 2,503,718, for tires, namely those used in applications for agriculture, construction, lawn and garden, specialty, military and industrial vehicles, owned by Titan International, Inc.;
- TRAILBACK, Reg. No. 2,439,023, for running boards for trucks and sport utility vehicles, owned by Lund, Inc.;
- TRAIL-R-MATE, Reg. No. 2,343,154, for land vehicle parts, anemly endless track assemblies composed of support frame, idler and drive wheels, drive track, tensioner and replacement parts therefore, owned by Mattracks, Inc.;
- TRAIL CRUISER, Reg. No. 2,417,830, for recreational vehicles, namely, fifth wheel and travel trailers, owned by International Truck Intellectual Property Company, LLC;
- TRAIL CLIMBER, Reg. No. 2,254,670, for vehicle tires, owned by Summit Tire and Battery, Inc.;
- TRAIL RUNNER, Reg. No. 2,046,071, for power transmission belts for land vehicles, namely, variable speed belts, owned by The Gates Corporation;
- TRAIL CUTTER, Reg. No. 1,780,173, for vehicle tires, owned by TBC Trademarks, LLC;
- TRAIL HAWK, Reg. No. 1,885,964, for all-terrain vehicle tires, owned by Carlisle Intangible Company;
- TRAIL BOSS, Reg. No. 1,402,071, for motor vehicles, namely, all-terrain vehicles, owned by Polaris Industries L.P.;
- TRAIL PRO, Reg. No. 1,333,132, for off-road all terrain vehicle tires, owned by Carlisle Intangible Company;
- TRAIL WAGONS, Reg. No. 1,201,928, for customized vehicles, namely, automobiles, trucks and vans, owned by Trail Wagons Inc.;

This large sampling of third-party marks, all of which have already been registered, indicate that “trail” marks are afforded a narrow scope of protection and can co-exist without confusion. In fact, seemingly identical “trail” marks already co-exist and are federally registered, such as TRAIL TUFF and TRAIL TOUGH (Reg. Nos. 4,049,426 and 2,839,067); TRAIL BLAZER, TRAILBLAZER and TRAILBLAZER (Reg. Nos. 3,255,601, 2,629,101 and 2,257,873); TRAIL MASTER, TRAIL MASTER and TRAILMASTER (Reg. Nos. 1,660,726, 3,083,191 and 1,371,217); TRAIL-BREAKER and TRAILBREAKER (Reg. Nos. 3,027,796 and 2,377,522); and TRAIL RUNNER and TRAIL RUNNER (Reg. Nos. 3,357,464, 3,378,902 and 2,046,071).

The “trail” trademarks in connection with vehicles of any kind, parts and accessories show that it is already a crowded market for similar goods. If the Registrant’s Marks and the above marks can all co-exist without confusion, surely Applicant’s Mark would not cause any confusion and should be deemed registrable.

CONCLUSION

The Supreme Court has explained that a likelihood of confusion is akin to a “probability” of confusion. *See American Steel Foundries v. Robertson*, 269 U.S. 372, 46 S. Ct. 160 (1926). The mere possibility of confusion is inadequate, and it must be shown that the confusion is probable. *See August Storck K.G. v. Nabisco, Inc.*, 35 U.S.P.Q.2d 1211 (7th Cir. 1995). With the additional information provided herein, the Examining Attorney cannot state with certainty that Applicant’s Mark is likely to cause confusion, mistake or deception with the Registrants’ Marks, or that it may be likely to cause confusion with pending applications for registration of marks. Applicant’s Goods and Registrant’s Goods are distinct from each other, are sold in different trade channels to consumers with different needs, and are sold to consumers that are sophisticated and discerning in their purchases. Accordingly, Applicant asserts that a likelihood of confusion is not only **unlikely** but also **improbable**.

In view of the foregoing amendments and remarks, it is believed that all formal requirements are in order and that this application is in condition to be passed to publication. Such action by the Examining Attorney is therefore respectfully requested.

EVIDENCE SECTION

EVIDENCE FILE NAME(S)	
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DESCRIPTION OF EVIDENCE FILE	Exhibit A: Promotional material describing Applicant's Goods; Exhibit B: Promotional material describing Applicant's Goods; Exhibit C: Website materials noting Applicant's Consumers & Trade Channels; and Exhibit D: Website materials noting Registrant's Consumers & Trade Channels.
SIGNATURE SECTION	
RESPONSE SIGNATURE	/njr/
SIGNATORY'S NAME	Nicole J. Renouard
SIGNATORY'S POSITION	Attorney of record
SIGNATORY'S PHONE NUMBER	414.978.5533
DATE SIGNED	02/16/2012
AUTHORIZED SIGNATORY	YES

CONCURRENT APPEAL NOTICE FILED	YES
FILING INFORMATION SECTION	
SUBMIT DATE	Thu Feb 16 14:05:03 EST 2012
TEAS STAMP	USPTO/RFR-207.67.83.66-20 120216140503044635-852015 36-490b9e4d27339e9e54cd41 8ca88d617f-N/A-N/A-201202 16134916913920

PTO Form 1930 (Rev 9/2007)
OMB No. 0651-0050 (Exp. 4/30/2009)

Request for Reconsideration after Final Action To the Commissioner for Trademarks:

Application serial no. **85201536** has been amended as follows:

ARGUMENT(S)

In response to the substantive refusal(s), please note the following:

The Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. Section 1052(d), on the basis that the Applicant's mark, TRAILTRAC (the "Applicant's Mark"), when used on or in connection with Applicant's goods, is likely to cause confusion with the registered mark TRAIL TRAC owned by Summit Tire and Battery, Inc. (the "Registrant") and used on vehicle tires ("Registrant's Goods"). Applicant's Mark, on the other hand, is not used on tires but instead on:

- Electronic brake controls for use in snowmobiles, all-terrain vehicles, and utility terrain vehicles, in International Class 9; and
- Brake systems for snowmobiles, all-terrain vehicles, and utility terrain vehicles, in International Class 12.

The Examining Attorney has rejected registration of Applicant's Mark with respect to those goods specified in International Class 12, namely, brake systems for snowmobiles, all-terrain vehicles, and utility

terrain vehicles (“Applicant’s Goods”).

Applicant respectfully asserts that there is no likelihood of confusion between its mark and the Registrant’s Mark cited by the Examining Attorney. In this case, the Examining Attorney emphasizes the similarities between the marks without assessing the significant differences in the goods. Even though the marks are similar in sound and appearance, this alone does not compel a finding that confusion is likely to occur. *See Therma-Scan v. Thermoscan Inc.*, 63 U.S.P.Q.2d 1659, 1669 (6th Cir. 2002). Instead, many other factors are important in determining whether a likelihood of confusion exists, among which are the following:

1. the conditions under which, and buyers to whom, sales are made;
2. the similarity of the goods or services to which the marks are applied;
3. the similarity of the channels of trade;
4. the similarity of the marks in their entirety;
5. the fame of the prior or registered mark;
6. the number and nature of similar marks; and
7. actual confusion.

See In re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 1361, 177 U.S.P.Q. 563, 567 (C.C.P.A. 1973).

Analysis of the above-stated *du Pont* factors in the present case demonstrates that Applicant’s Mark and Registrant’s Mark are not confusingly similar. This response addresses the (i) relatedness of the goods; (ii) channels of trade; (iii) sophistication of the consumer; and (iv) existence of third-party marks. These factors clearly demonstrate that there is no likelihood of confusion between Applicant’s Mark and the Registrant’s Mark and that Applicant’s Mark should be approved for publication in its entirety.

I. Distinctive Goods

As mentioned in Applicant’s earlier Response filed on August 1, 2011, the practicalities of the commercial world, not mere theoretical relatedness, must determine whether goods are sufficiently related to lead to consumer confusion. There is no monopoly in a mark with respect to all goods or services, and similar or identical marks often co-exist without confusion. *See Quality Inns Int’l v. McDonald’s Corp.*, 8 U.S.P.Q.2d 1633 (D.Md. 1988). In determining whether a likelihood of confusion exists, goods are related **only** if they are likely to be encountered by the same consumers under circumstances giving rise to the mistaken belief that the goods originate from, or are associated with, the same source. *See Trademark Manual of Examining Procedure* § 1207.01(a)(i); *see, e.g., On-Line Careline Inc. v. America Online Inc.*, 56 U.S.P.Q.2d 1471 (Fed. Cir. 2000). Indeed, “[w]hen two products are part of distinct

sectors of a broad product category, they can be sufficiently unrelated that consumers are not likely to assume the products originate from the same mark.” *Checkpoint Systems Inc. v. Check Point Software Technologies Inc.*, 60 U.S.P.Q.2d 1609, 1620 (3rd Cir. 2001). That is precisely the case here.

Applicant’s Goods consist of a braking system designed to improve vehicle performance with greater brake control, stability, steering ability and responsiveness. This is accomplished through hydraulic channels, electronic controls, sensors and software to provide controlled braking technology, similar to ABS (anti-lock braking system) technology widely used in today’s automobiles. **See Exhibits A & B.** With the TRAILTRAC braking system, the driver is able to maintain control and prevent wheels from locking as the snowmobile, all-terrain vehicle or utility terrain vehicle slows down. The stopping distance is reduced, and the driver is able to effectively steer the vehicle. The end result is a significant improvement in vehicle performance and personal safety. **See Exhibit B.** This particular braking system is particularly novel as it can be used on extreme, diverse and unpredictable surfaces, such as rocks or trails. In short, Applicant has introduced a completely advanced and greatly improved braking system to the marketplace.

In contrast, Registrant’s Goods are limited to vehicle tires. Tires and specialized braking systems are similar only in that a vehicle includes both tires and brakes, just as a vehicle includes a steering mechanism, seat and thousands of other parts and accessories. Simply because Applicant’s and Registrant’s goods can both be used in various kinds of vehicles does not mean they are related. Moreover, Registrant’s Goods appear to be limited to automobiles. **See Exhibit D.** While the registration simply lists “vehicle tires,” it does not include small recreational vehicles such as snowmobiles (which does not even use tires), all-terrain vehicles or utility terrain vehicles. Unless further specified, “vehicles” typically refers to “automobiles.” Regardless of whether there is any overlap of “vehicles” between Applicant and Registrant, tires and highly advanced braking systems are not at all the same and are often sold in different channels, to different consumers and are, of course, used for different purposes.

In a similar context, the TTAB rejected a “per se rule that vehicles, vehicle parts and accessories always must be deemed to be related and similar”, stating that “no such rule exists.” *In re Truckcraft Corporation*, 2003 WL 22273102 (TTAB 2003) (unpublished opinion). In *Truckcraft* the TTAB noted that “the decisions in which such goods were found to be related were based upon the facts that the goods

in question **all comprised automotive parts, accessories, and equipment which could be purchased through the same channels of trade ...by the same classes of purchasers ...**". *Id. citing In re Jeep Corporation*, 222 U.S.P.Q. 333, 334 (TTAB 1984) (emphasis added). Based upon these distinctions the TTAB approved registration of the mark TRUCKCRAFT for "structural parts for trucks, namely, dump truck bodies, truck bed flats, dumper beds, dump truck bed and body inserts for pickup trucks" even though the mark TRUCKRAFT was previously registered for "truck parts, namely brake blocks, oil seals, gearing, rebuilt clutches, water pumps, starts and moister ejectors." *Id.*

Furthermore, the TTAB has previously approved the use of similar marks on automobiles and on automotive products by different manufacturers. *See In re General Motors Corp.*, 23 U.S.P.Q.2d 1465, (TTAB 1992). In *In re General Motors Corp.* an application to register the mark GRAND PRIX for "automobiles" was approved despite the fact that the identical mark GRAND PRIX was already registered by another manufacturer for (i) "automobile tires", (ii) "motor vehicle parts—namely, wheels", (iii) "motor oil" and "filters and oil filters for land vehicles and shock absorbers", (iv) "automotive vehicle tires", (v) "mufflers and brake parts for automotive vehicle[s]" and (vi) "automobile parts, namely, drive shafts, boots and velocity joints." *Id.* at 1466-1467. Though the TTAB agreed with the Examining Attorney that the "respective goods must be considered to be closely related," it found that confusion between the marks had not occurred in the past and was unlikely to occur in the future. *Id.* at 1468-1470.

If the TTAB found that consumers were able to discriminate between an identical mark used on automobiles and on a variety of automobile parts and accessories, surely consumers can discriminate between vehicle tires and specialty brake systems and controls for snowmobiles, all-terrain vehicles and utility terrain vehicles. In addition, the goods at issue are not sold to the same consumers. Registrant's Goods are sold to independent tire dealers, who then sell the tires either directly to consumers or to automotive service centers. Applicant's Goods, however, supply its goods to manufacturers who then incorporate the braking systems into their products. Any tangential relatedness between the goods is thereby ameliorated by the distinct trade channels and purchasers. With different trade channels, classes of consumers, and kinds of goods, the marks at issue should not be deemed confusingly similar and should be able to coexist without confusion.

II. Distinctive Trade Channels

Even if one finds the goods related in some way, the question is whether consumers would be confused as to the source of the goods. “Where the parties have different customers and market their goods or services in different ways, the likelihood of confusion decreases.” *Therma-Scan Inc. v. Thermoscan Inc.*, 3 U.S.P.Q.2d 1659, 1666 (6th Cir. 2002) (explaining that this factor assists in assessing what actually happens in the marketplace); *see also Electronic Design & Sales, Inc. v. Electronic Data Systems Corp.*, 954 F. 2d 713, 21 U.S.P.Q. 2d 1388 (Fed. Cir. 1992) (holding no likelihood of confusion between the mark E.D.S. for computer services and the mark EDS for power supplies and battery chargers because sales were made in separate trade channels to different consumers, despite some overlap in markets). In other words, where trade channels are distinct and do not lead to the same purchasers, confusion is unlikely. *See Homeowners Group, Inc. v. Home Mktg. Specialists, Inc.* 18 U.S.P.Q. 2d 1587 (6th Cir. 1991).

The TTAB has held that goods sold in different channels in the automotive industry are unlikely to cause confusion. *Vetronix Corporation v. American Financial Warranty Corporation*, 2004 WL 240311 (TTAB 2004) (unpublished opinion). In *Vetronix* the TTAB held that the mark “MASTERTECH Vehicle Protection Program” used on vehicle service contracts covering mechanical breakdown was not likely to cause confusion with the mark “MASTERTECH” used on hand held testers of automobile electronic systems because the former was marketed to automobile salespeople while the latter was marketed to mechanics doing the repairs. *Id.*

In this case, it is unlikely that consumers would have the mistaken belief that the goods at issue emanate from a common source because Applicant and Registrant employ totally different trade channels. Applicant is part of the automotive supply chain for the manufacture of the consumer product, which, in this case, consist of snowmobiles, all-terrain vehicles and utility terrain vehicles. Its customers consist of manufacturers while Registrant sells its goods to independent tire dealers, who then sell to automotive service centers or the end consumer. **See Exhibits C & D.** Independent tire dealers specialize in tires and have nothing to do with the manufacture of brakes, much less highly specialized braking systems such as the one sold by Applicant in connection snowmobiles, all-terrain vehicles or utility terrain vehicles. Subsequent purchasers of Registrant’s Goods, such as automotive service centers, are not purchasers of Applicant’s Goods. Because there is no cross-over among the trade channels or consumers, it is unlikely

that the applicable consumers would likely ever know that similar marks are used by Applicant and Registrant. The relevant consumers simply do not have contact with both Applicant's and Registrant's Goods.

In a situation very similar to the current one, the Federal District Court of Minnesota approved registration of the mark "El Tigre" for use on snowmobiles by one manufacturer even though it was already registered for use on automobile tires and minibikes by another manufacturer. *See J.C. Penney Company, Inc. v. Arctic Enterprises, Inc.*, 375 F.Supp. 913, 915 (D. Minn. 1974). The court first held that because "El Tigre" was simply the Spanish translation of "The Tiger", it was suggestive, not fanciful or arbitrary, and therefore a weak trademark, noting that "hundreds of different marketed products use the tiger mark and tiger design." *Id.* at 914. The court found that, because (i) the "demographics and characteristics" of the average snowmobile purchaser and minibike purchaser were different, (ii) there was a substantial difference in selling price for snowmobiles, tires, and minibikes, (iii) the products were "markedly dissimilar", and (iv) the products were sold in separate markets, there would be no likelihood of confusion. *Id.* at 915. The court elaborated on the different channels through which the products were sold, noting that while the tires and minibikes were sold in "automobile centers and through catalogs," the snowmobiles were sold through approximately 1750 authorized dealers, and finally stating that the products "customarily are not sold in the same marketplace." *Id.* Finally, the court also noted that the tires and minibikes were "normally" sold with both the mark "El Tigre" and a J.C. Penny housemark while the name Arctic Cat was used in connection with the "El Tigre" mark on snowmobiles. *Id.*

The distinction between snowmobiles and tires is no more than the distinction between advanced braking systems and vehicle tires. If consumers can distinguish between identical marks on snowmobiles and tires, then they could certainly distinguish between similar goods on vehicle tires and braking systems for snowmobiles, all-terrain vehicles, and utility terrain vehicles. Additionally, as in *J.C. Penney Company, Inc.*, neither Applicant's Mark nor Registrant's Mark is a house brand. Applicant's Mark will often be advertised and marketed together with the mark "Hayes," while Registrant's Mark would likely be promoted in connection with "Summit." **See Exhibit D.** Such use, along with the specialized and distinct trade channels, will prevent any risk of confusion.

III. Sophisticated and Discriminating Purchasers

A likelihood of confusion is determined, among other factors, by evaluating the “reasonably prudent” purchaser’s mistaken belief that the goods originate from, or are associated with, the same source. See *McCarthy on Trademarks and Unfair Competition*, § 23:91(4th ed. 1996). “When consumers exercise heightened care in evaluating the relevant products before making purchasing decisions, courts have found there is not a strong likelihood of confusion.” *Checkpoint Systems Inc. v. Check Point Software Technologies Inc.*, 60 U.S.P.Q.2d 1609, 1617 (3rd Cir. 2001). For example, in *Information Resources Inc. v. X*Press Information Services*, 6 U.S.P.Q.2d 1034 (TTAB 1988), the TTAB found no likelihood of confusion between computer-related goods and services where the goods and services involved were expensive and purchased with care and thought.

In this case, the relevant consumers are discriminating purchasers for specialized products. Registrant sells its products to independent tire dealers, who look to buy quality tires that sell well to consumers, are easy to market and result in few consumer complaints. End consumers of tires are shopping to replace existing tires and are concerned about quality, safety and price. As any driver knows, purchasing new tires is not a light or inexpensive purchase. Consumers are highly selective knowing that poor tires could cause a blowout, which has the potential to result in a serious car accident.

Consumers of Applicant’s Goods, on the other hand, consist of manufacturers who are also highly selective of the brakes and braking systems used to manufacture the end product. Applicant’s Goods have the potential to drastically improve the braking performance of snowmobiles, all-terrain vehicles and utility terrain vehicles, which can then improve the rider’s safety. Incorporating Applicant’s Goods in its products has the potential of truly differentiating its products among others in the marketplace since both vehicle performance and personal safety can be dramatically improved. Purchasing Applicant’s Goods are not casual purchases but rather done with significant knowledge of the braking system and vehicle performance.

In both cases, these are sophisticated purchasers looking for specific products and brands of quality that will improve performance and safety. For that reason, the purchasers are highly selective, careful with their purchases and not likely to be confused easily. These kinds of consumers do not expect the same company to manufacture or sell both tires and advanced braking systems.

IV. Third Party Marks

Although third party use is not relevant with respect to the issue of infringement, courts consider such use in determining likelihood of confusion. *Warhol Enterprises, Inc. v. Time Inc.*, 700 F. Supp. 760, 9 U.S.P.Q. 2d 1141 (Fed. Cir. 1988). Third-party registrations are useful if they tend to demonstrate that a mark, or a portion thereof, is suggestive or descriptive of certain goods and hence is entitled to only a narrow scope of protection. *See TMEP § 1207.01(c)(iv)*. A mark that is commonly used in connection with particular goods or services is less likely to be associated with a single source. *See e.g., J.C. Penney Company, Inc. v. Arctic Enterprises, Inc.*, 375 F.Supp. 913, 915 (D. Minn. 1974) (discussed above with respect to the “El Tigre” mark).

Applicant notes that the word “trail” is frequently used as a mark by third parties in connection with vehicles, parts and accessories. In fact, a brief check of USPTO records reveals a significant number of marks that use or incorporate the word “trail” relate to vehicles, parts and accessories. For example:

- TRAIL TOUGH, Reg. No. 4,049,426, for parts and accessories for four wheel drive vehicles, owned by Linda R. Bradshaw;
- TRAIL TUFF, Reg. No. 2,839,067, for custom manufactured components for off road vehicles, namely, bumpers, owned by Blender Products, Inc.;
- TRAIL BLAZER, Reg. No. 3,255,601, for all-terrain vehicles for off-road use only and structural parts therefore, owned by Polaris Industries Inc.;
- TRAILBLAZER, Reg. No. 2,629,101 for travel trailers and fifth wheel trailers, owned by Thor Tech, Inc.;
- TRAILBLAZER, Reg. No. 2,257,873, for motor vehicles, namely, sport utility vehicles, engines thereof and structural parts therefore, owned by General Motors LLC;
- TRAIL MASTER, Reg. No. 1,660,726, for suspension components for pick-up trucks, vans and recreational vehicles; namely, lift kits steering stabilizers, shock absorbers and leaf springs, owned by Trailmasters Products, Inc.;
- TRAIL MASTER, Reg. No., 3,083,191, for all terrain-vehicle tires, owned by Carlisle Intangible Company;
- TRAILMASTER, Reg. No. 1,371,217, for passenger road vehicles, namely vans, pickups and suburbans, and conversions thereof, owned by Trail Master Vehicles, Inc.;
- TRAIL-BREAKER, Reg. No. 3,027,796, for motorized two-wheel, cross-country passenger and cargo vehicle in the nature of a heavy duty motorcycle, owned by Rokon International, Inc.;
- TRAILBREAKER, Reg. No. 2,377,522, for vehicle tires, owned by Polymer Enterprises Corp;
- TRAIL RUNNER, Reg. No. 3,357,464, for recreational vehicles, namely, fifth wheel trailers and travel trailers, owned by Heartland Recreational Vehicles, LLC;
- TRAIL RUNNER, Reg. Nos. 3,378,902 and 2,046,071, for power transmission belts for land vehicles, owned by The Gates Corporation;
- TRAILRIDER, Reg. no. 3,080,897, for recreational vehicles, namely, travel trailers and fifth wheels, owned by Skyline Corporation;

- TRAILDRIVER, Reg. No., 3,966,026, for motor vehicles, namely, automobiles, trucks, vans, sport utility vehicles and structural parts therefor, owned by Tag—The Accessory Group;
- TRAILAIR, Reg. No., 3,298,010, for land vehicle suspension parts, namely, equalizers, owned by Lippert Components Manufacturing, Inc.;
- TRAILAIR, Reg. No. 2,494,388, for vehicle hitches, owned by Lippert Components Manufacturing, Inc.;
- TRAIL SLAYER, Reg. No. 3,471,313, for suspension systems for sport utility vehicles, owned by Linda R. Bradshaw;
- TRAILTECH, Reg. No. 2,540,650, for motorcycle and all terrain vehicle computers, and sensor cables and mounting fittings sold together as a unit, owned by Trail Tech, Inc.;
- TRAILTECH, Reg. No. 2,408,552, for vehicles, namely, flat deck trailers, cargo trailers, transporters and truck decks, owned by Trailtech Inc.;
- TRAILTANK, Reg. No. 3,440,248, for oversized fuel tanks designed and produced for snowmobile recreational vehicles, owned by Creation Composites, LLC;
- TRAIL BOSS, Reg. No., 3,367,905, for recreational vehicles, namely, campers, owned by RV Manufacturing Enterprises, LLC;
- TRAILBLOC, Reg. Nos. 3,185,268 and 3,155,717, for continuously variable transmission for all types of land vehicle engines and motors, owned by Investissements CVTech Inc.;
- TRAIL TRACER, Reg. No. 3,199,667, for tires, excluding bicycle tires and tricycle tires, owned by TBC Trademarks, LLC;
- TRAILCART, Reg. No. 3,74,0152, for vehicles, namely, non-motorized all terrain vehicles, namely, human-powered four-wheeled cycles, owned by TrailCart GmbH;
- TRAIL JAMMER, Reg. No. 3,153,781, for kits for increasing vehicle engine performance, namely, an engine control module and a throttle body and air intake system for use wherewith, owned by Edge Products, LLC;
- TRAILMANOR, Reg. No., 3,970,029, for recreational vehicles, namely, campers, fifth wheel trailers, towable trailers, travel trailers, owned by Carol J. Hulsey;
- TRAIL GUIDE, Reg. No. 3,248,365, for hand held global positioning navigation system with vehicle mounted docking station, owned by Chrysler LLC;
- TRAIL ARMOR, Reg. No. 3,070,209, for body cladding for trucks and sport utility vehicles, owned by Bushwacker, Inc.;
- TRAIL RATED, Reg. No. 2,975,740, for motor vehicles, namely, sport utility vehicles; and structural parts and engines therefore, owned by Chrysler LLC;
- TRAIL RATED, Reg. No., 2,872,653, for motor vehicles, namely, sport utility vehicles, and structural parts therefore, owned by Chrysler Group LLC;
- TRAILOW, Reg. No., 3,855,613, for recreational vehicles, namely, towable trailers, owned by Ezee Trailers Limited;
- TRAILREADY, Reg. No. 3,328,858, for accessories for offroad vehicle body protection, namely, bumpers, specialty offroad wheels, bead locks, brush guards, skid plates, rocker panel covers, owned by TrailReady Products, LLC;
- TRAILFINDER, Reg. No., 3,644,027, for tires for all terrain vehicles, owned by The Reinalt-Thomas Corporation;
- TRAILCON, Reg. No. 2,959,089, for truck trailers and cargo trailers, owned by TrailCon Leasing Inc.;
- TRAILPORT, Reg. No. 3,318,960, for trailers, namely automobile trailers fused as secure permanent vehicle ports and as traveling vehicle ports, owned by Advanced Trailer Concepts, Inc.;

- TRAIL SHIELDS, Reg. No. 2,937,310, for adhering protective and decorative covers for outer surfaces of off-road vehicles, owned by Truck Shields, LLC;
- TRAIL CLAW II, Reg. No. 2,503,718, for tires, namely those used in applications for agriculture, construction, lawn and garden, specialty, military and industrial vehicles, owned by Titan International, Inc.;
- TRAILBACK, Reg. No. 2,439,023, for running boards for trucks and sport utility vehicles, owned by Lund, Inc.;
- TRAIL-R-MATE, Reg. No. 2,343,154, for land vehicle parts, anemly endless track assemblies composed of support frame, idler and drive wheels, drive track, tensioner and replacement parts therefore, owned by Mattracks, Inc.;
- TRAIL CRUISER, Reg. No. 2,417,830, for recreational vehicles, namely, fifth wheel and travel trailers, owned by International Truck Intellectual Property Company, LLC;
- TRAIL CLIMBER, Reg. No. 2,254,670, for vehicle tires, owned by Summit Tire and Battery, Inc.;
- TRAIL RUNNER, Reg. No. 2,046,071, for power transmission belts for land vehicles, namely, variable speed belts, owned by The Gates Corporation;
- TRAIL CUTTER, Reg. No. 1,780,173, for vehicle tires, owned by TBC Trademarks, LLC;
- TRAIL HAWK, Reg. No. 1,885,964, for all-terrain vehicle tires, owned by Carlisle Intangible Company;
- TRAIL BOSS, Reg. No. 1,402,071, for motor vehicles, namely, all-terrain vehicles, owned by Polaris Industries L.P.;
- TRAIL PRO, Reg. No. 1,333,132, for off-road all terrain vehicle tires, owned by Carlisle Intangible Company;
- TRAIL WAGONS, Reg. No. 1,201,928, for customized vehicles, namely, automobiles, trucks and vans, owned by Trail Wagons Inc.;

This large sampling of third-party marks, all of which have already been registered, indicate that “trail” marks are afforded a narrow scope of protection and can co-exist without confusion. In fact, seemingly identical “trail” marks already co-exist and are federally registered, such as TRAIL TUFF and TRAIL TOUGH (Reg. Nos. 4,049,426 and 2,839,067); TRAIL BLAZER, TRAILBLAZER and TRAILBLAZER (Reg. Nos. 3,255,601, 2,629,101 and 2,257,873); TRAIL MASTER, TRAIL MASTER and TRAILMASTER (Reg. Nos. 1,660,726, 3,083,191 and 1,371,217); TRAIL-BREAKER and TRAILBREAKER (Reg. Nos. 3,027,796 and 2,377,522); and TRAIL RUNNER and TRAIL RUNNER (Reg. Nos. 3,357,464, 3,378,902 and 2,046,071).

The “trail” trademarks in connection with vehicles of any kind, parts and accessories show that it is already a crowded market for similar goods. If the Registrant’s Marks and the above marks can all co-exist without confusion, surely Applicant’s Mark would not cause any confusion and should be deemed registrable.

CONCLUSION

The Supreme Court has explained that a likelihood of confusion is akin to a “probability” of confusion. *See American Steel Foundries v. Robertson*, 269 U.S. 372, 46 S. Ct. 160 (1926). The mere possibility of confusion is inadequate, and it must be shown that the confusion is probable. *See August Storck K.G. v. Nabisco, Inc.*, 35 U.S.P.Q.2d 1211 (7th Cir. 1995). With the additional information provided herein, the Examining Attorney cannot state with certainty that Applicant’s Mark is likely to cause confusion, mistake or deception with the Registrants’ Marks, or that it may be likely to cause confusion with pending applications for registration of marks. Applicant’s Goods and Registrant’s Goods are distinct from each other, are sold in different trade channels to consumers with different needs, and are sold to consumers that are sophisticated and discerning in their purchases. Accordingly, Applicant asserts that a likelihood of confusion is not only **unlikely** but also **improbable**.

In view of the foregoing amendments and remarks, it is believed that all formal requirements are in order and that this application is in condition to be passed to publication. Such action by the Examining Attorney is therefore respectfully requested.

EVIDENCE

Evidence in the nature of Exhibit A: Promotional material describing Applicant's Goods; Exhibit B: Promotional material describing Applicant's Goods; Exhibit C: Website materials noting Applicant's Consumers & Trade Channels; and Exhibit D: Website materials noting Registrant's Consumers & Trade Channels. has been attached.

Original PDF file:

[evi_207678366-134916913_.HBR-36824_Trail_Trac_Response_Exhibit_A.PDF](#)

Converted PDF file(s) (3 pages)

[Evidence-1](#)

[Evidence-2](#)

[Evidence-3](#)

Original PDF file:

[evi_207678366-134916913_.HBR-36824_Trail_Trac_Response_Exhibit_B.PDF](#)

Converted PDF file(s) (13 pages)

[Evidence-1](#)

[Evidence-2](#)

[Evidence-3](#)

[Evidence-4](#)

[Evidence-5](#)

[Evidence-6](#)

[Evidence-7](#)

[Evidence-8](#)

[Evidence-9](#)

[Evidence-10](#)

[Evidence-11](#)

[Evidence-12](#)

[Evidence-13](#)

Original PDF file:

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Converted PDF file(s) (2 pages)

[Evidence-1](#)

[Evidence-2](#)

Original PDF file:

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Converted PDF file(s) (5 pages)

[Evidence-1](#)

[Evidence-2](#)

[Evidence-3](#)

[Evidence-4](#)

[Evidence-5](#)

SIGNATURE(S)

Request for Reconsideration Signature

Signature: /njr/ Date: 02/16/2012

Signatory's Name: Nicole J. Renouard

Signatory's Position: Attorney of record

Signatory's Phone Number: 414.978.5533

The signatory has confirmed that he/she is an attorney who is a member in good standing of the bar of the highest court of a U.S. state, which includes the District of Columbia, Puerto Rico, and other federal territories and possessions; and he/she is currently the applicant's attorney or an associate thereof; and to the best of his/her knowledge, if prior to his/her appointment another U.S. attorney or a Canadian attorney/agent not currently associated with his/her company/firm previously represented the applicant in this matter: (1) the applicant has filed or is concurrently filing a signed revocation of or substitute power of attorney with the USPTO; (2) the USPTO has granted the request of the prior representative to withdraw; (3) the applicant has filed a power of attorney appointing him/her in this matter; or (4) the applicant's appointed U.S. attorney or Canadian attorney/agent has filed a power of attorney appointing him/her as an associate attorney in this matter.

The applicant is filing a Notice of Appeal in conjunction with this Request for Reconsideration.

Serial Number: 85201536

Internet Transmission Date: Thu Feb 16 14:05:03 EST 2012

TEAS Stamp: USPTO/RFR-207.67.83.66-20120216140503044

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HAYES™ TRAIL TRAC 1.0

Hayes *Trail Trac 1.0* is a 1-hydraulic channel electronically controlled braking system for snowmobiles which offers improved braking performance and vehicle controllability for a wide range of rider abilities. Added benefits include:

- less dependency on rider allowing inexperienced and experienced riders increased control
- performance enhancement during cornering and straight line deceleration
- improved stability descending hills and during panic stops to prevent high siding and rollovers
- predictable performance on a wide range of snow and ice conditions

The system is presently developed for the 2010-12 Polaris Rush high performance trail chassis. Hayes and BWI Group are jointly offering system kits and technical guidance to all 2012 SAE Clean Snowmobile Challenge teams for technology evaluation on the different makes and models of ICE snowmobiles used during competition. Use is encouraged, however, optional.

Electronically controlled braking is achieved with track speed input using a Hall Effect speed sensor mounted on the driveline and a brake light switch input at the handlebar master cylinder. Brake pressure regulation to the caliper is accomplished via two precision magnet valves (one inlet and one outlet), and a fluid recirculation pump and motor which are integrated as the hydraulic control unit (HCU). A separate detached electronic control unit (ECU) handles signal processing and valve and motor commands using embedded software. For 2012, teams will not have access to change the software. A team developed PLC approach may be offered as an option in future competitions.

Kit hardware includes a 'filled and bled' brake system comprised of the following:

- single piston 'Phantom' brake caliper
- stainless steel brake lines
- HCU – developed and offered by BWI Group
- ECU – developed and offered by BWI Group (includes software)
- composite handlebar master cylinder with integrated brake light switch
- electrical connectors
- track speed sensor and provisions for adaptations (wiring diagrams and prints)
- on/off power switch and LED warning lamp

Vehicle requirements include on-board 12V DC electrical systems, and space claims to accommodate the proposed hardware without modification and in accordance with Clean Snowmobile Challenge rules. Installation on snowmobiles other than the Polaris Rush chassis requires Hayes and BWI Group approval and oversight. Usage on ZE, personal snowmobiles, or other SAE competition vehicles is prohibited. Any unused kits must be returned to Hayes at the competition. Hayes reserves the right to replace, recall, or cancel the project at any time.

Hayes encourages teams to subjectively and objectively measure vehicle braking and dynamic behavior (stopping distance, yaw rate, deceleration) with system on/off and with stud/non-stud track applications, if available.

Participating teams will be judged on merits including but not limited:

- demonstrated understanding of technology and influence on vehicle behavior
- installation accuracy and thoroughness (adherence to instructions, thought to manufacturability and serviceability)

Based on an evaluation of these merits a cash reward of \$500 will be offered to the winning team. All participating teams will receive *Trail Trac 1.0* kits and technical guidance free of charge if the system is included in competition.

The kit contains developmental level prototype components and software. No warranty or performance guarantees are expressed or implied. CSC teams assume full responsibility for performance and function of the provide kit on their snowmobile.

Hayes and BWI Group are proud to continue our sponsorship and technical support for another SAE Clean Snowmobile Challenge.

Good luck!



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 **February 2012** 

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March

2012 Clean Snowmobile Challenge

March 05, 2012 - March 10, 2012

[View full calendar](#)

HB Performance Systems Introduces Trail Trac 1.0 at 2011 SAE Clean Snowmobile Challenge



Friday, 01 April 2011 13:12

HB Performance Systems Inc, or 'Hayes', was excited to offer another consecutive year of CSC support in 2011. In addition to technical support and administrative help, Hayes offered students access to new braking technology to potentially expand scope and increase innovation even further during future competitions. Hayes TrailTrac 1.0 is a **controlled braking technology, similar to Anti-Lock Braking (ABS), and applicable to snowmobiles**. About 50 interested students and industry participants were provided the opportunity to ride the Hayes snowmobile equipped with this technology, and compare 'system on' and 'system off' modes. All riders, inexperienced to highly experienced, gave positive feedback that they were impressed with the targeted benefits which were improved braking controllability and confidence. This feedback was no surprise for the Hayes team as this and similar technology for offroad power sports vehicles, such as ATV's and UTV's, has been in development in some cases for more than 5 years. Other opportunities were also offered, such as during the combined CSCSAE-Milwaukee Chapter meeting, to learn from presentation about new Hayes products and technologies.

In addition to the snowmobile demonstration Hayes allowed a sneak peak at another vehicle throughout the week, a UTV, which was equipped with similar technology (dubbed TrailTrac 3.0).

Students and industry participants involved with CSC are typically more experienced and focused on 'going' (emissions and noise) versus 'stopping' (braking) by nature of the competition and its history. Perhaps because of the technical similarities and inherently similar engineering challenges, such as adapting complex software control to achieve a desired vehicle behavior, interest in the new controlled braking technology was overwhelming.

Hayes was pleased to once again support the CSC. We thank you SAE, the students and industry representatives, for their review and interest in Hayes and its new technologies!

HAYES is excited about their growth and as a result is actively hiring. Find out about their employment opportunities in the "Job Postings" section of the website.



Kurt Person, VP Engineering and CTO, demonstrates TrailTrac 1.0 sled and invites others to take demo rides.

HAYESTM

Ken Cook Co.

Partners in Product Documentation

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Advanced Braking Technology

HAYES™
TRAIL TRAC 3.0

November , 2011



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Off-Road Power Sports Market Focus

A product strategy to meet market needs



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Technology Partnership

Brake pressure control

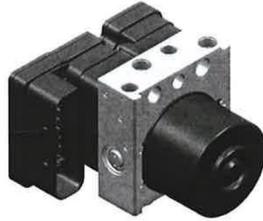
- Leading partner is a global automotive supplier
- HB is purchasing off-the-shelf high-volume hardware

TrailTrac 3.0

HB target use:

3 hydraulic channels

UTVs and ATVs



TrailTrac 2.0 and 1.0

HB target use:

1 or 2 hydraulic channels

Snowmobiles, assess ATVs



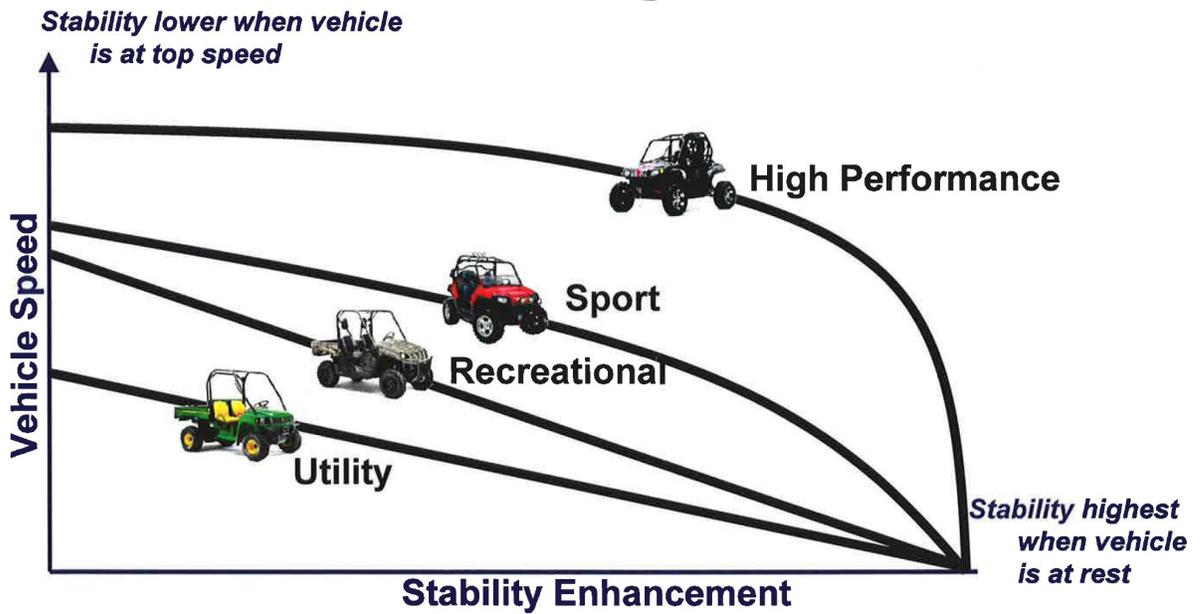
- Supplier is supporting knowledge & tools transfer to HB
- HB will retain ownership of software calibration strategy, execution, and end-of-line programming



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Segment Differentiation



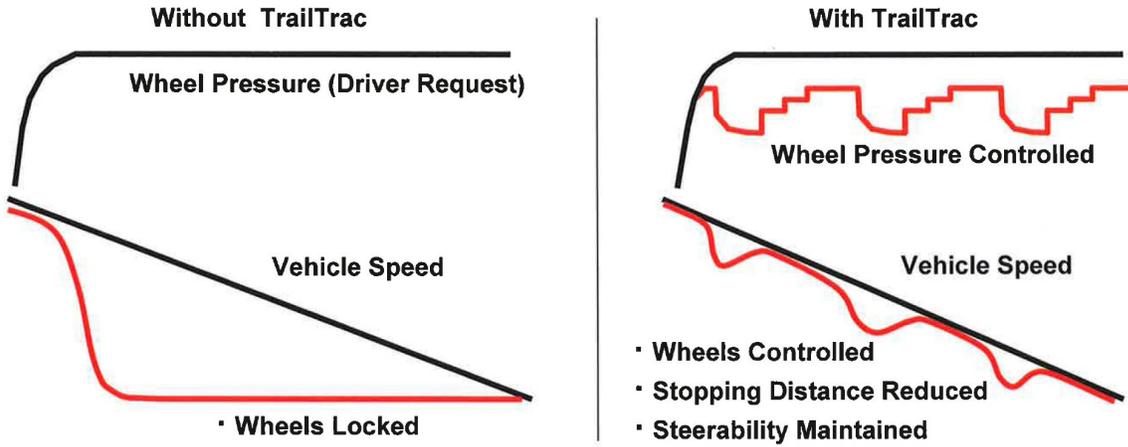
- Differentiation is achieved through HB custom software calibration and end-of-line programming



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Controlled Braking Overview



Benefit is enhanced braking performance and improved vehicle control



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ABS versus TrailTrac

ABS is designed for engineered and predictable surfaces:



Automotive Focus

TrailTrac is designed for extreme, diverse, and unpredictable surfaces:



Power Sports Focus → New Rules

Differentiated by custom software calibration and emphasis on controlled braking (wheel lock can be desirable)



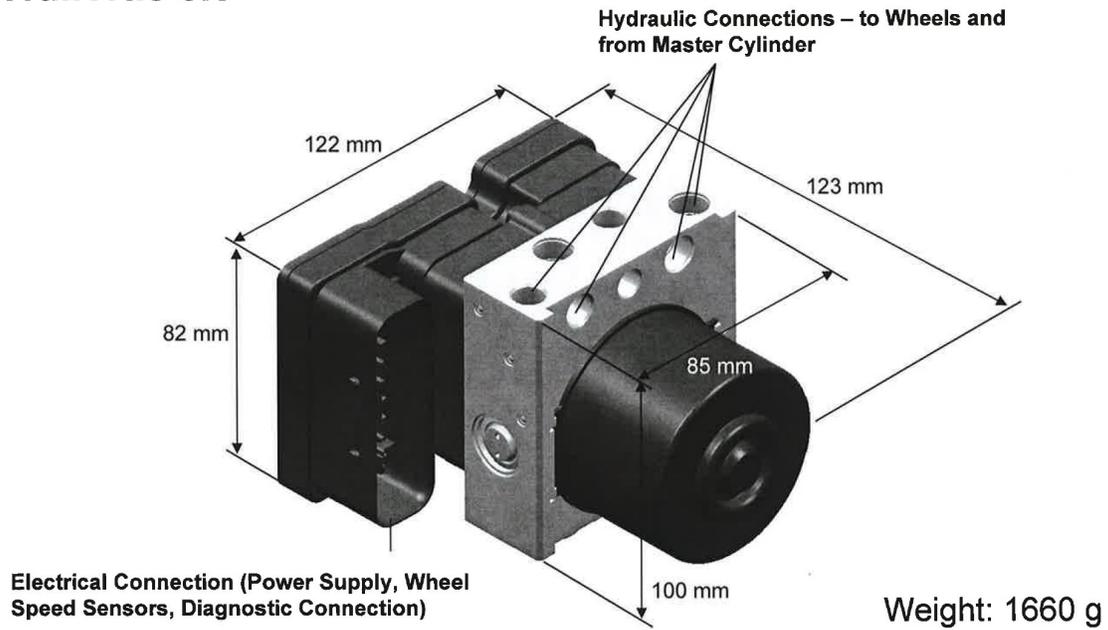
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METRIC

UTV Hardware Specification

TrailTrac 3.0



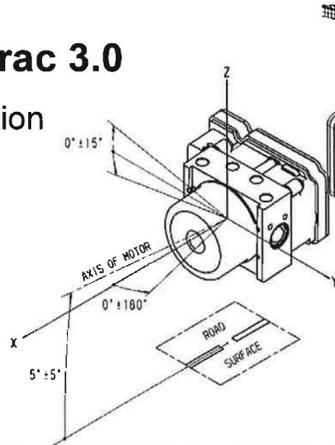
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UTV Hardware Specification

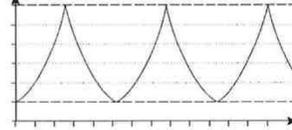
TrailTrac 3.0

Installation



Mechanical Shock and Vibration

Oscillation frequency: 10 Hz ... 60 Hz / 60 Hz ... 10 Hz
 Sweep rate: 1 octave/min (see diagram)
 Max. acceleration: 1.5 g



- Align capabilities with unique off-road requirements and customer specifications
- Application-specific bracket with 3-point isolation

Electrical

- 10-16 V operating range → full function
- At 13 V terminal voltage and room temperature, ignoring inrush currents
- DC motor: < 16 A , high pressure 150 bar (< 208 W)
- Valves: < 1.6 A each (< 21 W)
- EMI/EMC compatible

Environmental

- Operating range -40°C to +120°C
- Thermal shock resistance - IEC 68-2-14 Na
- High humidity - IEC 68-2-38 ZA/D
- Car wash spray, dust - DIN 40050 Part 9 (IEC 529)
- Submersibility – 10 min, 10 cm depth, room temperature
- Salt spray, mist - IEC 68-2-11 (144 hrs, 72 hrs no white rust)

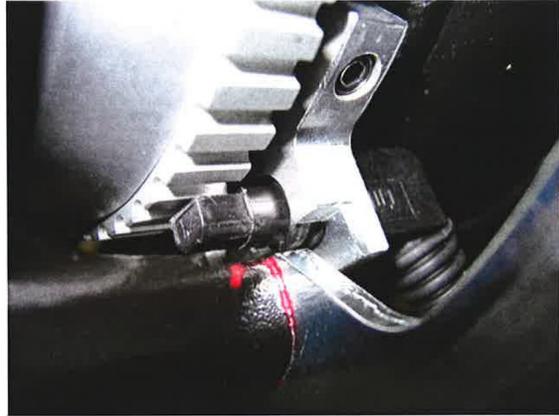
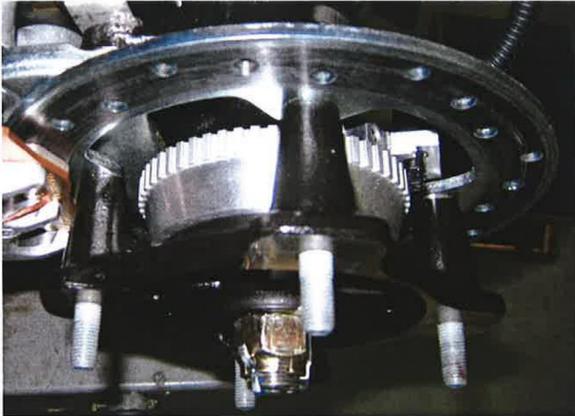


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UTV Hardware Installation

- **Adaptation of face read ferromagnetic tone wheels and active sensors**



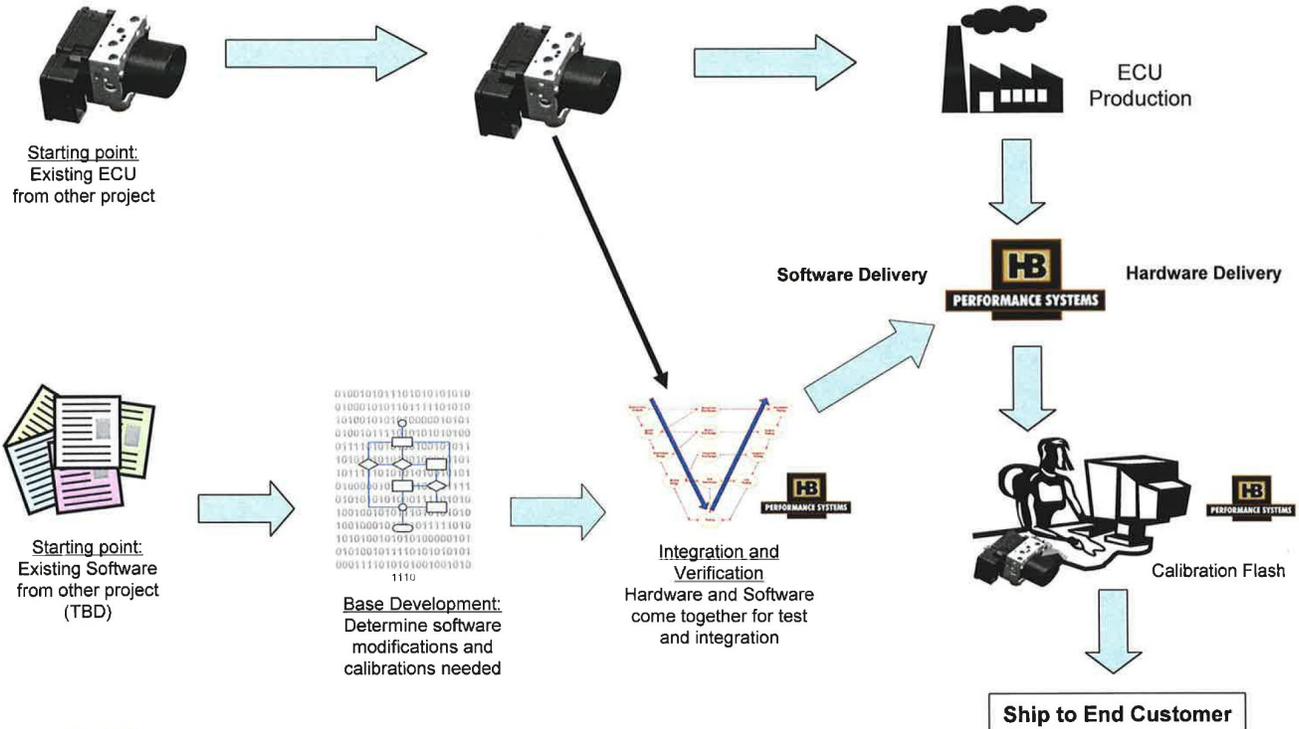
- **In-bearing solutions for production can offer improved robustness, design optimization, and assembly**



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Logistics Model



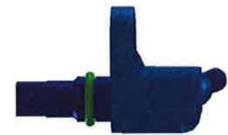
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Wheel Speed Sensor Specification

- **Current Modulated (Active) Sensors**

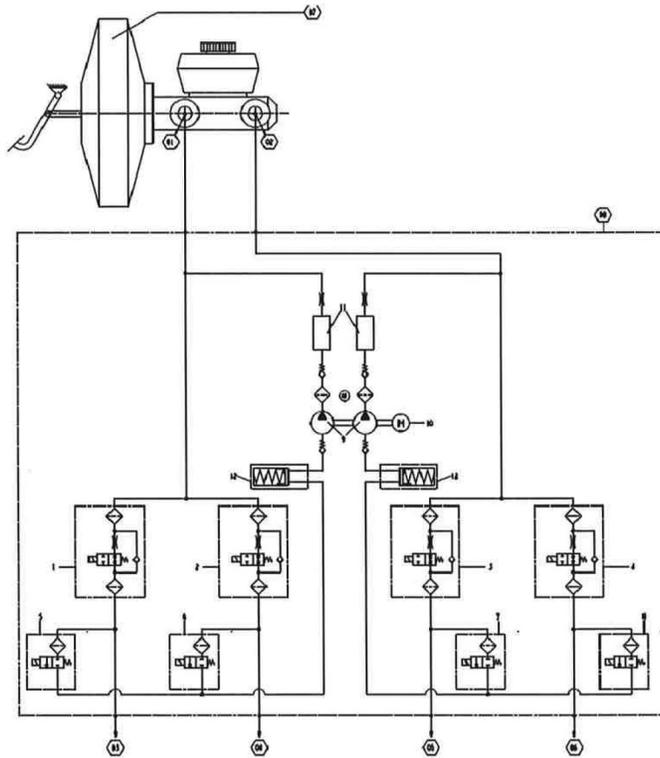
Descriptions:	Maximum	Minimum	Notes
Temperature Range of Sensor	150°C	-40°C	
Temperature Range of Cable	120°C	-40°C	
Input Voltage	12.5 V	7.5 V	12 V Typical 9 V would work
Output Current	7mA	14mA	Digital
# of Pins			2 pins



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Hydraulic Diagram



- 01 PRIMARY CIRCUIT
- 02 SECONDARY CIRCUIT
- 03 FR
- 04 RL
- 05 RR
- 06 FL
- 07 ACTUATION UNIT CPL.

- 08 HCU CPL.
 - 1 INLET VALVE (NO) FR
 - 2 INLET VALVE (NO) RL
 - 3 INLET VALVE (NO) RR
 - 4 INLET VALVE (NO) FL
 - 5 OUTLET VALVE (NC) FR
 - 6 OUTLET VALVE (NC) RL
 - 7 OUTLET VALVE (NC) RR
 - 8 OUTLET VALVE (NC) FL
 - 9 DUAL CIRCUIT HYDRAULIC PUMP
 - 10 D.C. MOTOR
 - 11 DAMPENING CHAMBER
 - 12 LOW PRESSURE ACCUMULATOR

- 01 DK - KREIS
- 02 SK - KREIS
- 03 VR
- 04 HL
- 05 HR
- 06 VL
- 07 BETÄTIGUNGSEINHEIT KPL.

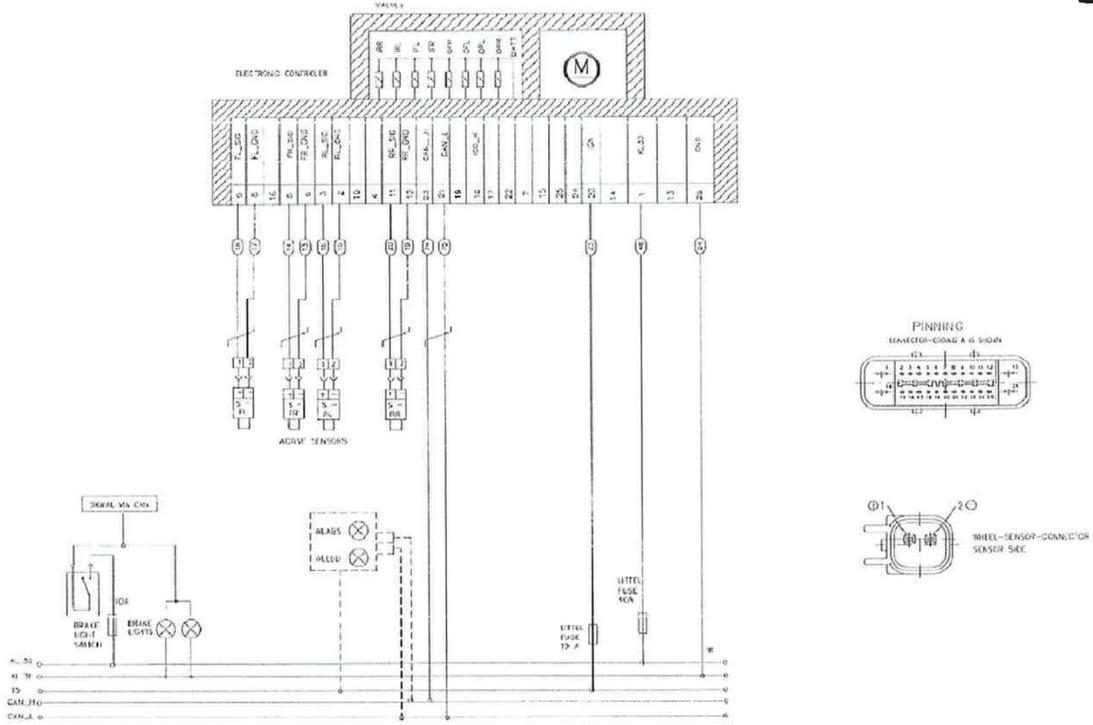
- 08 HCU KPL.
 - 1 EINLASSVENTIL (SO) VR
 - 2 EINLASSVENTIL (SO) HL
 - 3 EINLASSVENTIL (SO) HR
 - 4 EINLASSVENTIL (SO) VL
 - 5 AUSLASSVENTIL (SG) VR
 - 6 AUSLASSVENTIL (SG) HL
 - 7 AUSLASSVENTIL (SG) HR
 - 8 AUSLASSVENTIL (SG) VL
 - 9 HYDRAULIKPUMPE 2-KREISIG
 - 10 GLEICHSTROMMOTOR
 - 11 DAEMPUNGSKAMMER
 - 12 NIEDERDRUCKSPEICHER



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Electrical Diagram



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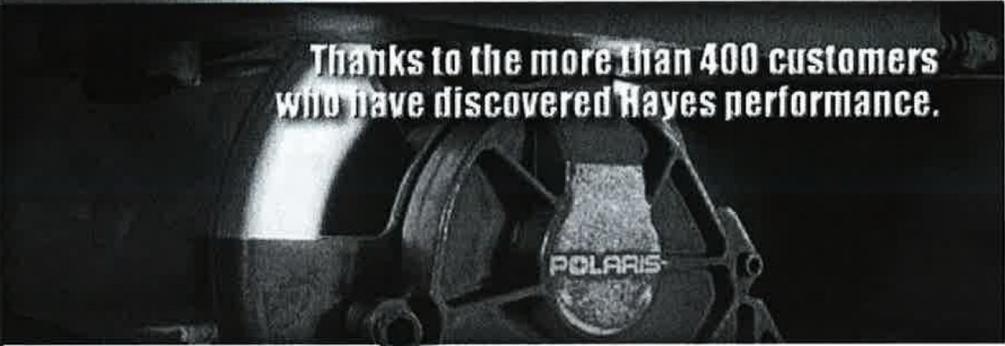




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History

A Brief History

Dependability, safety and performance have always been the dominant factors in the design and manufacture of Hayes Caliper Disc Brakes. Since 1946, first as H&H Products Company Inc., then as H&H Products Division of Kelsey-Hayes Company and beginning June of 1984 as Hayes Brake. Our disc brakes and brake systems have earned Hayes an enviable reputation as the "disc brake specialists". Many years of experience and development in this exclusive field have led to the comprehensive range of models and accessories that we offer today for recreational, construction, agricultural and military vehicles, motorcycles, bicycles, as well as other types of mobile and stationary equipment.

The first cars equipped with disc brakes came off the assembly lines in 1964 with Kelsey-Hayes designed four-piston brakes. In 1968, Kelsey-Hayes acquired H&H Products, which operated as a division with an emphasis on racing. Specially developed disc brakes went onto dragsters, Indianapolis-style cars and TransAm racers. The pinnacle of their involvement in racing came on October 23, 1970 when the Blue Flame, equipped with H&H disc brakes, set a new land speed record of 630.388 MPH (Kilometer Speed Record). In an earlier test run the drag chutes had failed and the brakes were able to bring the car to a safe stop from 550 MPH.

In June of 1971, the first disc brake was shipped to Harley-Davidson for the 1972 FLH model. The other Kelsey-Hayes disc brakes were used on the 1972 Harley-Davidson motorcycles. Harley-Davidson also used Kelsey-Hayes disc brakes on the 1972 Harley-Davidson motorcycles.

1962 - 1972 Upgrades - Kelsey-Hayes Brakes

Options

To support manufacturing of the new products, in 1972 an addition was put on the original building, which doubled the size of the plant to approximately 50,000 square feet of manufacturing space.

In 1992 Hayes began work to enter the mountain bike brake business, releasing its' first product in 1993. In 1998, Hayes Brake formed Hayes Disc Brake, resulting from the design, manufacture and supply of both mechanical and hydraulic disc brakes to the worlds leading manufacturers of mountain bikes. Through the 80's and 90's Hayes Brake has expanded its customer base to well over 300 strong. In addition to the aforementioned companies of Harley-Davidson and Polaris, Hayes Brake is proud to provide braking systems for John Deere, JCB, Caterpillar, Textron, Ariens, E-Z-Go, Tennant, Volvo, Trek, Schwinn and Giant to mention a few.

In 1999 Hayes Brake obtained ISO 9001 certification further demonstrating its commitment to quality and continuous improvement. 2001 marked another plant expansion bringing the total manufacturing space to 150,000 square feet.



By incorporating leading edge technologies and partnering relationships with customers and suppliers, Hayes Brake is well positioned to continue its steady growth.

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Heritage Trail Trac AP

Web (5) Summit Light Truck - Summit Tires

Images (3)

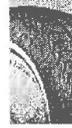


Heritage Trail Climber CLT

Options



Premium Plus II H and V Rated



Premium Plus II T Rated



Summit Trail Climber All Terrain



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MA-V1

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Summit Heritage Trail Trac AP



Description

- Aggressive all-weather design
- M+S Rated
- Polyester sidewall for a smooth ride
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- Wide durable steel belts with nylon overlays for added safety
- UTQG Ratings: Treadwear 400; Traction A; Temp. B (P-Metric)

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Heritage Trail Trac CLT



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