

This Opinion is not a
Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board

In re Altoz, Inc.

Serial No. 88625236

Glen E. Schumann and Michael A. Bondi, Moss & Barnett, for Altoz, Inc.

Tracy Cross, Trademark Examining Attorney, Law Office 109, Michael Kazazian, Managing Attorney.

Before Zervas, Mermelstein, and Lebow, Administrative Trademark Judges.

Opinion by Mermelstein, Administrative Trademark Judge:

Applicant seeks to register the standard-character mark **TRX** on the Principal Register for “[z]ero turn riding lawn mowers,” in International Class 7.¹

The Examining Attorney finally refused registration under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), on the ground that Applicant’s mark is likely to cause confusion or mistake or to deceive in view of the typed² mark **TRX**, registered for “[a]ll terrain vehicles and structural parts therefor,” in International Class 12.³

¹ Filed September 20, 2019, pursuant to Trademark Act § 1(a), 15 U.S.C. § 1051(a), alleging first use and use in commerce as of September 21, 2016.

² “Prior to November 2, 2003, ‘standard character’ drawings were known as ‘typed’ drawings. . . . A typed mark is the legal equivalent of a standard character mark.” TRADEMARK MANUAL OF EXAMINING PROCEDURE (“TMEP”) § 807.03(i) (July 2021).

³ Registration No. 3199168, issued January 16, 2007, renewed.

We affirm the refusal to register.

I. Evidentiary matters

In its opening brief, Applicant listed a number of third-party registrations and attached copies of the registrations. *App. Br.*, 4 TTABVUE 4–5, 10–46. The Examining Attorney objected to consideration of these registrations submitted for the first time on appeal. *Ex. Att. Br.*, 6 TTABVUE 4. In its reply brief, Applicant “acknowledge[d] the objection to the third party registrations submitted with the Appeal Brief,” *Reply Br.*, 7 TTABVUE 2, and does not argue against it.

We sustain the objection. The record in an application should be complete prior to the filing of an appeal. Trademark Rule 2.142(d); 37 C.F.R. § 2.142(d). We have not considered the third-party registration evidence submitted with Applicant’s brief.

Applicant also attached to its opening brief two Wikipedia articles. *App. Br.*, 4 TTABVUE 47–62 (“All-terrain vehicle”); 4 TTABVUE 63–76 (“Lawn mower”). Our precedent is clear: New evidence attached to a brief will only be considered if the nonoffering party (1) does not object and (2) discusses the untimely evidence or otherwise affirmatively treats it as properly of record. *In re Litehouse Inc.*, 82 USPQ2d 1471, 1475 n.2 (TTAB 2007) (registrations submitted for first time with applicant’s brief considered because examining attorney did not object and instead presented arguments in rebuttal of this evidence); *In re Rodale Inc.*, 80 USPQ2d 1696, 1699 n.4 (TTAB 2006) (Board considered summary of applicant’s prior registrations presented for the first time in its appeal brief because the examining attorney did not object and also presented substantive arguments regarding the registrations); see TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 1207.03 (June 2021). In this case, although the examining attorney did not specifically object to the Wikipedia

articles, neither did she discuss them or otherwise affirmatively treat them as properly of record. Accordingly, these untimely submitted articles will not be considered.⁴

Nevertheless, we take judicial notice⁵ of the following dictionary definition, which we find useful for our consideration:

all-terrain vehicle noun

: a small motor vehicle with three or four wheels that is designed for use on various types of terrain

Merriam-Webster.com Dictionary, <https://www.merriam-webster.com>. (last accessed Aug. 4, 2021).

II. Likelihood of Confusion

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 the issue of likelihood of confusion. *See In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In considering the evidence, 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. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); *see In re Azteca Rest. Enters., Inc.*, 50 USPQ2d 1209, 1210 (TTAB 1999). We must consider

⁴ The Board will not take judicial notice of Wikipedia articles on appeal. *In re Jimmy Moore LLC*, 119 USPQ2d 1764, 1768 (TTAB 2016).

⁵ 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, 596 (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).

each *du Pont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

Applicant contends that the refusal to register should be reversed, arguing that **TRX** is entitled to a narrow scope of protection, that customers for the goods are sophisticated and exercise a high degree of care, and that the goods are dissimilar. The Examining Attorney addresses the identity of the marks, the similarity of the goods, and the sophistication of the consumers.

A. Similarity or dissimilarity of the marks

In a likelihood of confusion analysis, we compare the marks in their entireties for similarities and dissimilarities in appearance, sound, connotation, and commercial impression. *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). Similarity in any one element may be sufficient to find the marks similar. *In re Inn at St. John's, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff'd mem.*, 777 Fed. App'x 516 (Fed. Cir. 2019) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)).

In this case, Applicant's mark, **TRX**, is the same as the mark in the cited registration. Applicant's only mention of this *du Pont* factor is its acknowledgement that the marks are "similar[]." *Reply Br.*, 7 TTABVUE 4. Not surprisingly, we find that the marks are identical, and thus look alike,⁶ sound alike, and have the same connotation and commercial impression. This factor "weighs heavily" in favor of a

⁶ Applicant's mark and that of the cited registrant are in typed or standard characters. As such, they could be displayed in any stylization, including the same or similar stylization. *See* Trademark Rule 2.52(a); 37 CFR § 2.52(a); *see Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983) ("the argument concerning a difference in type style is not viable where one party asserts rights in no particular display").

likelihood of confusion.” *In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1748 (Fed. Cir. 2017) (quoting *In re Majestic Distilling Co., Inc.*, 65 USPQ2d at 1201.

B. The similarity or dissimilarity and nature of the goods

In comparing the goods, “[t]he issue to be determined . . . is not whether the goods . . . are likely to be confused but rather whether there is a likelihood that purchasers will be misled into the belief that they emanate from a common source.” *Helene Curtis Indus. Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618, 1624 (TTAB 1989). It is not necessary that the parties’ goods be similar or even competitive to support a finding of likelihood of confusion. It is sufficient if the goods are related in some manner or that the conditions surrounding their marketing are such that they would be encountered by the same persons under circumstances that could, in light of the similarity of the marks, give rise to the mistaken belief that they come from or are associated with the same source. *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1786 (TTAB 1993). We base our determination on the goods as identified in the application and cited registration. *See Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp., Inc.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981). “When marks appear on identical [goods or] services, the degree of similarity necessary to support a conclusion of likelihood of confusion declines.” *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

Applicant’s goods are “[z]ero turn riding lawn mowers,” while the goods in the cited registration are “[a]ll terrain vehicles and structural parts therefor.” Noting that the goods differ, Applicant argues that “a person looking to purchase a zero turn riding lawn mower would not view an all-terrain vehicle as being an acceptable substitute and vice versa.” *App. Br.*, 4 TTABVUE 8.

We agree with Applicant that its goods and those of the cited registrant differ, and are not competitive, *i.e.*, prospective purchasers of zero-turn lawn mowers would not view all-terrain vehicles as an acceptable substitute and vice versa. Nonetheless, “it is not necessary that the products of the parties be similar or even competitive to support a finding of likelihood of confusion.” *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)). “Instead, likelihood of confusion can be found “if the respective products are related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source.” *Id.* The examining attorney has provided evidence in an attempt to show that the goods are related.

1. Third Party Registration Evidence

The Examining Attorney first points to several third-party registrations in which the registrant’s goods include “riding mowers” or “lawn mowers”⁷ on the one hand and all-terrain vehicles on the other. 6 TTABVUE 8–11:

Registration No.	Mark	Relevant Goods
2800753	N2 (stylized)	“all terrain vehicles” <i>and</i> “riding mowers”
2901999	ROTAX	“all-terrain vehicles” <i>and</i> “lawn mowers”

⁷ Applicant points out that its goods “are narrowly defined as zero turn riding lawn mowers.” *Reply Br.*, 7 TTABVUE 3. While true, it makes little difference for these purposes because the identification of “lawn mowers” and “riding lawn mowers” in the third-party registrations must be construed to encompass all such goods, including the more narrowly defined zero-turn riding lawn mowers. However, we have excluded Registration No. 4599604 from our consideration. While the registration covered “robotic lawn mowers” at the time of registration, those goods were deleted by a post-registration amendment, and the registration no longer covers any kind of lawn mower. In any event, robotic lawn mowers do not encompass zero-turn riding lawn mowers.

Registration No.	Mark	Relevant Goods
3273163	KYMCO	“all terrain vehicles” <i>and</i> “lawn mowers”
4011920	AG-PRO	“Dealerships in the field of . . . lawn mowers, [and] all terrain vehicles.”
4359150	COUNTRY CAT (and de- sign)	“Retail stores featuring . . . all terrain vehicles” <i>and</i> “lawn mowers”
5200128	SUNBELT RENTALS (and design)	“all-terrain vehicles” <i>and</i> “lawn mowers”
5586958	GALVSTAR	“all-terrain vehicles” <i>and</i> “lawn mowers”

Ofc. Action (Dec. 21, 2019).⁸

While such evidence is not proof that the registered marks are in use on a commercial scale or that consumers are familiar with them, “[t]hird-party registrations that individually cover different items and that are based on use in commerce serve to suggest that the listed goods . . . are of a type that may emanate from a single source.” *In re La Peregrina Ltd.*, 86 USPQ2d 1645, 1647 (TTAB 2008) (citing *In re Albert Trostel & Sons*, 29 USPQ2d 1783 (TTAB 1993); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467 (TTAB 1988), *aff’d mem.*, 864 F.2d 149 (Fed. Cir. 1988)). The Examining Attorney’s registration evidence thus suggests that Applicant’s goods and those of the registrant are “of a type that may emanate from a single source.”

2. Internet Evidence

Next, the examining attorney submitted evidence of five websites at which both

⁸ An additional registration, No. 3730498, was cancelled on July 31, 2020, for failure to file an acceptable declaration under Trademark Act § 8.

lawn mowers and all-terrain vehicles are offered:

Website	ATV	Mower
www.wherethepoweris.com	CAN-AM	HONDA (walk behind)
www.toolsinaction.com	Various “ATV Mowers” ⁹	Various brands (zero-turn ride-on mower)
www.noltspower.com	KAWASAKI	Various brands (ride-on)
www.shivercarts.com	TEXTRON	SCAG (“lawn mowers”)
www.atlanticttractor.net (John Deere brand)	JOHN DEERE	JOHN DEERE (ride-on mowers, including zero-turn)

Final Ofc. Action (May 31, 2020).

Again, Applicant emphasizes that its goods are narrowly defined as “zero turn riding lawn mowers,” and that evidence relating to other kinds of lawn mowers should not be considered. *See App. Br.*, 4 TTABVUE 6. Unlike interpretation of registrations where we consider identifications categorically, when considering evidence of use in the marketplace, we consider the actual use shown. Thus, for these purposes, we assign little probative weight to the evidence from www.wherethepoweris.com (showing only walk-behind mowers) or www.shivercarts.com (naming only “lawn mowers” without further description). Walk-behind mowers differ significantly both in price, *see App. Br.*, 4 TTABVUE 6, and in function from riding mowers of any type. Nonetheless, we have considered evidence of ride-on mowers, regardless of their zero-turn capability. Although zero-turn mowers are typically more expensive than ride-on mowers lacking that feature, *see id.*, the two kinds of mower are highly similar in

⁹ This website shows the sale of mower attachments for ATVs, rather than ATVs themselves. We therefore do not consider this website to show that ATVs are related to zero-turn riding mowers.

purpose and function, and the difference in price — less than \$200 — is not large for an item costing more than \$3,000.

The remaining websites — www.noltspower.com and www.atlantictractor.net¹⁰ — are evidence that Applicant’s goods and those of the cited registrant are sold together. “[E]vidence, such as whether a single company sells the goods and services of both parties, if presented, is relevant to a relatedness analysis.” *Hewlett-Packard v. Packard Press*, 281 F.3d 1261 62 USPQ2d 1001, 1004 (Fed. Cir. 2002).

Taken together, the Examining Attorney’s registration and internet evidence persuades us that Applicant’s goods are commercially related to those of the cited registrant. This *du Pont* factor supports a finding of likely confusion.

C. Strength of TRX

Applicant argues that **TRX** is entitled to a narrow scope of protection. *App. Br.*, 4 TTABVUE 3–5. That argument, however, relies entirely on the third-party registrations that Applicant submitted with its brief. *Id.* Because Applicant’s third-party registration evidence is untimely, Applicant’s argument that **TRX** is commercially weak is unsupported by record evidence.¹¹ “[T]he Board need not consider *du Pont* factors

¹⁰ The atlantictractor.net site is particularly relevant because it demonstrates conjoint sale of John Deere branded ATVs and zero-turn riding lawn mowers.

¹¹ Even if properly submitted, Applicant’s third-party registration evidence would not have merited a different result. Applicant’s position appears to be that **TRX** is commercially weak, *i.e.*, that consumers in the marketplace encounter other uses of similar marks for similar goods. *App. Br.*, 4 TTABVUE 5 (“Consumers thereby encounter a very large number of marks that begin with TR such as TRX.”). Nonetheless, registrations are not evidence of use of the registered marks on a commercial scale. *See Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462 (CCPA 1973); *AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1407, 177 USPQ 268 (CCPA 1973); *Richardson-Vicks, Inc. v. Franklin Mint Corp.*, 216 USPQ 989

unsupported by evidence.” *In re Morinaga Nyugyo K.K.*, 120 USPQ2d 1738, 1744 (TTAB 2016) (citing *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 4 USPQ2d 1793, 1798 (Fed. Cir. 1987)).

We conclude that **TRX** is not weak, and is thus entitled to a normal scope of protection. This factor is neutral.

D. Channels of trade; conditions under which and buyers to whom sales are made

As demonstrated by the Examining Attorney’s internet evidence, Applicant’s goods and those of the cited registrant are sold through the same outlets. Nonetheless, Applicant argues that because of the significant price of zero-turn riding mowers and ATVs, “consumers are likely to exercise relatively high level of care when selecting in the goods in the cited registration or this application.” 4 TTABVUE 7.

While it is clear that ATVs and zero-turn mowers are not low-cost impulse items, the significant price of the goods at issue does not eliminate any possibility of confusion. “That the relevant class of buyers may exercise care does not necessarily impose on that class the responsibility of distinguishing between similar trademarks for similar goods. ‘Human memories even of discriminating purchasers . . . are not infallible.’” *In re Research & Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) (quoting *Carlisle Chem. Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970)).

(TTAB 1982). To the contrary, “[t]he probative value of third-party trademarks depends entirely upon their usage,” *Palm Bay Imps.*, 73 USPQ2d at 1693, and Applicant has proffered no evidence of the registrants’ usage of their marks. While it is true that registrations can be evidence that a frequently registered term has a descriptive or suggestive meaning, *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1339 (Fed. Cir. 2015), Applicant does not allege that **TRX** has a descriptive or suggestive meaning. Indeed, Applicant admits “that **TRX** is not a word in English or any other language.” *App. Br.*, 4 TTABVUE 3.

And while the goods at issue are not inexpensive, there is no evidence that buyers of ATVs and zero-turn mowers are by their nature particularly sophisticated or otherwise unlikely to be confused by the use of identical marks on related goods. We conclude that the relevant purchasers are ordinary consumers, including unsophisticated purchasers who exercise no more than ordinary care.

We further conclude that the goods at issue are sold in overlapping channels of trade to ordinary consumers. These factors favor a finding of likely confusion.

III. Conclusion

We find Applicant's mark to be identical to that in the cited registration, a factor which weighs heavily in favor of affirmance. Applicant's goods, while not identical to those of the registrant, are significantly related, and are sold in the same channels of trade to ordinary — including unsophisticated — consumers. Upon balancing the factors, we find that confusion is likely.

Decision: The refusal to register under Trademark Act § 2(d) is affirmed.