

**THIS DISPOSITION  
IS NOT A PRECEDENT  
OF THE TTAB**

Mailed: November 18, 2008

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re Hyatt

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Serial No. 76611740

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Robert E. Bushnell, Esquire for Diane M. and Richard G. Hyatt.

Verna Beth Ririe, Trademark Examining Attorney, Law Office 104 (Chris Doninger, Managing Attorney).

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Before Walters, Grendel and Taylor, Administrative Trademark Judges.

Opinion by Taylor, Administrative Trademark Judge:

Diane M. and Richard G. Hyatt have filed an application to register on the Principal Register the mark IQ LOCK (in standard character format) for "electric, electronic and electro mechanical locks and lock cylinders; electronic keys; electric striking plates; units for programming locks, cylinders and keys consisting of handheld programming units for programming keys and cylinders and parts for all the aforesaid goods; software for programming lock cylinders and software for programming

keys for lock cylinders" in International Class 9.<sup>1</sup> The term "lock" has been disclaimed.

The examining attorney has refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicants' mark is confusingly similar to the registered mark ASSA TWIN IQ (in standard character format) for "metal locks and keys therefor; metal lock cylinders; door and window fittings of metal; parts for all the aforesaid goods" in International Class 6; and "electric, electronic and electro-mechanical locks and lock cylinders, electronic keys, electric striking plates; units for programming locks; cylinders and keys consisting of hand-held programming units for programming keys and cylinders and parts for all the aforesaid goods; software for programming keys for lock cylinders" in International Class 9.<sup>2</sup> The term "twin" has been disclaimed.

After the refusal was made final, applicants appealed and requested reconsideration of the refusal.<sup>3</sup> On August

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<sup>1</sup> Application Serial No. 76611740 filed September 16, 2004 and asserting a bona fide intention to use the mark in commerce.

<sup>2</sup> Registration No. 2700406 issued March 25, 2003.

<sup>3</sup> The examining attorney initially cited pending application Serial No. 78097899 as a potential bar to registration. However, the examining attorney withdrew her reliance on that application in the Final office action. Accordingly, applicants' arguments regarding the mark in Serial No 78097899 have not been considered in this decision.

17, 2007, the examining attorney denied the request for reconsideration and on August 29, 2007, this appeal was resumed. Applicants and the examining attorney filed briefs and an oral hearing was held. Applicants subsequently requested a rehearing of the oral argument, which was denied on September 26, 2008. For the reasons discussed below, we affirm the refusal to register.

We preliminarily note that because applicants and the examining attorney primarily focused their discussion on applicants' goods vis-à-vis the goods identified in International Class 9 of the cited registration, we will do the same.

Our determination of the issue of likelihood of confusion is based on an analysis of all 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 (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).

We first consider the *du Pont* factors which pertain to the similarity or dissimilarity of the goods, channels of trade and classes of purchasers. It is well settled that likelihood of confusion is determined on the basis of the goods as identified in the application and in the pleaded registration. *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002). Herein, the goods identified in the application are "electric, electronic and electro mechanical locks and lock cylinders; electronic keys; electric striking plates; units for programming locks, cylinders and keys consisting of handheld programming units for programming keys and cylinders and parts for all the aforesaid goods; software for programming lock cylinders and software for programming keys for lock cylinders." The goods identified in the cited registration are "electric, electronic and electro-mechanical locks and lock cylinders, electronic keys, electric striking plates; units for programming locks; cylinders and keys consisting of hand-held programming units for programming keys and cylinders and parts for all the aforesaid goods; software for programming keys for lock cylinders".<sup>4</sup> Thus, the goods legally identical.

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<sup>4</sup> The only difference between applicants' identified goods and the goods of the cited registration is the presence of hyphens in

Despite acknowledging the identity of the goods, applicants attempt to claim that the comparison of the goods should not be based on the respective identifications but rather on the basis of the actual nature of the goods. While noting that their application is based on intent-to-use, applicants particularly argue that registrant's product is a "unique niche product that capitalizes upon the extensive use of 'twin' structures." (Br. p. 10). This argument is unavailing. An applicant may not restrict the scope of the goods covered in the cited registration by argument or extrinsic evidence. See *In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986).

Applicants similarly attempt to claim that their goods and registrant's goods will travel in different trade channels and be offered to different classes of consumers. Specifically, applicants argue that:

... Registrant's and Appellant's [sic] goods move through different channels of trade, are expensive rather than low cost hardware store inventory, and are not available for purchase by ordinary consumers.

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The goods associated with the cited mark are marketed to property managements, commercial construction suppliers, architects and owner-operator sophisticated professionals. Appellant's goods on the other hand, are

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two words in registrant's identification. This difference is inconsequential.

marketed to the customer service community, that is, retailers, restaurants, banks vending machine distributors and delivery and transit services; there [sic] respective goods are tailored to distinct and different markets and require large item volume purchases by sophisticated and discerning purchasers.

(Br. pp. 10 and 17). This argument likewise is unavailing. Because the identical identifications of goods in applicants' application and the cited registration are not restricted as to channels of trade or classes of purchasers, we must presume that applicants' locks and lock accessories and registrant's locks and lock accessories will be offered in the same traditional channels of trade for such goods, including, e.g., hardware stores and building supply stores, and will be offered to the same usual consumers for such goods, including contractors, machine distributors and home owners seeking locks. See *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981).

We thus find the *du Pont* factors of the similarity of the goods, channels of trade and classes of purchasers strongly favor a finding of likelihood of confusion.

With respect to the conditions under which the respective goods will be purchased, in the absence of any limitations in the identification of both the application and the cited registration, it must be presumed that both applicants' and registrant's locks and lock accessories

will include both expensive and less expensive locks and, as noted above, these products will be purchased both by professional lock businesses and ordinary home owners. Thus, the purchase of locks will encompass both some degree of care in the purchasing decisions and a lack thereof. However, even if these consumers exercise some degree of care in their purchasing decisions, even careful purchasers of goods can be confused as to source under circumstances where substantially similar marks are used on identical and closely related goods. See *In re Research Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) citing *Carlisle Chemical Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970).

Accordingly, the *du Pont* factor pertaining to the care with which the products are purchased does not aid applicants' position.

Considering then the marks, the examining attorney maintains that applicants' mark IQ LOCK and registrant's mark ASSA TWIN IQ are very similar and create a common commercial impression because "both parties use, or intend to use, the common, distinctive term 'IQ' to identify their goods." (Br. unnumbered p. 6). The examining attorney argues that given the descriptive significance of the term "lock" in applicants' mark and "twin" in registrant's mark,

the term "IQ" is the dominant portion of applicants' mark and the term "ASSA IQ" is the dominant portion of registrant's mark. Essentially, she further argues that the mere deletion of registrant's house mark ASSA from the dominant portion of applicants' mark does not serve to avoid a likelihood of confusion between the two marks.

Applicants, in urging reversal of the refusal, argue that the examining attorney has impermissibly dissected the marks and improperly ignored the terms ASSA and TWIN in the cited mark; that the term ASSA is the dominant element in registrant's mark; that the presence of registrant's famous house mark ASSA on any product negates a likelihood of confusion; and that the applicants' mark and the cited mark create "distinct and readily discernable" overall commercial impressions.

With respect to the marks, we keep in mind that when marks would appear on identical goods, as they do here, the degree of similarity necessary to support a conclusion of likely confusion declines. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). In determining the similarity or dissimilarity of the marks, we must consider the marks in their entireties in terms of sound, appearance, meaning and commercial impression. *Palm Bay Imports, Inc. v. Veuve*

*Clicquot Ponsardin*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). 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 their entireties that confusion as to the source of the goods offered under the respective marks is likely to result. Although we must compare the marks in their entireties, one feature of a mark may be more significant than another and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985) ["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 the ultimate conclusion rests on consideration of the marks in their entireties. Indeed, this type of analysis appears to be unavoidable."] For instance, as our principal reviewing court has observed, "[t]hat a particular feature is descriptive or generic with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of the mark." See *In re National Data Corp.*, 224 USPQ at 751.

In this case, applicants' mark consists of two words, the first being the word IQ, meaning "intelligence

quotient,"<sup>5</sup> which appears to be arbitrary in connection with the recited goods. The second word, LOCK, is used in the identification to describe applicants' goods and has been disclaimed. As such, the term LOCK would not be looked to by consumers as source identifying. Accordingly, the dominant and distinguishing portion of applicants' mark is the word IQ.

Comparing, now, applicants' mark, IQ LOCK, with the cited registered mark, ASSA TWIN IQ, we note, first, that applicants are correct that the mere fact that the two marks share a common term does not necessarily mean that the marks are confusingly similar. Here, however, applicants have appropriated as the dominant part of their mark an essential and dominant element of the cited registered mark. In the cited registered mark, the word TWIN has also been disclaimed, as it merely describes, as noted by applicants, the "twin" structures used in registrant's products. As such, the term TWIN likewise would not be viewed by purchasers as a source-indicating element and thus does not serve to distinguish the two

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<sup>5</sup> The American Heritage Dictionary of the English Language (4<sup>th</sup> ed. 2000). The Board may take judicial notice of dictionary definitions, including online dictionaries which exist in printed format. See *In re CyberFinancial.Net Inc.*, 65 USPQ2d 1789 (TTAB 2002). See also *University of Notre Dame du Lac v. J. C. Gourmet Foot Imports Co., Inc.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

marks. Nor do we find the house mark ASSA in the registered mark sufficient to distinguish the marks. Generally, likelihood of confusion is not avoided between otherwise confusingly similar marks by adding or deleting a house mark. See *In re Chatam International Inc.*, 380 F.3d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004); *Hewlett-Packard Co. v. Packard Press Inc.*, supra; *In re Apparel Ventures, Inc.*, 229 USPQ 225 (TTAB 1986); and *In re Riddle*, 225 USPQ 630 (TTAB 1985). Because of the shared dominant term IQ, we find the marks similar in appearance and sound.

Further, and contrary to applicants' contention, we find no difference in meaning or commercial impression to distinguish the marks. The term IQ, at least on this record, appears to be arbitrary in relation to the identified goods, and applicants have not argued otherwise. In addition, the word LOCK in applicants' mark, and the words ASSA and TWIN in registrant's mark, do not significantly change the commercial impression created by the term IQ alone.

Despite the obvious differences in appearance and sound, we find the marks in their entireties to be similar in appearance, sound, meaning and commercial impression. Accordingly, the *du Pont* factor of similarity of the marks favors a finding of likelihood confusion.

Applicants essentially argue, citing to various registrations purportedly owned by registrant for marks including the term ASSA,<sup>6</sup> that ASSA TWIN IQ is part of a family of marks. Applicants conclude based on such use that the term ASSA is the dominant part of the registered mark.

This argument is not persuasive. Regardless of which, if any, part of registrant's mark is dominant, applicants have appropriated a significant element of registrant's mark. See, e.g., *Hewlett-Packard Co. v. Packard Press Inc.*, 62 USPQ2d at 1004 (PACKARD TECHNOLOGIES and HEWLITT PACKARD convey similar commercial impressions since PACKARD, the dominant element of PACKARD TECHNOLOGIES is identical to a "prominent" portion of HEWLITT PACKARD). Furthermore, even if applicants had shown, which they have not, that registrant uses the term ASSA as part of a family of marks, this *du Pont* factor, if anything, would favor registrant, not applicants.

Applicants also assert that there are at least 247 marks with an IQ component in classes 6 and 9, in

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<sup>6</sup> Applicants merely included a table in a previous response to an office action (and repeated in the brief) setting forth the serial and registration numbers and the marks. Although this information was not properly submitted, because the examining attorney did not object thereto, we will consider it of record for whatever value it may have.

registrations and live and dead applications, and that "[i]n view of this widespread occurrence of the IQ component in International classes 6 and 9 without a likelihood of confusion, ... there is little, or no, likelihood of confusion between Appellant's mark and the two cited marks<sup>7</sup>, because Appellant's mark and two cited marks create distinct and readily discernable overall impressions." (Brief, pp. 14-15). Applicants unsupported assertion is unavailing. A mere statement that such registrations (and applications) exist, without copies of such registrations showing the mark, the registration number, and the goods and/or services associated therewith, has virtually no probative value. See TBMP § 1208.02 (2d ed. rev. 2004).<sup>8</sup> Applicants' statement that "'IQ is also a term which is commonly recognized and frequently used not only in the United States but anywhere in the world as evidenced by 4,790,000 hits as a result of a quick Google

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<sup>7</sup> As previously noted, the examining attorney withdrew her reference to the pending application.

<sup>8</sup> Further, expired registrations and pending and abandoned applications have no probative value. *Action Temporary Services Inc. v. Labor Force Inc.*, 870 F.2d 1563, 10 USPQ2d 1307, 1309 (Fed. Cir. 1989) ("[A] cancelled registration does not provide constructive notice of anything"), and the applications show only that they have been filed. See *Interpayment Services Ltd. v. Docters & Thiede*, 66 USPQ2d 1463 (TTAB 2003).

search of 'IQ'<sup>9</sup> is similarly unsupported and devoid of context and, accordingly, has no probative value.

Applicants also maintain that there have been no instances of actual confusion between the marks. However, there is nothing in the record to show that there have been meaningful opportunities for such confusion to have occurred, or that applicants have even commenced use of their mark. More importantly, in the context of an ex parte proceeding, "the lack of evidence of actual confusion carries little weight." In re Majestic Distilling Co., 65 USPQ2d at 1205.

After considering and balancing all of evidence as it relates to the relevant *du Pont* factors, we conclude that purchasers familiar with registrant's metal locks and keys therefor; metal lock cylinders; door and window fittings of metal; parts for all the aforesaid goods" in Class 6; and "electric, electronic and electro-mechanical locks and lock cylinders, electronic keys, electric striking plates; units for programming locks; cylinders and keys consisting of hand-held programming units for programming keys and cylinders and parts for all the aforesaid goods; software for programming keys for lock cylinders sold under the mark ASSA TWIN IQ would be likely to believe, upon encountering

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<sup>9</sup> (Br. p. 20).

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applicants' mark IQ LOCK for the some of the same goods, that the goods originate from or are associated with or sponsored by the same source.

Lastly, to the extent that any of the points raised by applicants raised a doubt about the 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).

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