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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re James Harris*

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Serial No. 85918970

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Barry L. Haley and Kristina M. DiMaggio of Malin Haley DiMaggio & Bowen, P.A.  
for James Harris.

Christopher Reams, Trademark Examining Attorney, Law Office 102 (Mitchell  
Front, Managing Attorney). <sup>1</sup>

Before Zervas, Bergsman and Kuczma, Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

James Harris (“Applicant”) seeks registration on the Principal Register of the  
mark THE WASH BOX (in standard character form) for “portable vehicle wash  
water filter” in International Class 11.<sup>2</sup> Applicant entered a disclaimer of the term  
“wash.”

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<sup>1</sup> Different Examining Attorneys authored the Office Actions and the Examining Attorney’s  
Brief.

<sup>2</sup> Application Serial No. 85918970 was filed on April 30, 2013, based on an allegation of a  
*bona fide* intention to use the mark in commerce.

The Examining Attorney refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), having determined that Applicant's mark is likely to cause confusion or mistake or to deceive in view of Reg. No. 3861687 for the mark WASH IN A BOX (in standard character form) for "vehicle washing and cleaning equipment, namely, automated pressure washing and pressure rinsing machines and electronic and mechanical controls therefor, all sold as a unit; vehicle washing machines and parts therefor" in International Class 7.<sup>3</sup>

When the refusal was made final, Applicant filed a request for reconsideration. After the Examining Attorney denied the request for reconsideration, Applicant filed an appeal. We reverse the refusal to register.

*Applicable Law*

Our determination under Trademark Act § 2(d) is based on an analysis of the probative facts in evidence that are relevant to the factors bearing on a likelihood of confusion. See *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973); see also *Palm Bay Imp., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); and *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997). In considering the evidence of record on these factors, we keep in mind that "[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." *Federated Foods, Inc. v.*

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<sup>3</sup> Registered October 12, 2010.

*Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); *see also In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014).

In addition to the similarities or dissimilarities of the marks and the goods, the relevant *du Pont* factors in this case are the similarities or dissimilarities of trade channels and purchasers, as argued by Applicant and the Examining Attorney.

*Similarity or Dissimilarity of the Goods*

We base our evaluation on the goods as they are identified in the registration and application. *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). *See also Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002). It is settled that 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 In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984). The goods need only be sufficiently related that consumers would be likely to assume, upon encountering the goods under similar marks, that the goods originate from, are sponsored or authorized by, or are otherwise connected to the same source. *See In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991).

Applicant described his goods as follows in his response to the first Office Action:

Applicant's product is a luggage sized portable water filter that connects to a garden hose for washing a car or motorcycle. The portable

vehicle wash water filter does not use electricity and includes filter cartridges that get replaced periodically so no corrosive or other chemicals leave water spots on car or motorcycle surfaces. Applicant's product will be marketed to individual consumers for personal use ....

At page 6 of his brief, Applicant states that his "portable wash water filter will be available at various retail stores and auto shops."

The Examining Attorney proffers several arguments on why we should find the goods related to one another. First, the Examining Attorney contends that "in this case, it is presumed that registrant's goods encompass all vehicle washing machines and parts therefor, including portable vehicle wash water filters."<sup>4</sup> The evidentiary record contains webpages depicting simple "vehicle washing machines," such as what appears to be a pressure washer in a webpage showing a "Commercial Pressure Washer on Wheels – Direct Drive Pump,"<sup>5</sup> whose water source is a garden hose.<sup>6</sup> There is no indication, however, that such vehicle washing machines have filters. Further, although the record includes other webpages from various vendors depicting carwash systems with filters, there is no indication that such filters are portable. They appear to be fixed in place, and probably are fixed in place, because some are intended for large car or truck washing facilities. Thus, there is no evidence in the record that vehicle washing machines incorporate or work in combination with *portable* car washing filters. To find that they do so, we would have to assume that a vehicle washing machine works in combination with a *portable* vehicle wash water filter; but the only evidence we have about portable

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<sup>4</sup> Examining Attorney's Brief at 8-9.

<sup>5</sup> From [www.detailing.com](http://www.detailing.com), first Office Action at 23.

<sup>6</sup> The webpage for this product states, "because it is on wheels it would fit your needs best if connected to a hose where the water is being dispensed through a faucet."

vehicle wash water filters (based on Applicant's statement in its response to the first Office Action) is that such filters operate in connection with garden hoses. Thus, we disagree with the Examining Attorney that registrant's goods encompass portable vehicle wash water filters.

In addition, the Examining Attorney contends as follows:

[T]he evidence of record demonstrates that applicant's vehicle wash water filters, are complementary to registrant's "vehicle washing and cleaning equipment, namely, automated pressure washing and pressure rinsing machines and electronic and mechanical controls therefor, all sold as a unit" because water filters are commonly sold as a component part of car wash systems. This evidence further shows that the goods are related because vehicle wash water filters are commonly sold under the same mark and through the same trade channels as "vehicle washing machines and parts therefor." The Office action issued on August 23, 2013 included web page printouts showing both the goods of the registrant and the goods of the applicant being offered for sale under the same trademarks, by a variety of different retailers.<sup>7</sup>

To evaluate the Examining Attorney's argument, we look to the evidence in the record, particularly the evidence discussed in the Examining Attorney's brief, which we consider to be the most relevant. The Examining Attorney relies on the following:

- *D&S Car Wash Systems* webpages – featuring "Spot Free Rinse Systems" which "purify soft, chlorine-free water through reverse osmosis to produce a pure final rinse that leaves no streaks or spots as the vehicle dries" and has "carbon filters." The webpages, however, do not discuss a portable filter.
- *Sultmeier Sales* webpages – featuring one webpage with a listing of categories of products and a heading "Mobile Car Wash/Cleaning" with "Pressure Washers" located thereunder, and a second webpage referring to "TwistII Clean Filter/Strainer(s). The filters depicted appear to be machine parts, and do not reflect that they

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<sup>7</sup> Examining Attorney's Brief at 9.

constitute portable filters of any form. In addition, filters are included on a list of over 40 “car wash, truck wash and mobile cleaning/washing equipment & products.”

- *HE Hydro Engineering* webpages – the Examining Attorney states that this material “provides water filtration products and full instant car washes (here identified as Wash Rack Systems) under the same mark” and features “Pressure Washers” and “Water Filtration” and “Car, Truck and Bus Washington Reclaim Systems.” No portable vehicle wash water filter is depicted or referred to in these materials. At best, the following statements, without further explanation, appear on a page discussing what may be a portable car wash system; “See Our New Instant Car Wash System”; “That’s right, a portable wash bay just like a self serve care wash. This [c]ar [w]ash bay is delivered and set up the same day”; “The Hydrokleen car wash reclaim system combines both biological filtration and mechanical filtration, which provides superior water quality while reducing maintenance requirements. It does not require large, in-ground water storage tanks to operate.”<sup>8</sup>

- *Diamond H<sub>2</sub>O* webpages featuring “Hydrosystem Wash Systems” with a carbon filter. The Examining Attorney states that the system depicted “integrates filters into its wash systems and provides washing units such as its pressure washers.” While true, there is no indication in the webpages regarding the portability of the filter. Further, there is no indication that those pressure washers on wheels depicted on the webpages have filters.

- *Ultimate Washer* webpages – the Examining Attorney states the systems provide a variety of car washing equipment, including “Water Car Wash Systems” and “reverse osmosis systems for spot free washes.” One webpage depicts a “Submerged Fixed—Film Biological Treatment System” for a wash water recycling system, and describes a filter. Again, the filter does not appear to be portable, and the car wash systems are actually described as suited for use in “equipment rental yards, automotive recyclers, military fleet operations, fork lift dealerships, trucking, marinas, food processing plants, municipalities, warehouses, and oil field services.”

Thus, aside from possibly the HE Hydro Engineering materials (which refers to a portable car wash system), none of the filters mentioned in the above listed

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<sup>8</sup> First Office Action at 45.

websites refers to a portable vehicle wash water filter. Thus, the evidence of record does not demonstrate that *portable* water filters are a component of car wash systems, or that *portable* carwash filters and vehicle washing machines and parts therefor are commonly sold under the same mark and through the same trade channels (as discussed more fully below).

*Similarity or Dissimilarity of Classes of Purchasers and Trade Channels*

The Examining Attorney disagrees with Applicant's position that the goods will be marketed to different customers, and that a "modular car wash system is sold to professional clients for commercial use whereas Applicant's portable vehicle wash water system will be sold to ordinary, individual customers for personal use."<sup>9</sup> According the Examining Attorney, registrant's goods are not limited to modular car wash systems, and the registration and application do not contain any limitations as to customers or channels of trade.

In this case, assuming that Applicant is correct and that portable car wash filters are only sold to individuals, there is still an overlap in purchasers. Registrant's identification includes vehicle washing machines and parts therefor, and the webpage from detailing.com offers, in addition to the vehicle washing machine noted above, an "Electric Pressure Washer for Auto Detailing" for \$150.00, with the following description of the product:

Our DC 5005-1600 PSI electric pressure washer is a very light, quiet, and easy to handle and easy to use auto detailing tool. You will save a lot of time by using this pressure washer to wash-up and prep vehicles for an auto detail, rather than using a garden hose.

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<sup>9</sup> Applicant's Brief at 6.

This pressure washer certainly is intended for individuals.<sup>10</sup> Thus, we find that the individuals who purchase the goods overlap.

As for trade channels, as noted above, Applicant has stated that its goods are available at various retail stores and auto shops. Applicant has not specified what the various retail stores are, but ostensibly, they include auto parts shops. The Examining Attorney has not introduced any evidence from auto parts merchants; the Examining Attorney's evidence is from vehicle wash vendors and vehicle wash builders. It is the Examining Attorney's burden to make out a *prima facie* case of likelihood of confusion supported by evidence. Further, despite Applicant's position that registrant's goods are offered to commercial customers, the Examining Attorney has not demonstrated that Applicant's goods, which are portable, are used by or even offered to commercial customers. Thus, even if the record supports a finding that the purchasers overlap, there is insufficient evidence in the record for us to conclude that the trade channels for Applicant's and registrant's goods are similar or even overlap.

*Purchaser Care and Consumer Sophistication*

Applicant represents in his brief that his goods cost approximately \$400.00-1000.00. As noted, the "Electric Pressure Washer for Auto Detailing" is offered at \$150.00. While not inexpensive, the goods are not so expensive that a customer would use heightened care in his or her purchasing decisions. We certainly do not

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<sup>10</sup> The detailing.com webpage also states, "Among the calls we get each day are those from people who purchase a pressure washer from one of the local hardware store outlets, brings it home and connects it to a water tank and it doesn't do the job."



face the same situation that the Board faced in *In re Oy Wilh. Schauman Ab*, 189 USPQ 245 (TTAB 1975), on which Applicant relies, where the Board considered low-priced canoes and high-priced yachts with the same trademark.

*Similarity or Dissimilarity of the Marks*

We compare the marks for similarities and dissimilarities in appearance, sound, connotation and commercial impression. *Palm Bay*, 73 USPQ2d at 1692. 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 that confusion as to the source of the goods or services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *In re Association of the United States Army*, 85 USPQ2d 1264 (TTAB 2007); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Under actual marketing conditions, consumers do not necessarily have the luxury of making side-by-side comparisons between marks, and must rely upon their imperfect recollections. *Dassler KG v. Roller Derby Skate Corp.*, 206 USPQ 255 (TTAB 1980).

Because the similarity or dissimilarity of the marks is determined based on the marks in their entireties, the analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entire marks, not just part of the marks. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). See also *Franklin Mint Corp. v. Master Mfg. Co.*, 667

F.2d 1005, 212 USPQ 23, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion”).

Registrant’s mark, WASH IN A BOX, bears a striking resemblance to the name of the ubiquitous children’s toy, “jack in a box” or “jack in the box.”<sup>11</sup> Because of its proximity to “jack in a box,” the commercial impression of this mark is remarkably different from THE WASH BOX. Thus, differences in commercial impression outweigh any similarities in the components of the marks in appearance, meaning and sound, due to the shared terms WASH and BOX.

### *Conclusion*

We have found that the Examining Attorney has not established that the goods are similar and that the differences in commercial impression of the marks outweigh any similarities in sound, meaning and appearance between the marks. Further, we have found that the Examining Attorney has not established that the trade channels between Applicant’s and registrant’s goods are similar. On the other hand, purchasers of Applicant’s and registrant’s goods overlap and purchasers will use ordinary care in their purchasing decisions. When we balance the *du Pont* factors which the Examining Attorney and Applicant have discussed in their briefs,

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<sup>11</sup> See definition of “jack-in-the-box” (“also ‘jack-in-a-box’”) taken from dictionary.com based on the Random House Dictionary (2015), “a toy consisting of a box from which an enclosed figure springs up when the lid is opened.” The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or have regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

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we find the Examining Attorney has not met the Examining Attorney's burden of establishing a likelihood of confusion between Applicant's and registrant's marks.

***Decision:*** The refusal to register Applicant's mark under Section 2(d) of the Trademark Act is reversed.