

**THIS DECISION IS NOT
CITABLE AS PRECEDENT
OF THE TTAB**

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Fugitt Rubber & Supply Co., Inc.

Serial Nos. 76342221 and 76342222

Jerome A. Broadhurst and Sara Falkinham of Armstrong Allen
for applicant.

Theodore McBride, Trademark Examining Attorney, Law Office
103 (Michael Hamilton, Managing Attorney).

Before Quinn, Holtzman and Rogers, Administrative Trademark
Judges.

Opinion by Quinn, Administrative Trademark Judge:

Fugitt Rubber & Supply Co., Inc. has filed
applications to register the marks TEMPEST POWER ("POWER"
disclaimed) and TEMPEST POWER UNIT ("POWER UNIT"
disclaimed) for "apparatus for generating power for use in
lighting, heating and other industrial uses, namely, a
mobile source of electrical power for operating emergency
lights, work lights, electric heaters, and electric power
tools and a source for providing compressed air used to
operate pneumatic hand tools and other types of pneumatic

Ser Nos. 76342221 and 76342222

equipment, in commercial and industrial applications, such as factory, construction industry, and warehouse settings, including electric generators for generating power for use in lighting, heating and other industrial uses, namely, mobile electrical generators for operating emergency lights, work lights, electric heaters, and electric power tools; air compressors, namely, a source for providing compressed air used to operate pneumatic hand tools and other types of pneumatic equipment, in commercial and industrial applications, such as factory, construction industry, and warehouse settings."¹

The trademark examining attorney refused registration under Section 2(d) of the Trademark Act on the ground that applicant's mark, if used in connection with applicant's goods, would so resemble the previously registered mark TEMPEST for "industrial rotary screw air compressors and parts therefor"² as to be likely to cause confusion. The examining attorney also refused registration based on applicant's failure to comply with the requirement to submit an acceptable identification of goods.

When the refusal to register was made final, applicant

¹ Application Serial Nos. 76342221 and 76342222, respectively, both filed November 27, 2001, and both based on an allegation of a bona fide intention to use the mark in commerce.

² Registration No. 2287159, issued October 19, 1999.

Ser Nos. 76342221 and 76342222

appealed. Applicant and the examining attorney filed briefs.³ An oral hearing was not requested. Because of the essentially identical issues involved in these appeals, the Board shall decide them in one opinion.

IDENTIFICATION OF GOODS

The examining attorney maintains that the identification of goods is unacceptable because it contains indefinite terminology and ambiguous language. The examining attorney asserts that applicant has failed to use the common commercial names for the goods, instead choosing to use indefinite terms such as "apparatus." Although the examining attorney recognizes that such term is followed by "namely," the examining attorney contends that the identification is tantamount to "apparatus, namely stuff." (Brief, p. 13). As for the amended identification proposed in applicant's supplemental brief, the examining attorney states that this identification is indefinite as well.

³ After filing its appeal brief, applicant filed a supplemental appeal brief wherein applicant proposed an alternative identification of goods. Accompanying this supplemental brief is a copy of applicant's recently issued Patent No. 6,547,527 B2 covering the goods herein. Although the submission of evidence with its appeal brief was manifestly untimely under Trademark Rule 2.142(d), the Examining Attorney, in his brief, considered the evidence as if properly of record. Accordingly, we likewise have treated the evidence to be of record.

Ser Nos. 76342221 and 76342222

Applicant simply argues that either of the identifications of goods is acceptable.

In further support of its position that the identification of goods is acceptable, applicant offered a concise description of its goods as follows: "[A] small, compact, mobile unit comprised of a gasoline-powered engine connected to both an electric generator and to an air compressor for generating power for a wide variety of uses in construction and in commercial applications, including the generation of power to operate electric and pneumatic tools." Its key feature, according to applicant, is that "it is a compact power source for air and electricity that can fit on the back of a small pickup truck or trailer for use in land-based construction and maintenance applications." The goods are used to provide electricity and compressed air for operating various types of power equipment and lighting fixtures, and the goods are marketed to building contractors, the construction trades and various maintenance shops. (Brief, p. 3) Applicant's patent covering the goods describes the goods in the Abstract as follows:

A portable power unit having an internal combustion engine, a tank for holding a supply of pressurized fluid, and electrical generator powered by the internal combustion engine, and a pump

Ser Nos. 76342221 and 76342222

selectively powered by the internal combustion engine. An electro-magnetic clutch is energized by a pressure switch on the tank when the pressure in the tank falls below a predetermined value, and a cooling fan for the pump may also be energized by the pressure switch together with the clutch. A non-slip positive drive belt couples power from the engine to the generator. The generator is overdriven at a shaft rotation speed above that of the engine's shaft, and the pump is underdriven at a shaft rotation speed below that of the engine's shaft.

The patent discloses that the invention generally relates to portable power generation and supply of a pressurized fluid.

Section 1402.01 of the Trademark Manual of Examining Procedure (TMEP), 3d ed. (rev. May 2003), provides that the identification of goods must be specific, definite, clear, accurate and concise. Pursuant to TMEP §1402.01(a), with few exceptions, an identification of goods will be considered acceptable if it meets certain guidelines, and deference should be given to the language set forth by applicant.

Given all of the information provided by applicant, we find that the identification is sufficiently definite. The specific nature of the goods is clear from the identification itself. In sum, the identification meets

Ser Nos. 76342221 and 76342222

the guidelines set forth in TMEP §1402.01(a); most importantly, the identification is understandable and sufficiently definite for purposes of the likelihood of confusion determination.

Accordingly, the requirement for a more definite identification of goods is reversed.

LIKELIHOOD OF CONFUSION

The examining attorney maintains that registrant's mark TEMPEST is similar to each of applicant's marks TEMPEST POWER and TEMPEST POWER UNIT, and that the goods marketed thereunder are related in that both entities sell air compressors. In response to applicant's contention that TEMPEST is a weak mark, the examining attorney states that applicant's evidence reveals that registrant and applicant are the only entities that use TEMPEST in connection with the types of goods involved herein. The examining attorney argues that applicant has impermissibly attempted to limit the scope of registrant's goods; he goes on to assert that the goods move through similar channels of trade and that it is common for the same entity to market both types of goods under the same mark. In connection with this latter contention, the examining attorney submitted copies of third-party registrations and

Ser Nos. 76342221 and 76342222

excerpts of web pages of third parties retrieved from the Internet.

Applicant argues that the cumulative differences between the marks and the goods sold thereunder make it unlikely that consumers will be confused when confronted with the marks. Applicant points to differences between the marks, and further asserts that the cited mark is weak in view of numerous third-party registrations. As to the goods, applicant states that registrant's goods are large screw compressors for use and installation on ocean-going vessels, and that these goods travel in different trade channels than do applicant's goods. Applicant also contends that the goods are expensive, requiring a deliberate purchasing decision by sophisticated buyers. In support of its position that the refusal be reversed, applicant submitted an excerpt from registrant's web site on the Internet, and a TESS printout of a list of third-party registrations and applications of TEMPEST marks.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also: *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201

Ser Nos. 76342221 and 76342222

(Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also: *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

We first turn to compare the marks. The marks are virtually identical in sound, appearance and meaning, with the only difference being the inclusion of the highly descriptive (if not generic) terms "POWER" and "POWER UNIT" in applicant's respective marks. With respect to a comparison of applicant's marks TEMPEST POWER and TEMPEST POWER UNIT with registrant's mark TEMPEST, we must consider the marks in their entireties. Nevertheless, in articulating reasons for reaching a conclusion on the issue of likelihood of confusion, "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided [that] the ultimate conclusion rests on consideration of the marks in their entireties." *In re National Data Corp.*, 753 F.3d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). For example, "that a particular feature is descriptive or generic with respect to the involved goods or services is

Ser Nos. 76342221 and 76342222

one commonly accepted rationale for giving less weight to a portion of a mark...." Id. at 751.

In the case at hand, when considering applicant's two typed marks, the highly descriptive or generic words "POWER" and "POWER UNIT," which have been disclaimed, clearly are subordinate to the remainder of the mark, "TEMPEST." This dominant portion of applicant's marks is identical to the entirety of registrant's mark. Applicant has merely appropriated the entirety of registrant's mark and added the descriptive words "POWER" and "POWER UNIT" to form its respective marks; it hardly need be stated that, in each instance, this addition does not sufficiently distinguish the marks in any meaningful way. In re El Torito Restaurants Inc., 9 USPQ2d 2002 (TTAB 1988). To the extent that applicant argues that its marks convey the idea of a "tempest in a teapot," certainly the term TEMPEST standing alone, as in registrant's mark, may impart the same connotation.

We next turn to compare the goods. As has been often stated, the question of registrability of applicant's mark must be decided on the basis of the identifications of goods in the involved application and the cited registration. Octocom Systems Inc. v. Houston Computers Services Inc., 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir.

Ser Nos. 76342221 and 76342222

1990). It is not necessary that the goods of the parties be similar or competitive, or even that they move in the same channels of trade to support a holding of likelihood of confusion. It is sufficient that the respective goods of the parties are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same producer. In re International Telephone & Telegraph Corp., 197 USPQ 910, 911 (TTAB 1978). Moreover, the greater the degree of similarity between the applicant's marks and the cited registered mark, the lesser the degree of similarity between the applicant's goods or services and the registrant's goods or services that is required to support a finding of likelihood of confusion. In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993); and In re Opus One Inc., 60 USPQ2d 1812 (TTAB 2001).

The goods are related in that the identifications of goods in the cited registration and the involved applications list air compressors, and both types of air compressors are used in industrial applications. Although the air compressors may be specifically different, the

Ser Nos. 76342221 and 76342222

goods are sufficiently related that, when sold under the similar marks TEMPEST and TEMPEST POWER (or TEMPEST POWER UNIT), there is likely to be confusion among purchasers.

Applicant contends that "[a]lthough an air compressor is part of its power source, Applicant's TEMPEST POWER [TEMPEST POWER UNIT] product is notable for its compact integration of many features." (Brief, p. 3) While the gist of applicant's remarks is that air compressors are only a component of applicant's product, it must be noted, however, that applicant's identification of goods lists "air compressors" separately as a source for providing compressed air.

Further, applicant, by relying on information obtained from registrant's Internet website, has attempted to restrict the scope of registrant's goods to large air compressors used on ocean-going vessels. The nature and scope of registrant's goods must be determined on the basis of the goods recited in the registration. In re Shell Oil Co., supra 1690, n. 4 (Fed. Cir. 1993). An applicant may not restrict the scope of its goods and/or the scope of the goods covered in the registration by extrinsic argument or evidence. In re Bercut-Vandervoort & Co., 229 USPQ 763, 764 (TTAB 1986). Inasmuch as there is no limitation in registrant's identification of goods, the "industrial

Ser Nos. 76342221 and 76342222

rotary screw air compressors" must be presumed to encompass all goods of the type described, and not just large air compressors that might be used on ocean-going vessels.

In order to demonstrate the requisite relatedness of the goods, the examining submitted evidence retrieved from the Internet and five third-party registrations. The Internet evidence covers air compressors and shows that various types of air compressors may emanate from the same source. No mention is made, however, if the different types of compressors are marketed under the same mark. As to the third-party registration evidence, such registrations which individually cover a number of different items and which are based on use in commerce serve to suggest that the listed goods and/or services are of a type which may emanate from a single source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993). Each of the five use-based registrations lists different types of air compressors, and suggests that various kinds of compressors, including the types involved herein, may emanate from a single source under the same mark.

Applicant argues the point that the respective goods are not bought on impulse, and that these expensive products are purchased by sophisticated and knowledgeable purchasers. Firstly, there is no evidence to support this

Ser Nos. 76342221 and 76342222

proposition and, as stated above, the identifications of goods do not include any restrictions bearing on price or sophistication of purchasers. Secondly, even assuming that the purchasers of these goods are sophisticated, this does not mean that such consumers are immune from confusion as to the origin of the respective goods, especially when sold under similar marks. *Wincharger Corp. v. Rinco, Inc.*, 297 F.2d 261, 132 USPQ 289 (CCPA 1962); *In re Total Quality Group Inc.*, 51 USPQ2d 1474 (TTAB 1999); and *In re Decombe*, 9 USPQ2d 1812 (TTAB 1988).

The evidence of third-party registrations and applications of TEMPEST marks is not persuasive. This evidence was submitted in the form of a list retrieved from the TESS database.⁴ The list consists of the mark, the serial number and, if registered, the registration number, and whether the application or registration is "live" or "dead." This list fails to show the goods and/or services sold under the various registered TEMPEST marks; consequently, this evidence is entitled to minimal probative value. Further, with respect to the listed

⁴ Generally, a list of registrations is insufficient to make them of record. *In re Duofold Inc.*, 184 USPQ 638 (TTAB 1974). In this case, however, no objection was ever made to the list; rather, the examining attorney considered the list as if properly made of record. Accordingly, the printout of the TESS list is deemed to be stipulated into the record.

Ser Nos. 76342221 and 76342222

applications, applications are evidence of nothing more than that the application was filed.

Another point argued by applicant is that its corporate name appears in close proximity to its marks in advertising and product literature, thereby eliminating the likelihood of confusion with registrant's mark. In our determination, we must compare the marks as shown in the cited registration and involved application. Here, applicant's corporate name does not appear in either of the marks sought to be registered. Accordingly, applicant's point is irrelevant to our analysis.

In sum, in view of the similarities between the marks and the goods sold thereunder, as reflected in the identifications of goods, we find that confusion is likely to occur among purchasers.

Lastly, to the extent that any of the points argued by applicant cast doubt on our ultimate conclusion on the issue of likelihood of confusion, we resolve that doubt, as we must, in favor of the prior registrant. In re Hyper Shoppes (Ohio), Inc., 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988); and In re Martin's Famous Pastry Shoppe, Inc., 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984).

Decision: The refusal to register is affirmed.