

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

SMH/PC

Mailed: September 14, 2007

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re Rally Manufacturing, Inc.

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Serial No. 78576497

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Matthew F. Johnston of Liniak Berenato & White for Rally Manufacturing, Inc.

James Rauen, Trademark Examining Attorney, Law Office 109  
(Dan Vavonese, Managing Attorney).

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Before Hohein, Cataldo and Mermelstein,  
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Rally Manufacturing, Inc. has filed an application to register on the Principal Register the mark WEATHER GUARD in standard character form for goods ultimately identified as "floor mats for land vehicles sold through distinct channels of trade of mass retails [sic] outlets and

automotive after market retail stores" in International Class 27.<sup>1</sup>

The trademark examining attorney has refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when used in connection with its goods, so resembles the mark WEATHER GUARD, which is registered in typed or standard character form for:

prepackaged van and minivan interior modules for storage and shelving; van shelves, cabinets and shelf accessories, namely, work tops, bin boxes and bin dividers, shelf work covers, hard hat racks, fire extinguisher racks, retainer lips, stacking brackets, shelf mats, doors and back panels; freon tank racks and tank rings, wire spool racks; file boxes; window screens; vehicle bulkhead panels and bulkhead custom accessories, namely, binder files, spare tire chocks, literature holders, hard hat racks, fire extinguisher holders, extension cord brackets, spare tire brackets, first aid kit trays, window covers and safety reflectors; stabilizers; floor mats for vans and minivans; cab screens and cab protectors for attachment to rear windows of trucks; vehicle service body racks; ladder guides; sliding platforms and rails for all land vehicles

in International Class 12,<sup>2</sup> as to be likely to cause confusion or to cause mistake or to deceive.

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<sup>1</sup> Serial No. 78576497 was filed on February 28, 2005, based on applicant's allegation of a bona fide intent to use the mark in commerce.

<sup>2</sup> Registration No. 2228051 issued on December 12, 1997. Section 8 affidavit accepted; Section 15 affidavit acknowledged.

When the Examining Attorney made the refusal final, applicant appealed. Applicant and the examining attorney have filed briefs. We affirm the refusal to register.

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 1976); see also *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997). Here, inasmuch as the respective marks are identical in sound, appearance, connotation and commercial impression, as applicant essentially concedes,<sup>3</sup> the focus of our inquiry accordingly is primarily on the goods at issue.

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<sup>3</sup> "Applicant concedes the similarity of the marks." (Brief, p. 3.)

The Goods

We turn then to consideration of the goods, noting at the outset that because the marks are identical, the extent to which applicant's and registrant's goods must be the same or similar to support a finding of likelihood of confusion is lessened. See *In re Opus One Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001). Where the marks are the same, as in this case, it is only necessary that there be a viable relationship between the goods to support a finding of likelihood of confusion. See *In re Concordia International Forwarding Corp.*, 222 USPQ 355, 356 (TTAB 1983).

Furthermore, it is not necessary that the goods at issue 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 instead that the respective goods 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 identity or similarity of the marks, give rise to the mistaken belief that they originate from the same producer. See *In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978).

In this case applicant's goods are floor mats for land vehicles while registrant's goods include floor mats for vans and minivans. As the examining attorney notes, registrant's floor mats for vans and minivans are clearly encompassed under the umbrella of applicant's floor mats for land vehicles. Thus, we may presume that applicant's floor mats for land vehicles include and are otherwise related to the registrant's floor mats for vans and minivans. As a result, registrant's goods are identical in part to those identified in the involved application.

Channels of Trade

Applicant argues that the respective goods "are not competitive given the substantial differences in the channels of trade and historical interface between applicant and registrant" (brief, p. 3). It is settled, however, that in our determination of the issue of likelihood of confusion, we must look to the goods as identified in the involved application and cited registration. See *Octocom Systems Inc. v. Houston Computer 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 Co. v. Johnson Publishing Co., Inc.*, 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, the identification of goods in the cited registration does not contain any limitations as to channels of trade or class of purchasers. As a result, registrant's goods must be presumed to move in all channels of trade common for such goods and be available to all purchasers thereof.

In addition, applicant relies upon a district court decision, *Knaack Mfg. Co. v. Rally Accessories, Inc.*, 42 USPQ2d 1649 (ND Ill. 1997), to support its argument that its channels of trade differ from the registrant's channels of trade.<sup>4</sup> In that case, the district court made findings of fact with regard to certain goods of applicant not covered by the involved application (vehicle covers) and determined, *inter alia*, that the parties' goods moved in

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<sup>4</sup> We note that the assignment of cited Registration No. 2228051, from registrant Knaack Manufacturing Company to Knaack LLC, is recorded with the Assignment Branch of this Office at Reel 2573/Frame 0375.

channels of trade that were distinct from one another. However and as noted above, in the context of this ex parte proceeding, we must base our consideration of applicant's and registrant's trade channels solely upon the identification of goods in the involved application and cited registration. See *In re Linkvest S.A.*, 24 USPQ2d 1716 (TTAB 1992). See also *Paula Payne Products Co. v. Johnson Publishing Co., Inc.*, supra. Inasmuch as there are no restrictions as to trade channels in registrant's identification of goods, they must be presumed to encompass applicant's more narrowly defined channels of trade. As a result, the finding of the district court does not compel a similar result herein.

Third Party Use

In its brief, applicant argues that the mark WEATHER GUARD is weak and that third-party registrations of WEATHER GUARD for various goods weigh against a finding of likelihood of confusion. In support of its contention, applicant asserts that there are "scores of registrations and additional applications for the mark 'Weather Guard' and its close variants both within and outside of class 012"<sup>5</sup> (brief, p. 4). However, applicant did not make either

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<sup>5</sup> We note that if applicant had submitted evidence consisting of the referenced third-party applications, they would not be

these registrations or any other evidence of third-party use of WEATHER GUARD of record at any time during the prosecution of its application.<sup>6</sup> Furthermore, applicant did not introduce any evidence of the asserted weakness of the WEATHER GUARD mark. As a result, we find on this record that there is no evidence of either the relative strength of the WEATHER GUARD mark or third-party use of WEATHER GUARD such that that confusion between the marks in the cited registration and involved application is unlikely. Moreover, even if the WEATHER GUARD mark was found to be weak, such mark nonetheless is entitled to protection against the registration of an identical mark for goods that are identical in part to those recited therein.

Actual Confusion

Another *du Pont* factor discussed by applicant is that of lack of instances of actual confusion. Applicant

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probative in any event. "The Board has long held that third party applications are evidence only of the fact that they were filed; they have no other probative value." *Interpayment Services Ltd. v. Docters & Thiede*, 66 USPQ2d 1463, 1467 n.6 (TTAB 2003). In addition, third-party registrations are not evidence that the marks therefor are in use or that the consuming public is accustomed to encountering such marks. See *AMF Inc. v. American Leisure Prods., Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973) ("The existence of [third party] registrations is not evidence of what happens in the market place or that customers are familiar with them").

<sup>6</sup> We note in addition that if applicant had submitted evidence of third party use with its brief on appeal, it would be untimely. See Trademark Rule 2.142(d).

asserts that the absence of actual confusion suggests no likelihood of confusion between contemporaneous use of its mark for its goods and registrant's use of its mark for its goods. However, it is not necessary to show actual confusion to establish likelihood of confusion. See *Weiss Associates Inc. v. HRL Associates Inc.*, 902 F.2d 1546, 14 USPQ2d 1840 (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 of the issue of likelihood of confusion because the Board is not privy to whether the registrant is likewise unaware of any instances of actual confusion, or 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.*, supra at 1817; *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 *Opus One*, supra; and *Jeep*, supra. The "confluence of facts" is not present in this record.

Common Law Rights

Finally, applicant claims that it "is currently using its mark WEATHER GUARD for several product [sic] including Wiper [sic] blades, fitted car covers, and floor mats for land vehicles in the retail trade channels," "is unaware of any other use of the mark Weather Guard for floor mats in the retail channel of trade" and "therefore currently has common law rights in the mark" (brief p. 6-7). However, applicant has submitted no evidence of use of its mark or cited to any authority for the proposition that such use entitles it to register a mark that is identical to a previously registered mark for goods that are identical in part.

Summary

In light of the foregoing, we conclude that consumers familiar with registrant's goods sold under its mark would be likely to believe, upon encountering applicant's goods sold under its identical mark, that the goods originated with or are somehow associated with or sponsored by the same entity.

**Decision:** The refusal to register is affirmed.