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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Rally Manufacturing, Inc.

Serial No. 78576416

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Before Hohein, Holtzman, and Drost, Administrative Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

On February 28, 2005, Rally Manufacturing, Inc. (applicant) filed an application seeking registration of the mark DURA GUARD in standard character form on the Principal Register for goods identified as "floor mats for land vehicles" in Class 27.¹

¹ Serial No. 78576416. The application is based on applicant's allegation of a bona fide intention to use the mark in commerce.

The examining attorney has refused to register applicant's mark on the ground that it is confusingly similar under Section 2(d) of the Trademark Act (15 U.S.C. § 1052(d)) with the mark DURAGARD (in typed or standard character form), which is registered for "semi-fitted and fitted covers for vehicles" in Class 12.² After the examining attorney made the refusal final, this appeal and a request for reconsideration followed. An oral hearing was held on November 6, 2007.

In a case involving a refusal under Section 2(d), we analyze the facts as they relate to the relevant factors set out 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.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003) and *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1896 (Fed. Cir. 2000).

"The first *DuPont* factor requires examination of 'the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.'" *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177

² Registration No. 2416428, issued December 26, 2000, affidavits under Section 8 and 15 accepted and acknowledged.

USPQ at 567). Here, the marks are DURA GUARD and DURAGARD, both shown without any particular stylization or design. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1847 (Fed. Cir. 2000) ("Registrations with typed drawings are not limited to any particular rendition of the mark and, in particular, are not limited to the mark as it is used in commerce"). The only differences between the marks are the fact that registrant spells its mark without a letter "U" in "Guard" and without a space between the terms DURA and GARD. The presence or absence of a space between virtually the same words is not a significant difference. *Stockpot, Inc. v. Stock Pot Restaurant, Inc.*, 220 USPQ 52, 54 (TTAB 1983), *aff'd*, 737 F.2d 1576, 222 USPQ 665 (Fed. Cir. 1984) ("There is no question that the marks of the parties [STOCKPOT and STOCK POT] are confusingly similar. The word marks are phonetically identical and visually almost identical"); *In re Best Western Family Steak House, Inc.*, 222 USPQ 827, 827 (TTAB 1984) ("There can be little doubt that the marks [BEEFMASTER and BEEF MASTER] are practically identical").

Applicant argues that the marks "have different spellings, and present a different visual impression. An ordinary consumer of the goods would not confuse visually dissimilar marks." Brief at 3. We cannot agree. As

indicated above, the absence of a space is not legally significant and the presence or absence of the letter "U" would likewise have little impact in differentiating the marks. Most consumers would pronounce the marks the same³ and their meanings would be the same (a combination of a shortened form of "durable" with a variation of the term "guard"). The marks' appearances would be very similar and it is difficult to perceive of any difference in their commercial impression. Contrary to applicant's arguments, we conclude that the marks are virtually identical and this factor strongly supports the examining attorney's argument that there is a likelihood of confusion.

Next, we look at whether the goods are related. Applicant's goods are set forth as floor mats for land vehicles and registrant's goods are identified as semi-fitted and fitted covers for vehicles. Applicant argues that "floor mats are non-competitive with registrant's vehicle covers (i.e. a consumer would not purchase a vehicle car cover as a substitute for a floor mat). Moreover, the goods at issue are functionally unrelated."

³ "Guard - (gård)." *The Random House Dictionary of the English Language (unabridged)* (2d ed. 1987). We take judicial notice of this pronunciation. *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).

Brief at 3. This is not the test for whether the goods are related.

It is a well settled principle of trademark law that 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 for purposes herein 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 used therewith, give rise to the mistaken belief that they originate from or are in some way associated with the same producer.

In re International Telephone & Telegraph Corp., 197 USPQ 910, 911 (TTAB 1978).

Both applicant's and registrant's goods are used for vehicles: applicant's goods protect the floor of the vehicle while registrant's covers protect the vehicle itself. We point out in this regard that, as shown by the record, applicant itself is a source of both floor mats and vehicle covers. "Rally's product line includes Wheel Covers, **Car Covers**, Auxiliary Lights, Hydraulic Lift and Service products, **Floor Mats**, Lug Nuts & Locks, Car & truck Mirrors, Wiper Blades & Refills, Antennas as well as 12 Volt accessories." www.rallymfg.com. Other entities are also the source of both car covers and floor mats. See www.coverking.com (custom car covers and custom floormats);

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www.dashcover.com (mats & carpets and car covers);
www.webcovers.com ("Car Covers From \$80.99 - Car covers offer all weather protection for indoor and outdoor use and guard against nicks and dings. Our car covers are available for most cars and trucks... Floor Mats From 63.99 - America's #1 custom floor mats for cars, trucks, and SUVs"); Registration No. 2940505 ("car covers ... car floor mats"). The evidence of record supports the conclusion that, when purchasers encounter car floor mats and car covers marketed under virtually the same marks, they are likely to assume that there is a common source of these goods.

Furthermore, the purchasers of car covers and floor mats clearly overlap. Both items would be purchased by ordinary purchasers seeking to protect their cars' carpets and exterior finish. These items are likely to be encountered by the same purchasers as they seek to protect the appearance of their cars. See, e.g.,
www.coverking.com:

Our attention to detail results in the most intricate Custom Car Cover patterns, Car Seat Covers which look like original upholstery, Dash Covers which fit like a glove, and Custom Floormats which cover the floorboard better than a vehicle's original floormats.

The channels of trade for these items overlap. The evidence of record shows that both car covers and floor

mats would be sold online and in stores catering to car maintenance and upkeep. See Denial of Reconsideration attachments (Advance Auto Parts, AutoZone, Pep Boys, and AutoAnything).

Applicant argues that the "goods listed in the '438 registration only include 'semi-fitted and fitted covers for vehicles.' Registrant's identification of goods does not include floor mats for land vehicles. There is no basis for expanding the scope of the cited registration." Reply Brief at 5. As we pointed out above, there is no requirement that goods must be the same before they are related. Here, there is evidence that both types of goods come from the same source (including applicant itself). They are sold in overlapping channels of trade to the same purchasers. Under such circumstances, we conclude that the goods of applicant and registrant are related.

Applicant also argues that "Registrant's mark is relatively weak." Brief at 7. In support of this position, applicant has submitted numerous third-party registrations for various forms of the mark DURAGUARD. We note that the "existence of [third party] registrations is not evidence of what happens in the market place or that customers are familiar with them." *AMF Inc. v. American Leisure Prods., Inc.*, 474 F.2d 1403, 177 USPQ 268, 269

(CCPA 1973). Furthermore, most of the registrations that applicant has made of record are for goods that are unrelated to those at issue and, therefore, they do not support applicant's argument that registrant's mark is entitled to a narrow scope of protection. *In re Melville Corp.*, 18 USPQ2d 1386, 1388-89 (TTAB 1991) ("Registrations for goods unrelated to the clothing field are irrelevant to our discussion"); *SBS Products Inc. v. Sterling Plastic & Rubber Products Inc.*, 8 USPQ2d 1147, 1149 n.6 (TTAB 1988) ("[E]ven if evidence of such third-party use were submitted, it would be of no aid to respondent herein where the third-party usage was for goods unrelated to either petitioner's skin care products or respondent's stuffing box sealant"); and *Anderson, Clayton & Co. v. Christie Food Products Inc.*, 4 USPQ2d 1555, 1557 n.7 (TTAB 1987) ("The other third-party registrations relating to marks in unrelated fields are of no probative value").

Some of these registrations⁴ include: No. 2443921

(analytical chemical laboratory equipment); No. 2269080

⁴ Applicant has included several marks that have not registered. These applications are irrelevant. *In re Phillips-Van Heusen Corp.*, 63 USPQ2d 1047, 1049 n.4 (TTAB 2002) ("While applicant also submitted a copy of a third-party application ..., such has no probative value other than as evidence that the application was filed") and *Olin Corp. v. Hydrotreat, Inc.*, 210 USPQ 62, 65 n.5 (TTAB 1981) ("Introduction of the record of a pending application is competent to prove only the filing thereof"). See also *Glamorene Products Corp. v. Earl Grissmer Co., Inc.*, 203 USPQ

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(adhesive-backed property identification tags); No. 2261491 (non-metallic building materials); No. 2099812 (laminates for furniture); No. 1897957 (dishwasher racks); No. 1728562 (toilet seats); No. 2031813 (protective industrial gloves); Nos. 2099975, 2111116, and 2651854 (electrical plugs; same entity); No. 1023529 (storage battery cleaner); No. 0766372 (mattresses); No. 2536310 (overlay material for use on credit cards); No. 2899508 (lumber, wood siding); Nos. 2510881 and 2008128 (animal tissue for use as surgical implants, same registrant); and No. 1594072 (gas water heaters). Certainly, even if there were evidence that third parties were using the term DURAGUARD on such items as toilet seats, animal tissue, and dishwasher racks, it would not affect the scope of protection that we would give to registrant's mark for vehicle covers in this case.

There are a few registrations that, arguably, are somewhat relevant to the goods at issue here. By statute, the "Director may establish a classification of goods and services, for convenience of Patent and Trademark Office administration, but not to limit or extend the applicant's or registrant's rights." 15 U.S.C. § 1112. The fact that there are a few registrations in Classes 12 and 27 for such

1090, 1092 n.5 (TTAB 1979). Even here, the goods are unrelated, e.g., insect repellent and chemical coating applied to luggage.

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items as "wear plates for railway vehicles" (No. 1248283), "hydraulic fluid and transmission fluid for farm and industrial equipment" and "motor oil, gear and bearing lubricants for farm and industrial equipment (No. 3089245), vinyl floor covering (No. 1621357), and "oil filters for automotive engines" (No. 1633965) does not indicate, even if there were evidence of use, that registrant's mark is entitled to only a very narrow scope of protection. The goods in the cited registration are clearly much closer to applicant's goods than any other registration. These registrations simply show that the Office has considered each of the marks and the goods in those registrations in view of the unique facts of each case. In addition, even if the goods in these registrations were closer to the goods in the cited registration, these third-party registrations may be used to demonstrate that a mark or a portion of a mark is suggestive or descriptive, but they cannot be used to justify the registration of another confusingly similar mark. *In re J.M. Originals Inc.*, 6 USPQ2d 1393, 1394 (TTAB 1987). See also *Plus Products v. Star-Kist Foods, Inc.*, 220 USPQ 541, 544 (TTAB 1983) ("[T]hird party registrations relied on by applicant cannot justify the registration of another confusingly similar mark"). Therefore, while we can agree that the cited mark

is somewhat suggestive of the goods, the evidence does not show that it is so highly suggestive as to be entitled to only a narrow scope of protection.

Applicant also relies heavily on the case of *Knaack Manufacturing Co. v. Rally Accessories Inc.*, 955 F. Supp. 991, 42 USPQ2d 1649 (E.D. Ill. 1997). However, the facts of that case were significantly different. The marks in that case were variations of WEATHERGUARD and the goods were vehicle tool boxes and car covers. The Court specifically found that the "common meaning of the words 'weather guard' renders such a mark weak and greatly limits its scope of protection." *Id.* at 1659. We have made no such finding here. Also, the Court noted that there was evidence of "extensive use of the marks incorporating Weather Guard by third-parties on a wide variety of goods, services, and businesses clearly demonstrat[ing] the lack of distinctiveness and strength in Knaack's mark." As we have pointed out, there is no evidence of such use and, inasmuch as this is an ex parte case, we must assume that registrant's mark is inherently distinctive because it is registered on the Principal Register without an indication that the term has acquired distinctiveness. *See Contour Chair-Lounge Co., Inc. v. The Englander Co., Inc.*, 324 F.2d 186, 139 USPQ 285, 287 (CCPA 1963).

We also point out that we must decide each case on its own merits. The Court of Customs and Patent Appeals, as a predecessor to our principal reviewing court, has noted the limited value of precedent in deciding likelihood of confusion cases. *Star Watch Case Company v. Gebruder Junghans, A.G.*, 267 F.2d 950, 122 USPQ 370, 371 (CCPA 1959):

The determination of this issue requires that we evaluate the marks for the purpose of determining their probable impact upon potential purchasers as the marks would be encountered on the products of the respective parties in their usual markets... In making such a subjective evaluation, prior decisions are of little value. Each case must rest upon its own distinctive fact situation.

We add that to the extent that precedent can provide guidance in this case, there is no shortage of cases that have held that, based on the facts of those cases, various auto parts and accessories were held to be related despite the differences in the nature of the goods.

It has frequently been found that the marketing by different parties of different types of vehicular parts under the same or similar marks is likely to cause confusion. See, for example: *Monarch Mufflers, Inc. v. Goerlick's, Inc.*, 148 USPQ 20 (TTAB 1965) ["MONARCH" for brake linings for automotive use versus "MONARCH" for exhaust mufflers for motor vehicles]; *AP Parts Corp. v. Automotive Products Associated*, 156 USPQ 254 (TTAB 1967) ["AP" for clutches, brakes, steering joints, tie-rod joints, and suspension joints for land vehicles, aircraft, or watercraft versus "AP" for mufflers for explosive engines]; *Seiberling Rubber Co. v. General Battery and Ceramic Corp.*, 167 USPQ 766 (TTAB 1964) ["HOLIDAY" for storage batteries versus

"HOLIDAY" for pneumatic rubber tires and automobile floor mats--opposer's motion for summary judgment granted for the reason that "[I]t appears beyond question that the simultaneous use of the identical mark upon goods which are so closely related in their use as those of the parties would clearly cause the average purchaser to assume that they emanated from the same source"; *In re Market Tire Co. of Maryland, Inc.*, 171 USPQ 636 (TTAB 1971) ["ADMIRAL" for vehicle tires versus "ADMIRAL" for radiator anti-freeze]; *In re Uniroyal, Inc.*, 177 USPQ 29 (TTAB 1973) ["KODIAK" for vehicle tires versus "KODIAK" and design for anti-freeze and "KODIAK" for automobile heaters]; *In re Magic Muffler Service, Inc.*, 184 USPQ 125 (TTAB 1974) ["MAGIC" for vehicle parts, namely, mufflers, versus "MAGIC" for motors for motor vehicles]; *In re Trelleborgs Gummifabriks Aktiebolag*, 189 USPQ 106 (TTAB 1975) ["T" and design for, inter alia, hoses, namely, rubber hoses and rubber inner tubes for tires; and pneumatic semisolid and solid tires versus "T" and design for, inter alia, motor oil, oil additives, and fuel additives]; *In re Red Diamond Battery Co.*, 203 USPQ 472 (TTAB 1979) ["RED DIAMOND" for storage batteries versus "DIAMOND" for pneumatic rubber automobile and vehicle tires]; and *In re Delbar Products, Inc.*, 217 USPQ 859 (TTAB 1981) ["ULTRA" for outside mounted vehicle mirrors versus "ULTRA" and design for automobile parts, namely, pistons and pins, valves, water pumps, oil pumps, universal joints, gears, axle shafts, hydraulic brake parts, automatic transmission repair kits and parts, engine bearings, and jacks].

In re Jeep Corp., 222 USPQ 333, 334 (TTAB 1984).

Finally, applicant argues that there "is no evidence of actual confusion despite concurrent use." Brief at 10. To the extent that applicant's application is based on its intent-to-use the mark in commerce, that is hardly surprising. While applicant has apparently begun using the mark, the fact there is no evidence of actual confusion is

not uncommon and is entitled to little weight, particularly in ex parte cases where the other entity that would have such evidence, the registrant, is not participating. See *Majestic Distilling*, 65 USPQ2d at 1205:

With regard to the seventh *DuPont* factor, we agree with the Board that *Majestic's* uncorroborated statements of no known instances of actual confusion are of little evidentiary value. See *In re Bissett-Berman Corp.*, 476 F.2d 640, 642, 177 USPQ 528, 529 (CCPA 1973) (stating that self-serving testimony of appellant's corporate president's unawareness of instances of actual confusion was not conclusive that actual confusion did not exist or that there was no likelihood of confusion). A showing of actual confusion would of course be highly probative, if not conclusive, of a high likelihood of confusion. The opposite is not true, however. The lack of evidence of actual confusion carries little weight, *J.C. Hall Co. v. Hallmark Cards, Inc.*, 52 C.C.P.A. 981, 340 F.2d 960, 964, 144 USPQ 435, 438 (CCPA 1965), especially in an ex parte context.

When we consider that the marks in this case are virtually identical, DURA GUARD and DURAGARD, and that the goods are related, as well as the other *du Pont* factors, we conclude that there is a likelihood of confusion.

Decision: The refusal to register is affirmed.