

**THIS OPINION IS NOT A  
PRECEDENT OF  
THE T.T.A.B.**

Mailed: April 11, 2007

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re GITI Tire Pte Ltd.

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Serial No. 78539794

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Perry J. Viscounty of Lathan & Watkins, LLP for GITI Tire Pte Ltd.

Esther Borsuk, Trademark Examining Attorney, Law Office 112 (Angela Wilson, Managing Attorney).

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Before Drost, Cataldo and Bergsman,  
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

An application was filed by GITI Tires Pte Ltd. to register the mark MAXTOUR in typed or standard character form on the Principal Register for the following goods, as amended: "tires for highway use on land passenger vehicles" in International Class 12.<sup>1</sup>

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<sup>1</sup> Application Serial No. 78539794 was filed December 29, 2004, based on applicant's assertion of November 7, 2004 as a date of first use of the mark anywhere and in commerce.

The trademark examining attorney refused registration under Section 2(d) of the Trademark Act on the ground that applicant's mark, as intended to be used in connection with its goods, so resembles the mark TOURMAX, previously registered on the Principal Register in typed or standard character form for "pneumatic tires for vehicles" in International Class 12,<sup>2</sup> as to be likely to cause confusion, mistake or deception.

When the refusal was made final, applicant appealed. Applicant and the examining attorney have filed briefs on the issue under appeal.

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, 567 (CCPA 1973). See also *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, 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, 27 (CCPA

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<sup>2</sup> Registration No. 1344263 issued on June 25, 1985. Section 8 affidavit accepted; Section 15 affidavit acknowledged. Renewed.

1976). See also *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997).

The Goods

We turn first to our consideration of whether the goods of applicant and registrant are related. In making our determination, we look to the goods as identified in the involved application and cited registration. See *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed.") See also *Paula Payne Products v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) ("Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods.")

In this case, registrant's broadly identified "pneumatic tires for vehicles" are presumed to include applicant's more narrowly identified "tires for highway use on land passenger vehicles." In other words, applicant's

tires intended for use on land passenger vehicles that travel on highways are a subset of registrant's pneumatic tires intended for use on vehicles. We take judicial notice of the following definition of the term "pneumatic" in registrant's identification of goods: "Filled with air, esp. compressed air, as a tire."<sup>3</sup> Inasmuch as the term "pneumatic" merely indicates that registrant's tires are filled with air, we find that such a characteristic does not serve to distinguish its goods from those of applicant.

Nor are we persuaded by applicant's argument that registrant's tires are actually used on golf carts and thus are dissimilar from its own high mileage tires for passenger vehicles. First, the identification of goods in the cited registration contains no such limitations. Thus, and as noted above, we must base our determination with regard to the relatedness of the parties' goods upon the identification of goods set forth therein. *See Octocom Systems, Inc. v. Houston Computers Services Inc., supra.* Second, even in the event applicant's goods may be distinguished from those of registrant based upon the intended use therefor, it does not necessarily relieve

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<sup>3</sup> Webster's II New Riverside University Dictionary, © 1994 Houghton Mifflin Company. The Board may take judicial notice of dictionary definitions. *See University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co.*, 213 USPQ 594, 596 (TTAB 1982); *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

consumers from experiencing confusion as to the source or sponsorship of those goods. As the Federal Circuit stated in *Recot, Inc. v. M.C. Becton*, 214 F.3d 1332, 54 USPQ2d 1895, 1898 (Fed. Cir. 2000), "Even if the goods in question are different from, and thus not related to, one another in kind, the same goods can be related in the mind of the consuming public as to the origin of the goods. It is this sense of relatedness that matters in the likelihood of confusion analysis." See also *Bose Corp. v. QSC Audio Products, Inc.*, 293 F.2d 1367, 63 USPQ2d 1303, 1309-10 (Fed Cir. 2002) ("Hence the products as described in the pertinent registrations are not the same. But they are related as required by *du Pont*."); and *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) ("Even if the goods and services in question are not identical, the consuming public may perceive them as related enough to cause confusion about the source or origin of the goods and services.").

Trade Channels

Furthermore, inasmuch as the identifications of goods either in the cited registration or application are not limited to any specific channels of trade, we presume an overlap and that the goods would be offered in all ordinary trade channels for these goods and services and to all

normal classes of purchasers. See *In re Linkvest S.A.*, 24 USPQ2d 1716 (TTAB 1992). See also *Octocom Systems, Inc. v. Houston Computers Services Inc.*, *supra*. As noted above, neither applicant's nor registrant's goods contains any limitations as to trade channels or intended consumers. Accordingly, both applicant's and registrant's goods are presumed to move in all normal channels of trade and be available to all classes of potential consumers. See *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981).

The Marks

Next we consider the similarities and dissimilarities between the marks. In coming to our determination, we must compare the marks in their entireties as to appearance, sound, connotation and commercial impression. See *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005).

In this case, registrant's mark is TOURMAX while applicant's mark is MAXTOUR. Both marks contain the identical words "max" and "tour." Applicant has taken the only two words in registrant's mark and transposed them. These differences do not serve to distinguish the marks in terms of sound and appearance. Further, we are not persuaded that reversing the order of the words in the

marks makes a significant difference in commercial impression. As the Board has previously stated:

Further, the reversal in one mark of the essential elements of another mark may serve as a basis for a finding of no likelihood of confusion only if the transposed marks create distinctly different commercial impressions. See *Bank of America National Trust and Savings Assn. v. American National Bank of St. Joseph*, 201 USPQ 842 (TTAB 1978), and cases cited therein. Here, where the goods in question are legally identical, and where both marks, when applied to the goods in question, are likely to be perceived by purchasers as signifying that the product sold thereunder busts through, or breaks up, rust, we agree with the Examining Attorney that the marks create substantially similar commercial impressions, and there is a likelihood of confusion. Cf. *In re Inco*, 154 USPQ 629 (TTAB 1967) ["GUARDIAN OF POSTURE for mattresses versus "POSTURGUARD" for mattresses - registration refused], and *McNamee Coach Corp. v. Kamp-A-While Industries, Inc.* v. 148 USPQ 765 (TTAB 1965) ["KING KAMPER" for camping trailers versus "KAMP KING KOACHES" for campers - registration refused].

See *In re Nationwide Industries, Inc.*, 6 USPQ2d 1882, 1884 (TTAB 1988) (RUST BUSTER for rust-penetrating spray lubricants confusingly similar to BUST RUST for penetrating oil).

While applicant disagrees with the examining attorney's determination that applicant's and registrant's marks have the same commercial impression, its argument on this point is unpersuasive. Specifically, applicant argues that its mark MAXTOUR suggests the maximum extent of a

journey on high-speed highways and that registrant's mark TOURMAX suggests golf vehicles used in competitive golf matches. Although there may be subtle differences in the meanings of the marks when they are subjected to close analysis, we do not believe that consumers will undertake such an analysis. The test for likelihood of confusion is not whether the marks can be distinguished when subjected to a side-by-side comparison. Also, in evaluating similarities between the marks, the emphasis must be on the recollection of the average purchaser who normally retains a general rather than a specific impression of trademarks. *See Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Registrant's mark TOURMAX and applicant's mark MAXTOUR convey highly similar meanings and commercial impressions when used in connection with tires. Both marks suggest goods, in this case tires, that allow for maximum touring. Thus, when the marks are considered in their entirety, we find that they are similar in sound, appearance, meaning and commercial impression.

Family of Marks

In coming to our determination with regard to the similarities between the marks, we note applicant's claim of ownership of several marks containing MAX as a prefix and its argument that confusion in this case is unlikely

because it owns a family of MAX formative marks. However, applicant's ownership of a family of MAX formative marks, even if proven, is irrelevant. We must decide the issue of likelihood of confusion based upon applicant's MAXTOUR mark in its application at issue herein. See *In re Lar Mor International, Inc.*, 221 USPQ 180 (TTAB 1983); *In re U.S. Plywood-Champion Papers, Inc.*, 175 USPQ 445 (TTAB 1972); cf. *Baroid Drilling Fluids, Inc. v. Sun Drilling Products*, 24 USPQ2d 1048 (TTAB 1992). Thus, applicant's claim of a family of marks is unavailing in this case.

Conditions of Sale

Another *du Pont* factor discussed by applicant is that of the conditions of sale. Applicant asserts that its goods are expensive and would be purchased by careful and sophisticated users. However, there is no evidence that either applicant's or registrant's goods would be purchased only by highly sophisticated persons. In fact, tires may be purchased by anyone who owns a car and, therefore, tires may be purchased even by ordinary consumers. Further, sophisticated purchasers are not necessarily knowledgeable in the field of trademarks or immune from source confusion. See *In re Decombe*, 9 USPQ2d 1812, 1814-1815 (TTAB 1988). Moreover, even if some degree of care were exhibited in making the purchasing decision, the marks MAXTOUR and

TOURMAX are so similar that even careful purchasers are likely to assume that the marks identify goods emanating from a single source.

Third Party Use

In its January 27, 2006 response to the examining attorney's August 3, 2005 Office action, applicant argues that third party use of both MAXTOUR and TOURMAX to identify tires weighs against a finding of likelihood of confusion. In support of its contention, applicant submitted an electronic mail posting from an Internet mailing list in which the author refers to a "TourMax" motorcycle tire.<sup>4</sup> In addition, applicant submitted a printout from an Internet retail website offering "MAXTOUR 130/70 HB18 GL1500 motorcycle tires for sale."<sup>5</sup>

We note, however, that the only reference to "TourMax" is in an e-mail posting and provides no indication as to whether such mark is either registered or currently in use. The single reference to "MAXTOUR" does not indicate whether that mark is registered or currently in use, and further is unclear whether the mark stands alone or includes the numerical and letter designation that follows. We further

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<sup>4</sup> Archives.itg.uiuc.edu.virago//2001

<sup>5</sup> www.motorcycleproshop.com

note that both references are for motorcycle tires which, while not identical to applicant's goods, are nonetheless presumed to be included among registrant's more broadly recited goods. As a result, we do not find on this record that there is such extensive third party use of MAXTOUR or TOURMAX that confusion between the cited registration and challenged registration is unlikely.

Actual Confusion

The final *du Pont* factor discussed by applicant and the examining attorney is that of the lack of instances of actual confusion. Applicant asserts that the absence of actual confusion for over two years suggests no likelihood of confusion. However, and as pointed out by the examining attorney, it is not necessary to show actual confusion in order to establish likelihood of confusion. See *Weiss Associates Inc. v. HRL Associates Inc.* 902 F.2d 1546, 223 USPQ 1025 (Fed. Cir. 1990). Particularly in an *ex parte* proceeding, applicant's assertion of the absence of actual confusion is of little probative value in our determination on the issue of likelihood of confusion because the Board cannot readily determine whether there has been a significant opportunity for actual confusion to have occurred, such that the absence of confusion is meaningful. See *In re Opus One Inc.*, 60 USPQ2d 1812, 1817 (TTAB 2001);

*In re Kangaroos U.S.A.*, 223 USPQ 1025 (TTAB 1984); and *In re Jeep Corp.*, 222 USPQ 333 (TTAB 1984). In those situations where the Board has recognized the absence of actual confusion as probative in an ex parte setting, there existed a "confluence of facts" which together strongly suggested that the absence of confusion was meaningful and should be given probative weight. See *In re Opus One Inc.*, *supra*; and *In re Jeep Corp.*, *supra*. The "confluence of facts" is not present in this record.

In summary, weighing all of the evidence of record as it pertains to the relevant *du Pont* factors, we find that a likelihood of confusion exists. Moreover, to the extent that any of the points raised by applicant raise a doubt about likelihood of confusion, that doubt is required to be resolved in favor of the prior registrant. See *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988); and *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 165, 223 USPQ 1289 (Fed. Cir. 1984).

Decision: The refusal of registration is affirmed.