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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re CompressorWorks, Inc.

Serial No. 78855392

Linda M. Novak and J. Kevin Gray of Fish & Richardson P.C. for CompressorWorks, Inc.

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Before Bucher, Kuhlke and Taylor, Administrative Trademark Judges.

Opinion by Taylor, Administrative Trademark Judge:

CompressorWorks, Inc. has filed an application to register on the Principal Register the mark COOLFLO (in standard character format) for "land vehicle parts, namely, fan clutches" in International Class 12.[1]

Registration has been refused on the ground that applicant's mark is confusingly similar to the registered mark KOOL FLOW (in typed form) for "automotive parts, namely air

[1] Serial No. 78855392, filed April 6, 2006, and alleging a bona fide intention to use the mark in commerce.

filters for land vehicles" in International Class 7[2] under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d).

When the refusal was made final, applicant appealed.[3] Both applicant and the examining attorney filed briefs. For the reasons discussed below, we affirm the refusal to register.

As a preliminary matter, the examining attorney, citing in part to 37 C.F.R. § 2.142(d), has objected to Exhibits A-I[4] attached to applicant's appeal brief, arguing that the exhibits include new evidence. 37 C.F.R. § 2.142(d) provides, in part, that "[t]he record in the application should be complete prior to the filing of an appeal. The Trademark Trial and Appeal Board will ordinarily not consider additional evidence filed with the Board by the appellant or by the examiner after the appeal is filed." Accordingly, Exhibits A-I have not been considered in our decision herein, except to the extent that the

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[2] Registration No. 2776725, issued October 21, 2003.

[3] Applicant also filed a "request for reconsideration." The request for reconsideration did not purport to contain any additional evidence or argument, but rather, was merely a notification that applicant was seeking a consent agreement from the owner of the cited registration. Applicant neither filed a consent agreement nor requested that the appeal be suspended while applicant attempted to obtain one. Instead, applicant continued with the appeal. For that reason, on February 5, 2008, the Board issued an order stating that no further consideration would be given to the request for reconsideration.

[4] Exhibits A-I appear to be results from a search of the Google® Internet search engine in which either the terms "C(K)OOL" and "FLO(W)" were used in connection with automotive products.

submissions were submitted previously during the prosecution of the application.[5]

Our determination of the issue of likelihood of confusion is based on an analysis of all 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 Company, Inc., 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, 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 (CCPA 1976). See also, In re Dixie Restaurants Inc., 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

We consider first the goods based on a comparison of the identifications in the application and the cited registration. In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687, 1690 at n. 4 (Fed. Cir. 1993). As a general rule the goods or services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that the goods or services are related in some manner or that some

[5] We add, however, that even if we had considered this evidence, our decision would be the same. Particularly, of the third-party uses, all but one were for marks that did not include both the terms "C(K)OOL" AND "FLO(W)."

circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which would give rise, because of the marks used therewith, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each parties' goods or services. In re Melville Corp., 18 USPQ2d 1386 (TTAB 1991), and the cases cited therein.

Applicant's goods are "land vehicle parts, namely, fan clutches" and the goods in the cited registration are "automotive parts, namely air filters for land vehicles." Although applicant acknowledges that both its goods and registrant's goods are automotive engine parts, applicant argues that the goods are different because they "belong in different places in an automotive engine, operate in completely different ways, and serve different purposes." (Brief at 7).

Applicant also contends that there does not appear to be an "appreciable commonality" of purchasers and channels of trade. Specifically, applicant argues that while both its goods and registrant's goods will be sold to and in auto parts stores, its goods will be "behind the counter" products not available for pick-up and purchase on the sales floor whereas registrant's goods are sold in the main shopping floor of retail stores.

The examining attorney conversely maintains that although the goods are not identical, they are related and are likely to be encountered by the same group of consumers, being products that are sold along side one another. To support her position, the examining attorney made of record with her final office action copies of third-party registrations to show that applicant's type of fan clutches and registrant's type of air filters are parts for automobiles commonly sold under the same mark. These third-party registrations may serve to suggest that the types of goods involved herein are related goods. *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 emanate from a single source"). *See also* In re Albert Trostel & Sons Co., 29 USPQ2d 1783, 1786 (TTAB 1993).

These registrations include:[6]

> Registration No. 2929913 for, *inter alia*, "components of automotive air conditioning systems, namely … fan clutches" and "air filters";

[6] We note that while Registration Nos. 2873519, 2578733, 2869160, 3044874 and 3210128 cover both "air filters" and "clutches," it is unclear whether the clutches listed therein are engine parts. Accordingly, those registrations have little probative value.

> Registration No. 2986790 for, *inter alia*, "replacement parts for automotive air conditioners, namely, … air filters" and "replacement parts for automotive air conditioners, namely, … clutches"; and
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> Registration No. 3015016 for, *inter alia*, "automotive parts, namely, … air filters" and "air conditioner parts for automobiles, namely, … fan clutches."

Based on the identifications of record, which contain no limitations as to product placement, use or purpose, save that both applicant's and registrant's goods are for use with land vehicles, we find that the third-party registrations are sufficient to demonstrate that applicant's fan clutches and registrant's air filters are related automotive engine parts.

Further, and contrary to applicant's contention, in the absence of any limitations in the identifications of goods in either the application or the cited registration as to channels of trade or classes of purchasers, we must presume that both applicant's and registrant's automotive parts will be offered in the normal channels of trade for such goods, such as automotive supply stores, automobile dealers and automotive repair shops and will be offered to all normal purchasers of such goods. *See* In re Elbaum, 211 USPQ 639, 640 (TTAB 1981). Moreover, there is nothing in the record to substantiate applicant's claim that the normal sales practices for the parties' goods differ, i.e., applicant' goods being "behind the counter" products selected

with aid as opposed to registrant's goods being "shopping floor" items.

In view thereof, the *du Pont* factors of the similarity of the goods, channels of trade and classes of purchasers strongly favor a finding of likelihood of confusion as to the cited registration.

We now consider the marks. In determining the similarity or dissimilarity of the marks, we must compare the marks in their entireties as to appearance, sound, connotation and commercial impression. Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). 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 their entireties that confusion as to the source of the goods offered under the respective marks is likely to result. Applicant's mark is COOLFLO and the cited mark is KOOL FLOW. Both marks are depicted without any stylization or design. The marks are similar because, as the examining attorney points out, they are essentially phonetic equivalents which will be pronounced identically. *See* RE/MAX of America, Inc. v. Realty Mart, Inc., 207 USPQ 960, 964 (TTAB 1980) (similarity in sound alone may be sufficient to support a finding of likelihood of confusion). *See also, for example*, Molenaar, Inc. v. Happy Toys Inc., 188

USPQ 469 (TTAB 1975); and In re Cresco Mfg. Co., 138 USPQ 401 (TTAB 1963). Contrary to applicant's position, we find that neither the fanciful spelling of the term "cool" in registrant's mark nor the fanciful spelling of the term "flow" and the deletion of the space between the terms "cool" and "flo[w]" in applicant's mark are sufficient to distinguish the marks as to appearance. In addition, due to the similarity in sound and appearance, we find the marks similar in meaning and commercial impression.

Applicant, however, in urging that the refusal be reversed, argues that the marks are different in meaning and commercial impression because one cannot assume that "KOOL" means the same thing as "COOL." Applicant relies on the following definitions of "kool" and "cool":

> "Kool" means "cooler than cool" as in "hip," "awesome," "sweet" and the like.[7]
>
> "Cool" means "moderately cold; Lacking in warmth."[8]

The Board may take judicial notice of dictionary definitions, including online dictionaries which exist in printed format. *See* In re CyberFinancial.Net Inc., 65 USPQ2d 1789 (TTAB 2002). *See also* University of Notre Dame du Lac v. J. C. Gourmet Foot Imports Co., Inc., 213 USPQ 594 (TTAB 1982), aff'd, 703 F.2d

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[7] Urban Dictionary at www.urbandictionary.com/define.php?term=kool.
[8] Merriam-Webster Online Dictionary at www.m-w.com.

1372, 217 USPQ 505 (Fed. Cir. 1983). However, inasmuch as it appears that the Urban Dictionary is solely an online publication, we will not further consider the definition of "kool." Rather, we consider applicant's position regarding the definition of "kool" unsubstantiated argument only.[9] The use of "kool" (as opposed to "cool") in the cited mark, applicant contends, "suggests something more than moderately cold – the spelling is a slang spelling and alludes to being 'hip,' 'with it,' or the like" while "cool" in applicant's mark means moderately cold. Applicant further contends that by ending the "flo" portion of its mark with an "O," "applicant alludes to the open clutch which permits air to flow through the carburetor. Applicant combines two terms to mimic the smooth continuous flow of air." (Brief at 11.) Applicant thus maintains that its mark creates a separate and distinct commercial impression that is different than that of the cited mark.

We do not find this argument persuasive. While some consumers may perceive slight differences in meaning, there is nothing in the record to suggest that consumers upon seeing the registered mark used on or in connection with air filters would immediately think "something hip" as opposed to something that "mimic[s] the smooth continuous flow of [moderately cold] air."

[9] Doing so, however, does not affect the outcome of this decision.

(Applicant's brief at 11). Indeed, the advertising/informational copy of record for registrant's air filters states:

> Remember to allow for the cold air feed flexible tube that is connected to the front of the filter. This must be directed toward a cold air source, such as below the radiator or through the fender well. This cold air source does not need to be a ram air effect.

(Applicant's response to Office Action No. 1 at Exhibit F-2). We thus find the meaning and commercial of the marks similar.

Put simply, when viewing the marks in their entireties, we find that the similarity of the marks, due to their phonetic equivalence, and the similarity in meaning and commercial impression outweigh the slight differences in spelling and appearance. This factor thus favors a finding of likelihood of confusion.

Applicant also argues that the cited "KOOL FLOW" mark is weak and should therefore be given limited protection. In support of its position that the mark is weak, applicant made of record copies from the TESS and TARR databases of the U.S. Patent and Trademark Office (USPTO) of four third-party applications and seven third-party registrations for marks containing the terms "C(K)OOL", and/or "FLO(W)" for a variety of goods. We find these examples of limited probative value. First, as regards the applications, they show only that the applications have been filed. See Interpayment Services Ltd. v.

Docters & Thiede, 66 USPQ2d 1463 (TTAB 2003). As regards the third-party registrations, while they may be used to demonstrate that a portion of a mark is suggestive or descriptive, they are not evidence that the marks shown therein are in use or that the public is aware of them. See AMF Incorporated v. American Leisure Products, Inc., 177 USPQ 268, 269 (CCPA 1973)["little weight is to be given such registrations in evaluating whether there is likelihood of confusion."]. Moreover, our review of such registrations reveals that of the seven registrations, only five of the marks in those registrations (i.e., COOLFLO, COOL FLOW, COOLFLOW, KOOL-FLO and KOOL FLOW) contain both the terms "c(k)ool and "flo(w)."[10] However, they cover very different goods (i.e., sporting goods, water purifying fountains for pets, infusion pumps used in electrophysiology procedures, plastic containers for trees and water distribution and return control systems, respectively).

Nonetheless, we note that even if "KOOL FLOW" was considered to be weak due to an asserted degree of common usage, even weak marks are entitled to protection where confusion is likely. See Matsushita Electric Company v. National Steel Co., 442 F.2d 1383, 170 USPQ 98, 99 (CCPA 1971) ["Even though a mark may be 'weak' in the sense of being a common word in common use

[10] The other two registrations are for the marks KOOL FLOSS and THE FLORIDA COOL RING.

as a trademark, it is entitled to be protected sufficiently to prevent confusion from source arising"]. Here, notwithstanding any alleged weakness in the registered mark, it is still similar in sound, appearance, connotation and commercial impression to applicant's mark. We accordingly find this *du Pont* factor is neutral.

Two final arguments made by applicant require comment. First, with respect to the conditions of sale, applicant argues that:

> Applicant's mark is unlikely to be confused with the Cited Mark because consumers buying the respective goods are sophisticated consumers. … Both parties sell specific parts used *inside* the engine of land vehicles. Only people sophisticated about the mechanics and operation of motors of land vehicles attempt to replace or repair such parts.
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> ***
> Distributors, repair shops, parts houses, and automotive parts stores have sophisticated purchasing agents who are trained to know about auto parts, their manufacturers, and their uses. Because the goods of Applicant and Registrant are highly specialized, these consumers are expected to, and will, exercise great care in the selection and purchase of their respective goods. Accordingly, these consumers will likely exercise great care when viewing Registrant's Mark versus Applicant's mark – such consumers will know that Applicant only sells fan clutches under the COOLFLO mark and will be able to distinguish Applicant's fan clutches from Registrant's air filters sold under the KOOL FLOW mark.

(Brief at 7-8). We find these arguments unavailing. Even assuming that purchasers of applicant's fan clutches and

registrant's air filters may need to exercise a degree of care or thought in choosing such goods, even careful purchasers of goods can be confused as to source under circumstances where substantially similar marks are used on substantially related goods. See In re Research Trading Corp., 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) citing Carlisle Chemical Works, Inc. v. Hardman & Holden Ltd., 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970) ("Human memories even of discriminating purchasers … are not infallible.").

Last, applicant argues that the Trademark Trial and Appeal Board, and various Federal and state courts, have many times ruled that similarly situated marks have not been confusingly similar. However, as often noted by the Board and the Courts, each case must be decided on its own merits. The determination of registrability of a mark in another case cannot control the merits in the case now before us. See In re Nett Designs Inc., 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001). See also, In re Kent-Gamebore Corp., 59 USPQ2d 1373 (TTAB 2001); and In re Wilson, 57 USPQ2d 1863 (TTAB 2001).

In view of the foregoing, we conclude that prospective purchasers familiar with the registered mark KOOL FLOW for automotive parts, namely air filters for land vehicles would be likely to believe, upon encountering applicant's substantially similar mark COOLFLO for land vehicle parts, namely, fan

clutches, that such goods emanate from, or are sponsored by or affiliated with the same source.

Decision: The refusal to register is affirmed.