

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

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Bucher

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Bayco Products, Ltd.

Serial No. 78565383

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Sawyer, L.L.P. for Bayco Products, Ltd.

Elizabeth L. Beyer, Trademark Examining Attorney, Law  
Office 102 (Matthew C. Kline, Acting Managing Attorney).

Before Hairston, Bucher and Cataldo, Administrative  
Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

Bayco Products, Ltd. seeks registration on the  
Principal Register of the mark **BAYCO** (*in standard character  
format*) for goods identified in the application, as amended,  
as "battery booster cables for automotive and truck use" in  
International Class 9.<sup>1</sup>

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

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<sup>1</sup> Application Serial No. 78565383 was filed on February 11,  
2005 based upon applicant's allegation of first use anywhere and  
first use in commerce at least as early as January 2001.

register this designation 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 mark **BAYCO** (*also in standard character format*) for the following goods:

"metal automatic valves - namely, flanged swing check valves, and spring-actuated check valves and air relief valves; spring-actuated pressure fill and vent caps for fuel tanks" in International Class 9,<sup>2</sup>

as to be likely to cause confusion, to cause mistake or to deceive.

The Trademark Examining Attorney and Applicant have fully briefed the case. We reverse the refusal to register.

The Trademark Examining Attorney argues that inasmuch as the marks of registrant and applicant are identical, the

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<sup>2</sup> Registration No. 1316536 issued on January 29, 1985 based upon an application filed on May 9, 1983 claiming first use anywhere and first use in commerce at least as early as 1963; renewed. Although the second class is not cited against Applicant, this registration has two-classes of goods, including also "metal manually-operated valves-namely, locking angle valves for fuel tanks and butterfly valves for dry bulk handling; locking fuel caps and collars for fuel tanks; quick couplers, adaptors and hose fittings for fuel tank trucks; metal non-automatic fueling nozzles; and fuel dispensing apparatus sold as a unit comprising a metal non-automatic fueling nozzle, a metal manually operated locking angle valve, a reducer bushing and close nipple, and a coupled fuel hose" in International Class 6.

relationship between the respective goods need not be as close in order to support a finding of likelihood of confusion as might apply where differences exist between the marks. In addition, she argues that the respective goods are closely related and will move through the same channels of trade to the same classes of ordinary purchasers.

By contrast, Applicant argues that the cited registration is relatively narrow in scope. Applicant contends that evidence it has placed into the record demonstrates that Registrant does not sell its products at retail to ordinary consumers through home improvement stores and automotive stores. Rather, given the detailed and specialized nature of Registrant's metal, manually-operated valves, its metal automatic valves, and fuel nozzles, Applicant argues that it is clear that purchasers of these goods would be sophisticated purchasers who are expected to exercise a relatively high degree of care.

### **Preliminary Matters**

The Trademark Examining Attorney has objected to consideration of two sets of evidence that Applicant attached to its appeal brief. Specifically, Applicant submitted evidence consisting of three of its own earlier

issued **BAYCO** registrations and five pages of Internet website evidence. The Trademark Examining Attorney argues that the submission of this evidence with Applicant's appeal brief is untimely as the record in any application must be complete prior to appeal. 37 C.F.R. § 2.142(d) (2004); TBMP §§ 1207.01 *et seq.* (2d ed. rev. 2004); *Rexall Drug Co. v. Manhattan Drug Co.*, 284 F.2d 391, 128 USPQ 114, 115 (CCPA 1960); and *In re Psygnosis Ltd.*, 51 USPQ2d 1594 (TTAB 1999). As such, the Trademark Examining Attorney has requested that this evidence be given no consideration.

In response, Applicant argues that the Trademark Examining Attorney's objections are without merit. First, Applicant contends these are not third party registrations, but are Applicant's own registrations. Furthermore, Applicant argues that the registrations were specifically referenced in Applicant's earlier responses and were acknowledged by the Trademark Examining Attorney in her Office Action of September 5, 2006. As to the second exhibit, Applicant claims that inasmuch as the Registrant's goods are specific and limited, it is appropriate to submit Registrant's website pages in order to provide context, amplification and understanding of the "trade meaning" of Registrant's specialized goods as identified in the cited

registration, consistent with *In re Trackmobile, Inc.*, 15 USPQ2d 1152 (TTAB 1990). In fact, Applicant contends that fairness requires this further delineation of Registrant's goods. See *In re Bed & Breakfast Registry*, 791 F.2d 157, 229 USPQ 818 (Fed. Cir. 1986).

We find that the Trademark Examining Attorney's objections to this late-filed evidence are well taken. See TBMP § 1207.01 (2d ed. rev. 2004). We agree with Applicant that the objectionable material in the *Rexall Drug Company* case cited by the Trademark Examining Attorney did involve late filed, third party registrations. Additionally, exclusion of tardy third party registrations has been upheld frequently in subsequent cases of this Board. However, the principle of Trademark Rule 2.142(d) applies much more broadly, and includes late submissions of an applicant's own earlier-issued registrations [*In re Mayer-Beaton Corporation*, 223 USPQ 1347 (TTAB 1984)] and website evidence drawn from the Internet [*In re Trans Continental Records Inc.*, 62 USPQ2d 1541 (TTAB 2002)].

### **Likelihood of Confusion**

We turn then to a consideration of the issue of likelihood of confusion. Our determination is based upon our analysis of all of the probative facts in evidence that

are relevant to the factors bearing on the issue of likelihood of confusion. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key, although not exclusive, considerations are the similarities between the marks and the relationship 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).

### **The marks**

We look first at the similarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. It is beyond dispute that the involved marks are identical in every way. While Applicant argues that this is among the only *du Pont* factors supporting the position of the Trademark Examining Attorney, the Trademark Examining Attorney takes the position that the identical nature of the two marks means that the goods need not be as closely related in order to

support a finding of likelihood of confusion as might apply where differences exist between the marks.

In any case, this *du Pont* factor clearly favors a finding of likelihood of confusion.

### **Relationship of the goods**

We turn next to the *du Pont* factor focusing on the relationship of the goods identified in the involved application and the goods of the cited registration.

It is clear from a review of the prosecution of this application that on this key *du Pont* factor, the Trademark Examining Attorney has tried to stretch Registrant's goods while Applicant has attempted just as strenuously to restrict them quite narrowly. In reality, we find that the respective goods are exactly what the registration and application say they are.

As seen, the involved application is for "battery booster cables for automotive and truck use." The specimens show a product commonly referred to in the vernacular as battery "jumper cables." Applicant's goods are available in lengths of eight and twelve feet, and would certainly be found, *inter alia*, in auto parts stores.

Parsing the slightly more complicated wording of Registrant's International Class 9 goods reveals valves and

caps of four different enumerated types: (i) metal automatic valves - namely, flanged swing **check valves**; (ii) metal automatic valves - namely, spring-actuated **check valves**; (iii) metal automatic valves - namely, air **relief valves**; and (iv) spring-actuated pressure fill and vent **caps** for fuel tanks."

On this record, Applicant questions whether the Trademark Examining Attorney has demonstrated that the goods are related. We are compelled to agree.

In a much too simplistic fashion, the Trademark Examining Attorney appears to have taken the words highlighted above in isolation, and searched databases for them in order to prove a relationship between ordinary booster cables and Registrant's goods. In support of her position that booster cables are related to check valves, air relief valves, fuel and filler caps, etc., the Trademark Examining Attorney submitted her search results drawn from a variety of websites.

For example, she submitted the results of various word searches [of "caps," "check valve," "booster cables," etc.] done on NAPA's parts and accessories website ([www.NAPAonline.com](http://www.NAPAonline.com)). Her search on NAPA's parts and accessories database of the word "caps" resulted in

everything from truck bed caps and rain caps to capacitors. However, we remain unconvinced that these "caps" have anything to do with "booster cables."

Similarly, results from another of the Trademark Examining Attorney's Internet searches demonstrates how ubiquitous is the "check valve" - a mechanical device that normally allows fluids, gases or air to flow through it in only one direction. Check valves are found: in fire-protection products such as fire sprinkler systems marketed by Ferguson Fire and Fabrication (hereinafter "FFF") (<http://www.fergusonfire.com/>); as component of Strauss Discount Auto's engine control and auto emission systems (<http://www.straussauto.com/>); in welding equipment from Bernie's Automotive Products, an Internet gateway for online automotive tools linked to more than 150 global auto tool and auto equipment manufacturing companies (<http://www.small-business-help.com/>); in truck air brakes (<http://www.NAPAonline.com/>); in power valves as components of automobile ignition systems ([http://www.pepboys.com/parts\\_supplies/parts\\_tools/brands.html](http://www.pepboys.com/parts_supplies/parts_tools/brands.html)); and finally, as parts of Registrant's petroleum tankers and their fittings (<http://www.dixonbayco.com>).

We see in the third party website of FFF that its customers are made up of contractors who install fire sprinkler systems. Interestingly, in addition to booster cables, FFF's category of "tools and machines" also includes utility knives, wire brushes, folding wooden rulers, caulking guns, work gloves, first aid kits, electrical extension cords and ladders. Using this evidence placed into the record by the Trademark Examining Attorney, and the logic applied thereto, one could also make the case that Registrant's specialized components are related to each of these prosaic household items as well.

In summary, the Trademark Examining Attorney's evidence demonstrates that: (i) "check valves" are ubiquitous; (ii) a wide variety of auto parts and accessories are sold at the same online retailers; and (iii) a variety of types of businesses unrelated to auto parts suppliers actually market inexpensive booster cables. However, this is not the same thing as demonstrating that automotive check valves and air relief valves, on one hand, and battery booster cables, on the other hand, emanate from the same entities under a single mark. The fact that the involved goods are both in the general auto parts and accessories field is not sufficient to establish the relatedness of the goods. As

we have done repeatedly with food, clothing, and a number of other fields, we explicitly eschew any *per se* rule that everything sold in an auto parts outlet - whether found online or located in a traditional bricks-and-mortar location - is related. As to the relationship of the respective goods, we find that the Trademark Examining Attorney's evidence falls short of demonstrating that Registrant's types of valves and filler caps are related to booster cables. Applicant reminds us that in determining whether there is a likelihood of confusion, "we are not concerned with mere theoretical possibilities of confusion, deception, or mistake or with *de minimus* situations, but with the practicalities of the commercial world, with which trademark laws deal." *Witco Chemical Co. v. Whiffield Chemical Co.*, 418 F.2d 1403, 164 USPQ 43, 44-45 (CCPA 1969).

However, Applicant also goes much further with this argument, contending that the record contains "no competent evidence that the generic auto store 'check valves' referenced in this online evidence have any relation to Registrant's specialized goods." Applicant's brief at 6.

On the one hand, we agree with Applicant that on their face, Registrant's specialized goods cannot, in fairness to

Applicant, be shortened to one- and two-word terms before making the comparison with booster cables, as the Trademark Examining Attorney has done.

On yet the other hand, as much as we may want to pay heed to "the practicalities of the commercial world," we cannot resort to extrinsic evidence, such as registrant's website, in order to restrict the field of use of registrant's check valves and air relief valves. For example, Applicant argues that it is quite clear from Registrant's website that Registrant manufactures fittings used on tanker-trucks to transfer petroleum products from tankers to in-ground and above-ground storage facilities. Registrant's check valve is an expensive, heavy, high performance, industrial fitting made of dozens of components, primarily of cast iron or steel. Applicant argues correctly that this kind of industrial product seems to have no connection to a small check valve found in a bin in the local auto parts store. However, even if this website information had been timely submitted, we would not be permitted to venture there.

The instant case is different from the situation where the goods are so vague that one needs some extrinsic evidence in order to clarify the basic nature of the goods

themselves, as was true in the case of *In re Trackmobile, Inc.*, 15 USPQ2d at 1153-54:

When the description of goods for a cited registration is somewhat unclear, as in the case herein, 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.

This Board will resort to extrinsic evidence only when the nature of the goods themselves is so unclear that we cannot determine their relatedness for purposes of a likelihood of confusion determination. Here, the goods are clear enough as to their type and nature to allow us to decide the issue. We will rarely look beyond the identification of goods and/or recitation of services, and this is not one of those cases when it is absolutely necessary.

While we cannot take words away from the identification of goods in the cited registration, as suggested by the Trademark Examining Attorney in her attempt to broaden its scope, neither can we add words to Registrant's identification of goods, as suggested by Applicant, in an attempt to narrow its scope. For example, under a strict reading of Registrant's identification of goods, it is not

clear that the restrictive language "for fuel tanks" at the end of Registrant's description in International Class 9 relates back to "check valves" and "air relief valves." Moreover, these valves and caps are not expressly limited to fittings used on petroleum tanker-trucks. Hence, in the absence of any limitations, we must presume that Registrant's goods encompasses check valves of all types, including those used on automobiles - provided, of course, that the check valves are made of metal and characterized by a 'flanged swing' or an 'actuated spring.'

Accordingly, we find that the Office has failed to demonstrate that Registrant's types of valves and filler caps are related to booster cables, and this critical *du Pont* factor favors the position of Applicant that there is no likelihood of confusion herein.

**The similarity of established, likely-to-continue trade channels**

As to the *du Pont* factor focusing on the similarity or dissimilarity of established, likely-to-continue trade channels, Applicant argues that the trade channels are dissimilar. Applicant contends that evidence it has placed into the record demonstrates that Registrant does not sell its products to ordinary consumers through normal retail channels (e.g., home improvement and auto parts stores).

Of course, there are no restrictions on Registrant's channels of trade, and despite Applicant's urgings, we have refused to impose such restrictions based upon the extrinsic evidence Applicant has provided for the record. Hence, all the involved goods are presumably both sold in the retail trade to ordinary consumers.

### **Conditions Under Which Sales Are Made**

As to the *du Pont* factor focusing on the conditions under which and buyers to whom sales are made, while booster cables would seem to be purchased without a great deal of care, we are inclined to agree with Applicant that consumers of specialized goods identified as "metal automatic valves - namely, flanged swing check valves, and spring-actuated check valves and air relief valves; spring-actuated pressure fill and vent caps for fuel tanks" would be somewhat more sophisticated than the average purchasers, and hence, would be expected, relatively, to exercise a higher degree of care in making this purchase. Hence, this *du Pont* factor appears to favor the position of Applicant.

In conclusion, we find that it is not clear, on this record, that the respective goods herein are related. We reach our finding on this determinative factor, however, without resort to extrinsic evidence, such as Registrant's

website. Hence, despite the fact that the marks are identical and that we must presume that the respective goods move through the same channels of trade, when balancing all of the relevant *du Pont* factors, we find there is no likelihood of confusion herein.

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