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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	88343768
Applicant	Mahindra Vehicle Sales and Service, Inc.
Applied for Mark	ROXWRAP
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re Application of :  
: Mahindra Vehicle Sales and Service, Inc. : Alina Morris  
: : Trademark Examining Attorney  
Serial No.: 88/343,768 : Law Office 117  
: :  
Filed: March 18, 2019 :  
: :  
Mark: ROXWRAP :  
: :  
: :

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UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451

**APPELLANT'S BRIEF**

MAHINDRA VEHICLE SALES AND  
SERVICE, INC.

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**I. Introduction**

Further to the Notice of Appeal filed May 26, 2020, Applicant Mahindra Vehicle Sales and Service, Inc. (hereafter “Appellant”) appeals from the Examining Attorney’s final refusal to register the trademark in Application Serial No. 88/343,768 filed March 18, 2019 as to goods in Class 12, and respectfully requests that the Trademark Trial and Appeal Board (the “Board”) reverse the Examining Attorney’s decision and allow the mark to proceed to registration.

**II. Appellant’s Trademark**

Appellant seeks registration on the Principal Register of its mark:

**ROXWRAP**

for the following goods:

- Pre-designed vehicle wraps specifically adapted for utility terrain vehicles (UTVs) in Class 12.

**III. Procedural Summary**

Appellant’s mark, filed under Section 1(b) of the Act, was examined and, on May 31, 2019, initially refused registration under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), because of a likelihood of confusion with U.S. Registration No. 4438298 for the mark ROX SPEED FX. Appellant challenged this refusal in a response to the Office Action dated November 15, 2019. The Examining Attorney maintained the refusal in a Final Office Action dated November 26, 2019. Appellant submitted a Request for Reconsideration of this refusal on May 26, 2020. On June 15, 2020, the Examining Attorney denied Appellant’s request for reconsideration. Proceedings in the appeal were resumed by the Board by Notice mailed June 22, 2020.

#### **IV. The Examining Attorney's Refusal**

The Examining Attorney refused registration of Appellant's mark under Section 2(d) of the Act, 15 U.S.C. § 1052(d), based upon the conclusion that the Appellant's mark ROXWRAP creates the same commercial impression as the registrant's mark ROX SPEED FX and on grounds that Appellant's goods "Pre-designed vehicle wraps specifically adapted for utility terrain vehicles (UTVs)" in Class 12 are highly similar and closely related to the registrant's goods, which include "sticker wraps" for snowmobiles, all-terrain vehicles (ATVs) and motorcycles, such that "consumers are likely to be confused and mistakenly believe that the respective goods emanate from a common source." May 31, 2019 Office Action, TSDR PDF pp. 2-3; *see also* November 26, 2019 Final Office Action, TSDR PDF pp. 2-4.<sup>1</sup>

#### **V. Argument**

The Examining Attorney's refusal should be reversed because the Examining Attorney placed undue weight on the shared element "ROX," which is a conceptually weak term. When the marks are properly considered in their entireties, Appellant's mark has a vastly different visual, aural and commercial impression from the mark in the cited registration. ROXWRAP is simply not similar to ROX SPEED FX. Moreover, the Examining Attorney did not present sufficient evidence to establish that the goods are meaningfully related as the Examining Attorney claims. Finally, the record evidence demonstrates that the relevant consumers are sophisticated and likely to exercise a degree of care in their purchasing decisions, which further reduces any likelihood of confusion.

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<sup>1</sup> Pursuant to Trademark Trial and Appeal Board Manual of Procedure ("TBMP") § 1203.01, all citations to TSDR records refer to the documents in .pdf format.

**A. The Overlapping Term Is Conceptually Weak**

It is undisputed that the only shared element between the marks is the term “ROX.” It is also undisputed that “ROX” is a common alternative spelling for “ROCKS”.<sup>2</sup> The Board may also take judicial notice of dictionary definitions from dictionary.com showing that the term “rock” refers to “a large mass of stone forming a hill, cliff, promontory, or the like” and also means “to be very good, impressive, exciting or effective[.]”<sup>3</sup> Thus, when used in connection with Appellant’s goods, which are used in connection with UTVs, and the registrant’s goods, which are used in connection with snowmobiles, ATVs and motorcycles, the term “ROX” is conceptually weak because it is highly suggestive of the terrain on which such sport vehicles would be driven. The term is also laudatory.

The conceptual weakness of the shared term “ROX” suggests that consumers will look to other elements of Appellant’s mark and the cited registration to identify and distinguish source. *In re FabFitFun, Inc.*, 127 USPQ2d 1670 (TTAB 2018) (precedential). For example, in *In re FabFitFun, Inc.*, the Board relied on the *MacMillan Dictionary*’s definition of “smoking hot” (namely, “attractive, sexy looking, very hot”) to find that this overlapping wording in the applicant’s and the registered marks was, at best, highly suggestive of the purpose or intended result of the cosmetics offered under both marks and thus conceptually weak. 127 USPQ2d at 1673. Given the evidence of conceptual weakness, the Board found that consumers of the overlapping “cosmetics” associated with both marks (which both “include[d] lower cost make-up

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<sup>2</sup> See May 26, 2020 Request For Reconsideration After Final Office Action (“Request For Reconsideration”), TSDR PDF p. 8; see also dictionary definition from *The Free Dictionary*, available at <https://acronyms.thefreedictionary.com/ROX> (last visited August 19, 2020), defining the acronym “ROX” as “Rocks,” of which the Board may take judicial notice. See TBMP § 1208.04 (“The Board may take judicial notice of dictionary definitions”). Consistent with this well-understood meaning of “ROX,” the Trademark Office has acknowledged this equivalence and has required a disclaimer of ROCKS in 13 marks containing ROX from 2002 to 2019.

<sup>3</sup> See <https://www.dictionary.com/browse/rocks?s=t> (last visited August 19, 2020).

items that may be purchased without a high degree of care” (*Id.* at 1673)) would look beyond the shared wording to identify and distinguish source. *Id.* at 1675.

The same is true of the relevant consumers in this case. Because the only overlapping term in the marks, “ROX,” merely describes or is highly suggestive of the type of terrain associated with the off-road, sport vehicles on which the Appellant’s and registrant’s goods are applied and the quality of such goods, the shared element is conceptually weak. *See* Trademark Manual of Examining Procedure (“TMEP”) § 1209.03(k) (“Laudatory terms, those that attribute quality or excellence to goods or services, are merely descriptive under § 2(e)(1).”). Even if “ROX” were to be considered a double-entendre, the word still remains merely descriptive because all meanings of it in relation to the goods are descriptive. *See* TMEP § 1213.05(c) (“If all meanings of a ‘double entendre’ are merely descriptive in relation to the goods, then the mark comprising the ‘double entendre’ must be refused registration as merely descriptive.”). Thus, the shared element in the marks, “ROX,” is conceptually weak and consumers are likely to look beyond it in order to identify and distinguish source.

**B. ROXWRAP Is Not Similar To ROX SPEED FX**

In refusing registration, the Examining Attorney relied heavily on the presence of the shared term “ROX” in the marks, it being the first portion of the marks. The Examining Attorney also relied on the fact that the registrant disclaimed the wording “SPEED FX” and the Examining Attorney’s determination that the term “WRAP” in Appellant’s mark is descriptive. It is respectfully submitted that the Examining Attorney’s refusal to register is erroneous because it fails to give due consideration to the marks as a whole, and improperly places undue weight on the shared term, which as set forth above, is conceptually weak.

In determining whether there is sufficient similarity between the marks, the focus should be on the overall commercial impression created by each mark. *American Ass'n for*

*Advancement of Science v. Hearst Corp.*, 498 F. Supp. 244, 259, 206 USPQ 605, 619 (D.D.C. 1980). Marks should be considered in their entireties because this is the manner in which consumers encounter them. They should not be dissected and analyzed piecemeal because this impacts the overall commercial impression conveyed. *Opryland USA, Inc. v. Great Am. Music Show, Inc.* 970 F.2d 847, 851, 23 USPQ2d 1471 (Fed. Cir. 1992) (“When it is the entirety of the marks that is perceived by the public, it is the entirety of the marks that must be compared”). The cited mark should not be separated into its individual components in order to find a connection with Appellant’s mark. See generally *Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (C.C.P.A. 1981); *Massey Junior College, Inc. v. Fashion Institute of Technology*, 492 F.2d 1399, 181 USPQ 272, 273 (C.C.P.A. 1974).

In *In re Hearst Corp.*, 982 F.2d 493, 25 USPQ2d 1238 (Fed. Cir. 1992), the Federal Circuit reversed a decision of the Trademark Trial and Appeal Board that refused registration of VARGA GIRL for calendars on the ground of likelihood of confusion with the registered mark VARGAS for calendars and similar goods. The Board’s decision relied upon its determination that “VARGA” was the dominant element of the mark VARGA GIRL and that “GIRL” was merely descriptive and could not be given substantial weight in a comparison of the marks. 982 F.2d at 494, 25 USPQ2d at 1239.

The Federal Circuit held that the Board erred in using this analytical approach. *Id.* The Court of Appeals found that, while “VARGA” and “VARGAS” were similar, the marks must be considered in the way they are used and perceived; this meant looking at the marks in their entireties and giving all components appropriate weight. *Id.* The Federal Circuit then held that the appearance, sound, sight and commercial impression of VARGA GIRL “derive[s] significant contribution from the component ‘girl’” and that while “stressing the portion ‘varga’ and diminishing the portion ‘girl,’ the Board inappropriately changed the mark.” *Id.* The Federal

Circuit held that the Board erred “in its diminution of the contribution of the word ‘girl’” and that, when both terms in VARGA GIRL are given fair weight, VARGA GIRL and VARGAS are sufficiently different in sound, appearance, connotation and commercial impression to negate likelihood of confusion under Section 2(d) of the Lanham Act. *Id.* The Court’s decision cites numerous cases in which confusion was found not likely despite the marks at issue having the same or similar beginning terms and combining additional descriptive or generic words. *See id.* at 494 n.2 (citing, for example: *Keebler Co. v. Murray Bakery Products*, 866 F.2d 1386, 9 USPQ2d 1736 (Fed. Cir. 1989) (PECAN SANDIES not confusingly similar to PECAN SHORTEES); *Land-O-Nod Co. v. Paulison*, 220 USPQ 61 (TTAB 1983) (CHIROPRACTIC and CHIRO-MATIC not confusingly similar); *In re Bed and Breakfast Registry*, 791 F.2d 157, 229 USPQ 818 (Fed. Cir. 1986) (BED AND BREAKFAST REGISTRY and BED AND BREAKFAST INTERNATIONAL not confusingly similar); and *Wooster Brush Co. v. Prager Brush Co.*, 231 USPQ 316 (TTAB 1986) (POLY PRO and POLY FLO not confusingly similar)).

Likewise, the refusal to register in this case inappropriately gives undue weight to the presence of ROX in both marks. That was improper, not only because the shared term is conceptually weak as noted above, but also because each mark derives significant contribution from the other terms that are present:

**ROXWRAP**

**ROX SPEED FX**

The marks should have been considered in their entirety because that is how they are perceived by consumers. *See In re Hearst*, 982 F.2d at 494 (“[m]arks tend to be perceived in their entirety”). While the registrant disclaimed the wording “SPEED FX,” the disclaimer denotes only that the registrant does not claim exclusive rights in the disclaimed wording apart from the whole. *See* TBMP § 1213.01(a) (stating that the basic purpose of disclaimers is “to indicate in

the record that a significant element of a composite mark is not being appropriated apart from the composite.”).

In addition, ROXWRAP is a unitary mark and should not have been dissected into individual parts. *See* TBMP § 1213.05 (describing compound word marks such as BOOKCHOICE, PROSHOT and MAXIMACHINE as unitary marks and stating that a mark is considered “unitary” when its elements are “so integrated or merged together that they cannot be regarded as separable.”). Further, and more significantly, the alliteration in the two terms ROX and WRAP (phonetically: räks, rap), when considered in the context of a mark that already is visually unitary, makes dissection or diminution of the term WRAP even more inappropriate. *See* TMEP § 1213.05(e) (noting that alliteration, *e.g.*, LIGHT N’ LIVELY, sometimes can make even non-unitary marks unitary for purposes of not requiring a disclaimer). By diminishing the presence of WRAP in Appellant’s mark and SPEED FX in the registered mark, the Examining Attorney inappropriately changed the commercial impressions of the marks conveyed to and perceived by consumers.

When properly considered in their entireties, the marks are significantly dissimilar. As is clearly shown above, the marks are structured differently and end in completely different, unrelated words (“ROXWRAP” vs. “ROX SPEED FX”). Appellant’s mark is a single, seven-letter word. It is visually and aurally distinctive because it is a coined term and because of the rhythmic alliteration created by the repeated letter “r” at the beginning of each syllable when the term is spoken aloud. Also, when Appellant fused the words “rox” (rocks) and “wrap” it created a unitary term that is conceptually arbitrary (*i.e.*, the meanings, if any, of “rocks wrap” are uncertain at best) and not descriptive of Appellant’s claimed vehicle wrap products in any meaningful way despite containing the term “wrap”.

The registered mark is not a compound word; it comprises three separate words of three, five and two letters each. It creates a different alliterative sound because the repeated letter is an “x” (not an “r”) that comes at the end of the first and third syllables (rather than the beginning). Also, its visual presentation is different because it relies on alternative spellings for common words, e.g., “ROX” for “ROCKS” and “FX” for “EFFECTS”.<sup>4</sup> The marks overall look and sound very different.

In addition, the marks differ significantly in meaning, connotation and commercial impression. Appellant’s mark ROXWRAP creates the commercial impression that Applicant’s goods envelop or cocoon the UTVs for which they are specifically made and to which they are applied. In contrast, the cited mark includes the term “SPEED” and the abbreviation “FX” (short for “effects”). Thus, the registered mark ROX SPEED FX overall connotes to consumers that registrant’s goods are performance enhancing accessories. The different sound, appearance, connotation and commercial impression created by the marks negate a likelihood of confusion under Section 2(d) of the Lanham Act.

**C. The Goods Of The Parties Are Different And There Is Insufficient Evidence To Show That The Parties’ Goods Are Related**

In addition, likelihood of confusion is avoided because the goods of the parties are different. The Appellant’s goods are “Pre-designed vehicle wraps specifically adapted for utility terrain vehicles (UTVs).” The goods in the cited registration include “Parts and accessories for snowmobiles, namely,...sticker wraps; parts and accessories for all-terrain vehicles (ATVs), namely,...sticker wraps; parts and accessories for motorcycles, namely,...sticker wraps.” Clearly, Appellant’s goods and the cited goods in the registration do not directly compete, as

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<sup>4</sup> See dictionary definition from *The Free Dictionary*, available at <https://acronyms.thefreedictionary.com/ROX> (last visited August 19, 2020), defining the acronym “ROX” as “Rocks”; see also May 26, 2020 Request For Reconsideration, TSDR PDF p. 14.

Appellant's goods are specifically adapted for UTVs and the registered goods are parts or accessories for snowmobiles, ATVs and motorcycles.

The Examining Attorney's refusal nonetheless concluded that the goods are "related" for likelihood of confusion purposes because they are similar or complementary in purpose or function. *See* May 31, 2019 Office Action, TSDR PDF at p. 3; *see also* November 26, 2019 Final Office Action, TSDR PDF p. 4. This finding was based on the Examining Attorney's determination that "sticker wraps" as used in the registrant's identification of goods actually refers to the type of full-body vehicle decals that the trade identifies by the term "sticker wrap" (or vehicle wrap), despite the record demonstrating that the registrant's use of the term was ambiguous. *See* November 26, 2019 Final Office Action, TSDR PDF pp. 3-4. "[W]hen the description of goods for a cited registration is somewhat unclear ... it is improper to simply consider that description in a vacuum and attach all possible interpretations to it when the applicant has presented extrinsic evidence showing that the description of goods has a specific meaning to members of the trade." *See* TMEP § 1207.01(a)(iii) (citing *In re Trackmobile Inc.*, 15 USPQ2d 1152, 1154 (TTAB 1990)).

As shown by the evidence made of record by the Examining Attorney, "sticker wraps" or "vehicle wraps" are large, cocoon-like, stretchy decals that are designed by vehicle type and model and to cover all or substantially all of the body of the vehicle. *See* November 26, 2019 Final Office Action, TSDR PDF pp. 9-31. In addition, these full-body decals are made of a protective material (such as vinyl) and are meant to last permanently or semi-permanently. *See, e.g.*, November 26, 2019 Final Office Action, TSDR PDF p. 23. Providing protection, these products are functional and not merely decorative.

While registrant's identification of goods refers to registrant's goods as "sticker wraps," the registrant's specimen shows that registrant's goods are actually 12" or 24" "Vinyl Stickers" that function only as advertising for registrant and its website:



Rox 12" Vinyl Sticker  
#  
\$ 2.99



Rox 24" Vinyl Sticker  
#BW-STICKER-24  
\$ 9.99

See May 26, 2020 Request for Reconsideration, TSDR PDF p. 29. Registrant's goods are not the type of protective, full-body vehicle adhesives that the trade denotes as "vehicle wraps" or "sticker wraps".

Because the registrant's use of the term "sticker wraps" in the identification of goods was ambiguous, the Examining Attorney should have considered the registrant's actual use. When registrant's actual use is considered, there is little to no evidence of record showing that consumers would deem the parties' respective goods related. The evidence cited by the Examining Attorney predominantly shows full-body graphic adhesives. See May 31, 2019 Office Action, TSDR PDF pp. 8-13; see also November 26, 2019 Final Office Action, TSDR PDF pp. 9-31. This is not probative of whether consumers would assume that registrant's actual goods (small, square vinyl logo stickers) for snowmobiles, ATVs and motorcycles, and Appellant's pre-designed full vehicle protective wraps for UTVs come from the same source.

**D. Consumer Sophistication Further Reduces Any Likelihood Of Confusion**

Finally, the Examining Attorney gave little to no weight to the record evidence showing that the consumers of the parties' respective products are sophisticated. For example, Appellant attached evidence showing that snowmobiles and ATVs for which registrant sells accessories retail at prices ranging from \$2,000 to \$10,000 and up. See May 26, 2020 Request for Reconsideration, TSDR PDF pp. 32-38 (collectively attaching articles from <http://www.gosnowmobiling.org/beginners-snowmobiling-tips.html> and <https://boostatv.com/atvcost/> (last visited May 24, 2020)). The 2020 base model of Appellant's ROXOR branded UTVs begin at approximately \$16,000. See May 26, 2020 Request for Reconsideration, TSDR PDF pp. 40-41 (printout of webpage at <https://www.roxoroffroad.com/> (last visited May 24, 2020)). Appellant's printed vehicle wraps are specifically adapted for its UTVs. Moreover, adhesive wraps for UTVs range in price from about \$300 to over \$2,000. See May 26, 2020 Request for Reconsideration, TSDR PDF pp. 43-71 (collectively attaching examples from <https://utvwrap.com/>, <https://www.mossoakgraphics.com/mossy-oak-camo-utv-side-by-side-wrap>, and <https://toyskinz.com/collections/utv-wraps> (last visited May 24, 2020)). Accordingly, purchasers of both parties' goods are likely to exercise a high degree of care in a purchasing decision and not buy on impulse, which further minimizes the likelihood of consumer confusion. *Cf. In re FabFitFun, Inc.*, 127 USPQ2d 1670, 2018 WL 4043156, \*3, 8 (finding no likelihood of confusion due to weakness of the overlapping elements in the marks, despite the shared goods, cosmetics, including items that are purchased "without a high degree of care").

**VI. Conclusion**

The Examining Attorney inappropriately discounted portions of the marks and gave the shared element undue weight in order to find confusing similarity. When properly viewed as a

whole, Appellant's mark and the registered mark are sufficiently dissimilar to avoid a likelihood of confusion under Section 2(d) of the Lanham Act. This by itself is sufficient to warrant a reversal of the Examining Attorney's refusal. In addition, the record evidence fails to show that the goods are related such that consumers would believe they emanate from the same source. Moreover, the record evidence demonstrates that the relevant consumers are sophisticated and likely to exercise a degree of care in their purchasing decisions. This further reduces any likelihood of confusion. Accordingly, Appellant respectfully requests reversal of the refusal to register grounded in Section 2(d) of the Trademark Act.

MAHINDRA VEHICLE SALES AND  
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Date: August 21, 2020

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