

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: September 27, 2007
PTH

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Boss Industries, Inc.

Serial No. 78643019

Garron M. Hobson of Thorpe North & Western L.L.P. for Boss Industries, Inc.

William Breckenfeld, Trademark Examining Attorney, Law Office 116 (Michael Baird, Managing Attorney).

Before Hairston, Kuhlke and Wellington, Administrative Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

Boss Industries, Inc. has filed an application to register on the Principal Register the mark BOSS NOSS (in standard character form) for goods ultimately identified as "kits for injecting nitrous oxide into internal combustion engines for use with snowmobiles" in International Class 7.¹

Registration has been finally refused under Section

¹ Serial No. 78643019, filed on June 3, 2005, which alleges dates of first use of June 1, 2004.

Ser No. 78643019

2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that applicant's mark, when applied to the identified goods, so resembles the previously registered marks NOS² (in standard character form) and the mark shown below,³



both for "fuel injector kits for injecting nitrous oxide and a fuel mixture into an internal combustion engine and nozzles for fuel injection," as to be likely to cause confusion. The cited registrations are owned by the same entity.

Applicant has appealed and briefs have been filed. 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 (CCPA 1973). See also, *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201

² Registration No. 1738011, issued on December 8, 1992; renewed.

³ Registration No. 1725069, issued on October 20, 1992; renewed.

(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. 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).

Considering first the similarity of the goods, we note that applicant does not argue that its goods are dissimilar to those of registrant. In fact, we note that applicant's kits for injecting nitrous oxide into internal combustion engines for use with snowmobiles are within the scope of registrant's fuel injector kits for injecting nitrous oxide and a fuel mixture into an internal combustion engine. Thus, these goods are legally identical. Also, applicant's goods are closely related to registrant's nozzles for fuel injection. Further, because applicant's and registrant's goods are legally identical and otherwise closely related, the channels of trade and purchasers are legally identical.

We turn, therefore, to a consideration of the marks, keeping in mind the well-established principle that when marks would appear on virtually identical goods, 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, 1700 (Fed. Cir. 1992).

With respect to the marks, we must determine whether applicant's mark and registrant's marks, when compared in their entireties, are similar or dissimilar in terms of sound, appearance, connotation and commercial impression. Although the marks must be considered in their entireties, it is well-settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). Furthermore, the test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. The focus is 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).

The examining attorney contends that the marks are similar in sound, appearance, connotation and commercial

impression. Specifically, the examining attorney argues that the dominant feature of applicant's mark is the term NOSS; that the term BOSS merely modifies NOSS; that the only other difference is the additional letter "S" in the term NOSS; that there is no correct pronunciation of a trademark, although NOSS and NOS could be pronounced the same; and that due to the shared term NOS/NOSS, the marks create similar commercial impressions.

Applicant, on the other hand, argues that the term BOSS is the dominant portion of its mark because it has been using the mark BOSS in connection with its snowmobiling products since 1996; that purchasers, upon seeing applicant's mark BOSS NOSS will immediately associate the mark with applicant's products; that the addition of the term BOSS to NOSS and the extra letter "S" therein are sufficient to distinguish applicant's mark from the registrant's marks; that the term NOS is an acronym for the generic/descriptive term "nitrous oxide system;" and that, therefore, registrant's marks are weak and entitled to a limited scope of protection. Applicant has submitted a "Wikipedia" printout for the entry "nitrous oxide" and four other Internet printouts which contain references to the term NOS.

Applicant's argument that the BOSS portion of its mark is well known in connection with applicant's snowmobiling products is not supported by any evidence. That is, the record is silent as to the extent of sales under the BOSS mark or as to applicant's expenditures in placing the mark before the purchasing public. Suffice it to say that we are unable to conclude that the BOSS portion of applicant's mark is dominant for the reason urged by applicant. Rather, we agree with the examining attorney that NOSS is the dominant portion of such mark with BOSS simply modifying NOSS.

Further, applicant's argument that the term NOS is generic/descriptive in relation to applicant's goods is not persuasive⁴ and it is an impermissible collateral attack on the cited registration. Such an attack will not be entertained in an ex parte appeal. See e.g., *In re Peebles Inc.*, 23 USPQ2d 1795 (TTAB 1992); and *In re C. F. Hathaway Co.*, 190 USPQ 343 (TTAB 1976).

In this case, there are specific differences in applicant's mark BOSS NOSS and the cited mark NOS (in standard character form): the term BOSS in applicant's mark; and the extra letter "S" in NOSS. Consumers are not,

⁴ For example, it is not clear that the term NOS is used in the Internet printouts in a generic/descriptive manner.

however, likely to note the extra "S" in NOSS. Further, the word BOSS in applicant's mark does not serve to distinguish applicant's mark; rather consumers will regard BOSS NOSS and NOS as variant marks identifying origin in a single source. Consumers are likely to view BOSS NOSS as identifying fuel injection kits which provide the ultimate in performance originating from registrant.⁵

Further, because there is no correct pronunciation of a trademark, someone who has heard (rather than seen) the mark NOS for fuel injector kits and nozzles and sees BOSS NOSS for fuel injector kits may well pronounce NOSS the same as the term NOS and, again, believe that the marks are variants of each other. Thus, when considered in their entirety, we find that the respective marks BOSS NOSS and NOS are sufficiently similar in sound, appearance, connotation and commercial impression that, when used on the identical and otherwise closely related goods involved herein, confusion as to source is likely.

For the foregoing reasons, we also find that applicant's BOSS NOSS mark and registrant's NOS and design

⁵ In this regard, we judicially notice that the word "boss" is defined, inter alia, as "Slang. First-rate; topnotch." The American Heritage Dictionary of the English Language (4th ed. 2006).

mark are similar in sound, appearance, connotation and commercial impression. Registrant's NOS and design mark is depicted in an extra bold font with an arrow emanating from the letter "N." By comparison, applicant depicts its BOSS NOSS mark in standard character form. Accordingly, in deciding the issue of likelihood of confusion, we must consider all reasonable manners in which applicant's mark could be displayed. See *Jockey International Inc. v. Mallory & Church Corp.*, 25 USPQ2d 1233 (TTAB 1992), and cases cited therein. One reasonable depiction of applicant's mark would include BOSS NOSS in the same extra bold font as used by registrant in its NOS and design mark. Perhaps use of an arrow, similar to that shown in the cited registration, would not constitute a reasonable depiction, but where as here, the goods are identical and otherwise closely related, this design feature in registrant's mark would not be sufficient to distinguish the marks. Consequently, when considered in their entirety, applicant's BOSS NOSS mark and the cited registrant's NOS and design mark project similar commercial impressions.

We recognize that purchasers of fuel injector kits of the type involved herein may be discriminating in the selection of products for their use. However, they are still likely to be confused as to the source of legally

identical and otherwise closely related goods when such goods are identified by similar marks. That is, even careful purchasers are not immune from confusion. See *Wincharger Corporation v. Rinco, Inc.*, 132 USPQ 289 (CCPA 1962).

Lastly, to the extent that any of the points argued by applicant raise doubt on our conclusion on the issue of likelihood of confusion, we resolve that doubt, as we must, in favor of the prior registrant. In *re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988); and *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984).

We conclude that purchasers and prospective customers, who are familiar with either of registrant's marks NOS (standard character form) or NOS and design for fuel injector kits for injecting nitrous oxide and a fuel mixture into an internal combustion engine and nozzles for fuel injection, would be likely to believe, upon encountering applicant's BOSS NOSS mark for its kits for injecting nitrous oxide into internal combustion engines for use with snowmobiles, that such goods emanate from, or are sponsored by or associated with, the same source.

Decision: The refusal to register applicant's mark on the ground that it is likely to cause confusion with

Ser No. 78643019

Registration Nos. 1738011 and 1725069 under Section 2(d) of
the Trademark Act is affirmed.