

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

Mailed:
August 23, 2005
Bucher

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Trakloc International, LLC

Serial No. 76393557

Kit M. Stetina of Stetina Brunda Garred & Brucker for
Trakloc International, LLC.

John S. Yard, Trademark Examining Attorney, Law Office 115
(Tomas V. Vlcek, Managing Attorney).

Before Quinn, Chapman and Bucher, Administrative Trademark
Judges.

Opinion by Bucher, Administrative Trademark Judge:

Trakloc International, LLC, seeks registration on the
Principal Register of the mark TRAKLOC (standard character
drawing) for goods identified in the application, as
amended, as follows: "metal building materials namely
structural beams and posts for forming walls in residential
and commercial structures" in International Class 6.¹

This case is now before the Board on appeal from the
final refusal of the Trademark Examining Attorney to

¹ Application Serial No. 76393557 was filed on April 10, 2002,
based upon applicant's allegation of a *bona fide* intention to use
the mark in commerce.

register this mark based upon Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d). The Trademark Examining Attorney has found that applicant's mark, when used in connection with the identified goods, so resembles the following registered mark as to be likely to cause confusion, to cause mistake or to deceive:

REGISTRATION No. 2628824 TRAC-LOC (standard character drawing)

for "flooring system comprising non-metal floor panels and metal or plastic track for mechanically interlocking the floor panels" in International Class 19.²

Applicant and the Trademark Examining Attorney submitted briefs. Applicant did not request an oral hearing. We reverse the refusal to register.

The Trademark Examining Attorney takes the position that applicant's mark and registrant's mark are highly similar in appearance and identical as to sound, connotation and commercial impression; and that applicant's and registrant's goods are both structural building products, meaning they are highly related and would be sold through the same channels of trade.

² Registration No. 2628824 issued to Premark RWP Holdings, Inc., on October 1, 2002, reciting a date of first use in commerce at least as early as January 15, 2002.

By contrast, in arguing for registrability, applicant asserts that its mark, TRAKLOC, creates a different commercial impression from registrant's TRAC-LOC, and hence its mark does not so resemble the cited mark such that there is a likelihood of confusion; that these respective goods are not related and will not move through the same channels of trade; and that all of these goods will be directed to sophisticated purchasers.

Our determination under Section 2(d) is based upon an analysis of all of the facts in evidence that are relevant to the factors bearing upon the issue of likelihood of confusion. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

We turn first to the du Pont factor focusing on the similarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. In both marks, the term LOC is a phonetic equivalent of the word "lock," a highly suggestive term having the identical connotation, whether applied to metal building materials for forming walls or to an interlocking panels comprising a flooring system. Similarly, the TRAC or TRAK (i.e., "track") terminology is highly suggestive of these respective goods.

As to the cited mark, applicant argues that it is significant that registrant's presentation of its mark joins the terms TRAC and LOC with a hyphen. Applicant argues that a hyphen draws attention to itself, creating a pause between the two terms.³ However, we agree with the Trademark Examining Attorney that the hyphen in registrant's cited mark is actually not dividing these words. Rather, it is placed in a natural break between the two words making up this mark, linking the two words, as is often the case with compound words. We find that punctuation and similar symbols generally do not change the commercial impression of a mark. *In re Burlington Industries, Inc.*, 196 USPQ 718, 719 (TTAB 1977) ["[A]n exclamation point does not serve to identify the source of the goods"]. Hence, the cited mark "will be pronounced precisely the same as applicant's non-hyphenated mark and create precisely the same connotation." Trademark Examining Attorney's brief, pp. 4-5.

Applicant also argues that registrant's mark "correctly spells" TRAC while its own proposed mark misspells TRAK in a

³ In support of this proposition, applicant submitted the relevant pages on hyphen use for writers of prose from *The Longman Handbook For Writers and Readers*. There is a problem, however, with this submission. The Trademark Examining Attorney objected to this evidence because the excerpt was submitted for the first time with applicant's appeal brief. Inasmuch as this material was not timely and properly introduced into the record, the Trademark Examining Attorney's objection is sustained, and this evidence has not been considered in reaching our decision.

"fanciful" manner, suggesting to prospective purchasers that these goods may be "unconventional" in some way.

Applicant's brief, p. 4. However, again, we agree with the Trademark Examining Attorney that the TRAC prefix in the registrant's mark is not a dictionary term either - both "Trac" and "Trak" appearing to be equally fanciful misspellings of the word "Track."

Furthermore, as to the slight difference in appearance between these two marks, the Trademark Examining Attorney correctly argues that the test of likelihood of confusion is not whether the marks can be distinguished when subjected to a side-by-side comparison.

On this factor, we conclude that the marks are quite similar as to appearance, and virtually identical as to sound, connotation and commercial impression.

We turn next to the du Pont factor focusing on the relationship of the goods as described in the application and the goods listed in the cited registration.

In support of his position that the goods are closely related, the Trademark Examining Attorney argues that the fact that registrant's panels are secured by a track indicates the goods are "structural building materials" -- not surface floor coverings such as floor tiles, carpets or resilient surface coverings typically found at flooring

stores. As such, the Trademark Examining Attorney argues that both applicant and registrant will be marketing structural building materials. Trademark Examining Attorney's appeal brief, p. 5.

Applicant argues strenuously that the Trademark Examining Attorney has failed to provide sufficient evidence showing that the goods are related in order to support a finding of likelihood of confusion.

By contrast, the Trademark Examining Attorney argues that he has provided copies of ten representative third-party registrations showing that the types of applicant's and of registrant's goods are manufactured and marketed by the same parties and sold under the same mark. He argues that these third-party registrations have probative value to the extent that they serve to suggest that the goods listed therein, namely structural building beams and posts, on the one hand, and flooring systems, on the other hand, are of a kind that may emanate from a single source. In re Infinity Broadcasting Corp. of Dallas, 60 USPQ2d 1214, 1218 (TTAB 2001), citing In re Albert Trostel & Sons Co., 29 USPQ2d 1783, 1785-86 (TTAB 1993); and In re Mucky Duck Mustard Co., Inc., 6 USPQ2d 1467, 1470 at n.6 (TTAB 1988).

Applicant counters that these third-party registrations do not support the position taken by the Trademark Examining

Attorney, but rather that they actually demonstrate that wood building products are generally manufactured and/or marketed by different companies than those that manufacture and/or market metal building products.

The Trademark Examining Attorney dismisses this argument as follows:

It is further worth noting that the registrant's goods, like many building material products, are comprised of both metal and non-metal components, further rendering the material composition argument as insignificant. Additionally, the classification of goods distinction between international class 6 metal building products and class 19 non-metal building products neither creates nor recognizes separate channels of trade. ... The fact that the United States Patent and Trademark Office classifies goods or services in different classes does not establish that the goods and services are unrelated under Trademark Act Section 2(d), 15 U.S.C. §1052(d). The determination concerning the proper classification of goods or services is a purely administrative determination unrelated to the determination of likelihood of confusion. [citations omitted] For the foregoing reasons, the applicant's attempts to distinguish the goods of the applicant ... must be considered unpersuasive.

Trademark Examining Attorney's appeal brief, pp. 7-8.

While we certainly agree with the Trademark Examining Attorney that the difference in International Classification is not determinative herein, we are unwilling so easily to dismiss the significance of the material composition of the

structural building materials or the floor panels, especially when interpreting the probative value of fewer than ten third-party registrations having both types of goods, which constitutes the totality of evidence in the file. Furthermore, we disagree with the Trademark Examining Attorney's conclusion that applicant's and registrant's goods are related merely because both can be characterized as "structural building products."

To the extent it is significant to our determination that applicant's beams and posts are metal and registrant's flooring panels are non-metal, we find that only one of the registrations based on use submitted by the Trademark Examining Attorney has both metal structural beams and posts and non-metal flooring panels.⁴ This too is a registration based on a foreign registration (Canadian), but that also has dates of use in commerce for the two relevant classes of goods. Registration No. 2449404 (PROWALL). However, this is a rather thin reed upon which to base a finding of a relationship between these goods. Absent any other evidence

⁴ In his brief, the Trademark Examining Attorney highlights three of the ten registrations in particular. However, while two of these three registrations [Reg. No. 2486509 (AMANCO and design) and Reg. No. 2645059 (BI-STEEL)] list metal beams and posts as well as non-metal flooring panels, both are registrations based upon Section 44 of the Act - not on use in commerce in (or with) the United States. Hence, they are of most limited probative value. See Mucky Duck Mustard, *supra* at 1470 n.6.

in the record to show the relationship of these respective goods, we cannot agree with the Trademark Examining Attorney that these goods "are highly related." Rather, on this record, we find that the respective goods, as identified, are not related.

As to a related du Pont factor, given our finding that the Trademark Examining Attorney has not shown these goods to be related, we agree with applicant that absent any other evidence, we also cannot find that they are likely to travel through the same channels of trade as the registrant's goods.

As to the du Pont factor focusing on the conditions under which and buyers to whom sales are made, applicant argues that the likelihood of confusion will be minimized by the care in purchasing taken by the relatively sophisticated purchasers involved herein. On its face, registrant's description of goods suggests that these are not systems designed for installation by the do-it-yourselfer. Similarly, while the involved application has no limitations on channels of trade or classes of purchasers, applicant has asserted that its goods are typically purchased by contractors and civil engineers, and that such professionals are careful to specify the source of the metal structural members to be purchased.

Upon reviewing the entire record herein, especially given the circumstances surrounding the purchase of applicant's goods, we accept from the identification of goods that the only overlap of purchasers between applicant's goods and registrant's goods involves persons skilled in the building trades, who are somewhat sophisticated, and will exercise care in purchasing the involved goods from the correct source.

In conclusion, while we find that the marks are similar, they are also highly suggestive. We also find, on this record, that these goods are not related, they do not necessarily move through the same channels of trade, and the goods would be selected with care by sophisticated purchasers.

Decision: The refusal to register under Section 2(d) of the Trademark Act is hereby reversed.