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**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re Rojenco Inc.

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Serial No. 78619172

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Lisa N. Kaufman of Litman Law Offices, LTD. for Rojenco Inc.<sup>1</sup>

Thomas V. Shaw, Managing Attorney, Law Office 102.<sup>2</sup>

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Before Drost, Taylor, and Bergsman, Administrative Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

On April 28, 2005, applicant Rojenco Inc. filed an application to register on the Principal Register the mark BUGGY BATHE AUTO WASH, LUBE & DETAIL SHOPPE (standard character form) for "automobile cleaning and maintenance services" in Class 37. The application (Serial No.

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<sup>1</sup> After applicant's main brief was filed, the board learned that applicant's original counsel died and, subsequently, current counsel was substituted.

<sup>2</sup> Trademark examining attorney Mary E. Crawford prosecuted the trademark application prior to the briefing stage.

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78619172) contains a disclaimer of the words "Auto Wash, Lube" and "Detail Shoppe" and it alleges a date of first use anywhere and in commerce of October 1, 2002.

The examining attorney refused to register applicant's mark under Section 2(d) of the Trademark Act (15 U.S.C. § 1052(d)) because of a registration for the mark YE OLDE BUGGY BATH (in typed or standard character form) for "automobile cleaning and car washing services" in Class 37. Registration No. 2905417 issued November 30, 2004.

After the examining attorney made the refusal final, this appeal followed.

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). In considering the evidence of record on these factors, we must keep in mind that "[t]he fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks." *Federated Foods, Inc. v.*

*Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

The first factor we will consider is whether applicant's and registrant's services are related. Applicant's services include automobile cleaning services, and registrant's services are also for automobile cleaning services. Therefore, the services are in part identical. "When marks would appear on virtually identical goods or services, 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, 1701 (Fed. Cir. 1992).

We add that the examining attorney has also included evidence, consisting of third-party, use-based registrations, to show that applicant's automobile maintenance services are related to registrant's automobile cleaning services. Registrations can suggest that goods or services are related. See *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988) (Although third-party registrations are "not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, [they] may nonetheless have some probative value to the extent that they may serve to suggest that such goods or services are of a type which may

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emanate from a single source"). See also *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1786 (TTAB 1993).

These registrations include:

No. 1487114 - "automobile cleaning and car wash services, repair services"

No. 2089581 - "automobile maintenance and repair... automobile cleaning"

No. 2177440 - "automobile cleaning and maintenance services"

No. 2812667 - "automobile cleaning and car washing, automobile detailing, automobile repair and maintenance"

No. 3007661 - "automobile cleaning and car washing; automobile service station services, vehicle repair and maintenance"

No. 3046781 - "automobile cleaning services and automotive repair and maintenance services, namely oil change services"

No. 3053652 - "automobile cleaning and car wash services; automobile service station services; automobile repair and maintenance services"

Furthermore, since the services are identical, we must presume that the channels of trade and purchasers would be the same. *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994) ("Because the goods are legally identical, they must be presumed to travel in the same channels of trade, and be sold to the same class of purchasers"). See also *Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1268 (TTAB 2003) ("Given the in-part identical and in-part related nature of

the parties' goods, and the lack of any restrictions in the identifications thereof as to trade channels and purchasers, these clothing items could be offered and sold to the same classes of purchasers through the same channels of trade").

The next factor we will consider is the similarities and dissimilarities of applicant's and registrant's marks. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005), quoting, *du Pont*, 177 USPQ at 567 ("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'").

Registrant's mark is for the words YE OLDE BUGGY BATH, while applicant's mark is for the words BUGGY BATHE AUTO WASH, LUBE & DETAIL SHOPPE. Applicant has disclaimed the terms "Auto Wash, Lube" and "Detail Shoppe." Applicant's specimen identifies its services as: "Full Service Auto Wash," "Full Service Lube Shoppe," and "Full Service Detail Shoppe." Therefore, this part of applicant's mark, which informs purchasers that its shop provides automobile washing, lube, and detailing services, would not be as significant to consumers in distinguishing the marks

because it exactly describes applicant's services.

*Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000), quoting, *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985) ("Regarding descriptive terms, this court has noted that the 'descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion'"). See also *M2 Software Inc. v. M2 Communications Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1948-49 (Fed. Cir. 2006) ("When comparing the similarity of marks, a disclaimed term, here 'COMMUNICATIONS,' may be given little weight, but it may not be ignored"); *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001) (Disclaimed matter is often "less significant in creating the mark's commercial impression").

Regarding the term "Buggy" and "Bath," both applicant and the examining attorney have put in definitions of the terms. Among the definitions of "Buggy," the most relevant for these services is "informal, an automobile." See Response dated June 6, 2006, Attachment. See also Final Office Action, Attachment ("Older Slang an automobile, esp. an old or dilapidated one"). "Bath" has numerous definitions including "the act of soaking or cleansing the body, as in water or steam" and "a vessel containing liquid

in which something is immersed (as to process it or to maintain it at a constant temperature or to lubricate it). See Response dated June 6, 2006, Attachments. While "Bathe" can be use as a verb and defined as "to take a bath" or to "to wash in a liquid" (Response dated June 6, 2006, Attachment), in the context of the mark BUGGY BATHE AUTO WASH, LUBE & DETAIL SHOPPE, most purchasers are likely to view the term as a quaint spelling of "Bath," as the term "Shoppe" is a quaint spelling of shop. See *The Random House Dictionary of the English Language (unabridged)* (2d ed. 1987) (Shoppe - "shop (Used chiefly for quaint effect)."<sup>3</sup>

Applicant argues that "Buggy" and "Bath" are "common and weak terms." Brief at 4. Applicant has attached printouts of numerous marks that contain these words. The lists consist of the serial and registration numbers, the mark, and whether the mark is "Live" or "Dead." We cannot consider this information because applicant submitted similar lists (although these lists were from a commercial service and they also included the class for the mark) in response to the examining attorney's first Office action.

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<sup>3</sup> We take judicial notice of this definition. *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).

In her final Office action (p. 3, parenthetical omitted), the examining attorney specifically advised applicant that a commercial search report was not proper evidence and "the submission of a list of registrations does not make these registrations part of the record... To make registrations of record, soft copies of the registrations or the complete electronic equivalent must be submitted." Applicant did not request reconsideration and its submission of another list of registrations with its appeal brief is untimely. *In re First Draft Inc.*, 76 USPQ2d 1183, 1192 (TTAB 2005) ("Submission of the TARR printout with its appeal brief, however, is an untimely submission of this evidence"). We also point out that a list of registrations that includes only the mark and registration number does not make them of record. *In re Duofold, Inc.*, 184 USPQ 638, 640 (TTAB 1974) ("[T]he submission of a list of registrations is insufficient to make them of record"). Furthermore, the inclusion of expired registrations and pending and abandoned applications is not relevant to the issues on appeal. *Action Temporary Services Inc. v. Labor Force Inc.*, 870 F.2d 1563, 10 USPQ2d 1307, 1309 (Fed. Cir. 1989) ("[A] canceled registration does not provide constructive notice of anything") and *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"). Therefore, we do not rely on this evidence.

Based on the definitions of record, we do find that the term "BUGGY BATH(E)" would have a suggestive meaning for the services of car cleaning. However, the evidence does not show that the combined term BUGGY BATH(E) is a commonly used term, much less that it is used by others in relation to the services of applicant or registrant. Therefore, we cannot conclude that the term is entitled to only a narrow scope of protection.

When we view the marks, we must consider whether the marks YE OLDE BUGGY BATH and BUGGY BATHE AUTO WASH, LUBE & DETAIL SHOPPE in their entirety are similar. The marks have several differences, including the descriptive wording in applicant's mark, the presence of "Ye Olde" in the registered mark, and different spellings of "Bath." For their similarities, we find that the common term, "Buggy Bath(e)," would dominate both marks.<sup>4</sup> It is less likely

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<sup>4</sup> Applicant itself uses the term BUGGY BATHE separately on its specimens. *In re Nationwide Industries*, 6 USPQ2d 1882, 1884 (TTAB 1984) ("Thus, it is settled that evidence of the context in which a mark is used on labels, packaging, advertising, etc., is probative of the significance which the mark is likely to project to purchasers").

that the descriptive matter or the "Ye Olde" portions of the marks would be used to differentiate the marks. The managing attorney points out that "both marks include the antiquated Middle-English spelling of several terms. The applicant's use of the antiquated term SHOPPE in its mark mirrors the registrant's use of the antiquated term YE OLDE and reinforces the similarity of the 'old-fashioned' commercial impression of both marks." Brief at 4. We also add that neither applicant's nor registrant's mark is limited to any specific style. Therefore, we must assume that they can be displayed in a similar style such as in an Olde English script. *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").

We find that the marks would have similarities in appearance and pronunciation inasmuch as the dominant part of both marks is virtually the same. Their suggestive meaning of a car wash as a "bath for buggies" is also the same. Furthermore, their commercial impression would be similar because of the Olde English or quaint impression that both marks present. Therefore, we find that the similarities of the marks in their entireties outweigh their differences. *Baseball America Inc. v. Powerplay*

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*Sports Ltd.*, 71 USPQ2d 1844, 1848 (TTAB 2004) ("The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks"). See also *Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller*, 477 F.2d 586, 177 USPQ 573, 574 (CCPA 1973).

When we consider that marks are used in association with identical and closely related automobile services and that the marks are similar, we hold that confusion is likely. We add that to the extent that we had any doubts about whether there was a likelihood of confusion, we have resolved in registrant's favor. *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988).

Decision: The examining attorney's refusal to register applicant's mark under Section 2(d) of the Trademark Act is affirmed.