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*Decision Mailed:
September 12, 2008
GDH/gdh*

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re ADI Limited

Serial No. 79025358

Eric O. Haugen of Haugen Law Firm PLLP for ADI Limited.

Ramona Ortiga Palmer, Trademark Examining Attorney, Law Office
117 (Loretta C. Beck, Managing Attorney).

Before Hohein, Hairston and Bergsman, Administrative Trademark
Judges.

Opinion by Hohein, Administrative Trademark Judge:

ADI Limited has filed an application to register on the
Principal Register in standard character form the mark
"BUSHMASTER" for "military vehicles, namely, armored military
vehicles, armored security vehicles for use by military
personnel, [and] armored mobility vehicles for rapid deployment
and protection of armored personnel" in International Class 12.¹

Registration has been finally refused under Section
2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that

¹ Ser. No. 79025358, filed on April 4, 2006, which is based on
International Reg. No. 0888884, issued on April 4, 2006 and claiming a
priority date of March 20, 2006.

applicant's mark, when applied to its goods, so resembles the mark "BUSHMASTER," which is registered on the Principal Register in standard character form for "tires, including all-terrain vehicle tires" in International Class 12,² as to be likely to cause confusion, or to cause mistake, or to deceive.

Applicant has appealed and briefs have been filed. We affirm the refusal to register.

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence which are relevant to the factors bearing on the issue of whether there is a likelihood of confusion. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 568 (CCPA 1973). See also In re Majestic Distilling Co., 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). However, as indicated in Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976), in any likelihood of confusion analysis, two key considerations are the similarity or dissimilarity of the goods at issue and the similarity or dissimilarity of the respective marks in their entireties.³ See also In re Dixie Restaurants Inc., 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997). Here, inasmuch as the respective marks are identical in all respects, the primary focus of our inquiry is accordingly on the similarities and dissimilarities in the goods at issue along with consideration

² Reg. No. 3,073,988, issued on March 28, 2006, which sets forth a date of first use of the mark anywhere and in commerce of July 15, 2003.

³ The court, in particular, pointed out that: "The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." 192 USPQ at 29.

of, *inter alia*, such factors as the similarity or dissimilarity of established, likely-to-continue trade channels and the conditions under which and buyers to whom sales are made, i.e., "impulse" vs. careful, sophisticated purchasing.⁴

Turning first to the similarities and dissimilarities in the respective goods, applicant maintains in its brief that (*italics in original*):

It is extremely important that this Board realize and give proper weight to the fact that applicant's goods are *specifically limited* to highly particularized goods in the nature of armored military and security vehicles. In rejecting the instant application, the Examining Attorney, generally, analogizes applicant's highly sophisticated military goods to "automobiles" or other consumer-based vehicles. In fact, applicant's goods are not "automobiles," "motorcycles," "bicycles", or any other sort of commonly marketed vehicle. Applicant's mark is used in connection with armored vehicles that are used for military purposes and the like. These goods, in addition to being highly sophisticated and extremely expensive, are unrelated to "tires" per se. This *Du Pont* factor clearly weighs in favor of applicant.

The Examining Attorney, on the other hand, properly notes as a preliminary matter in her brief that where the marks at issue are identical, as is the case herein, the respective goods "need not be as close to support a finding of likelihood of confusion as might apply where differences exist between the marks," citing *In re Opus One Inc.*, 60 USPQ2d 1812, 1815 (TTAB

⁴ Applicant, in its brief, contends that "[t]he BUSHMASTER mark cited against applicant is not known to be famous, nor has the Examining Attorney asserted that the '966 mark is famous." Although applicant consequently insists that the *du Pont* factor of the fame of the prior mark "weighs completely in applicant's favor," such factor is neutral given the absence of evidence with respect thereto.

2001) and *Amcors, Inc. v. Amcor Industries, Inc.*, 210 USPQ 70, 78 (TTAB 1981). See also, *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992), *cert. denied*, 506 U.S. 1034 (1994). In addition, the Examining Attorney correctly points out that it is well established that the issue of likelihood of confusion must be determined on the basis of the goods as they are set forth in the application and the cited registration. See, e.g., *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815-16 (Fed. Cir. 1987); *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983); *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983); and *Paula Payne Products Co. v. Johnson Publishing Co., Inc.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973). Thus, where applicant's and registrant's goods are broadly described as to their nature and type, it is presumed in each instance that in scope the application and cited registration encompass not only all goods of the nature and type described therein, but that the identified goods move in all channels of trade which would be normal for those goods and that they would be purchased by all potential buyers thereof. See, e.g., *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981).

Moreover, as the Examining Attorney also accurately observes, it is well settled that goods need not be identical or

even competitive in nature in order to support a finding of likelihood of confusion. Instead, it is sufficient that the goods are related in some manner and/or that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons under situations that would give rise, because of the marks employed in connection therewith, to the mistaken belief that they originate from or are in some way associated with the same producer or provider. See, e.g., Monsanto Co. v. Enviro-Chem Corp., 199 USPQ 590, 595-96 (TTAB 1978) and In re International Telephone & Telegraph Corp., 197 USPQ 910, 911 (TTAB 1978).

In light of such principles, the Examining Attorney contends in her brief that the goods at issue are related, arguing among other things that:

In this case, the registrant's goods are identified broadly. Therefore, it is presumed that the registration encompasses tires for all types of vehicles, including the applicant's military vehicles, that they move in all normal channels of trade, and that they are available to all potential customers.

Furthermore, the evidence of record shows that the applicant's "military vehicles," even if "sophisticated," have tires.

Contrary to applicant's arguments, the examining attorney did not analogize the applicant's goods to automobiles. Rather, the examining attorney relied on the identification of the goods specified in the application.

Further asserting, however, that the identification of applicant's vehicles "is broad enough to include armored military automobiles" inasmuch as The American Heritage Dictionary of the

English Language (4th ed. 2000) in relevant part defines "vehicle" as "1a. A device or structure for transporting persons or things, a conveyance: a *space vehicle*. b. A self-propelled conveyance that runs on tires, a motor vehicle" and "automobile" as "A self-propelled passenger vehicle that usually has four wheels and an internal-combustion engine, used for land transport,"⁵ the Examining Attorney maintains that applicant's goods are "related to the registrant's tires" in that:

The relatedness of automobiles and tires is well settled in this area. The Trademark Trial and Appeal Board has consistently found that the use of identical or similar marks on automobiles and on tires is likely to cause confusion. See *In re Jeep Corp.*, 222 USPQ 333 (TTAB 1984) (holding LAREDO for land vehicles and structural parts likely to be confused with LAREDO for pneumatic tires); ... *Jetzon Tire & Rubber Corp. v. Gen. Motors Corp.*, 177 USPQ 467 (TTAB 1973) (holding GEMINI and GMINI for automobiles likely to be confused with GEMINI for vehicle tires); [*Gen. Motors Corp. v. Pacific Tire & Rubber Co.*, 132 USPQ 562 (TTAB 1962) (holding BEL-AIR for pneumatic tires likely to be confused with BEL-AIR for automotive vehicles)]; see also TMEP §1207.01(a)(i).

Furthermore, the Trademark Trial and Appeal Board has consistently held that vehicles and their various accessories, parts and attachments are closely related goods such that the average person encountering the same or similar marks for such products is likely to be confused as to their source. It is well established in the marketplace that

⁵ The request by the Examining Attorney in her brief that the Board take judicial notice of such definitions is granted. It is well settled that the Board may properly take judicial notice of dictionary definitions. See, e.g., *Hancock v. American Steel & Wire Co. of New Jersey*, 203 F.2d 737, 97 USPQ 330, 332 (CCPA 1953); *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983); and *Marcal Paper Mills, Inc. v. American Can Co.*, 212 USPQ 852, 860 n.7 (TTAB 1981).

manufactures of vehicles often produce accessories and attachments for such vehicles and market them under the same mark. *E.g.*, *In re Gen. Motors Corp.*, 23 USPQ2d 1465, 1469 (TTAB 1992); *In re Jeep Corp.*, 222 USPQ 333, 334 (TTAB 1984); *In re Gen. Motors Corp.*, 196 USPQ 574, 575-76 (TTAB 1977).

In addition to the above cited precedent, the Examining Attorney has made of record, as evidentiary support for her position that the goods at issue herein are commercially related, copies of fifteen use-based third-party registrations for marks which are variously registered in International Class 12 for, *inter alia*, "automobiles," "motor vehicles, namely[,]
automobiles," "motor vehicles, namely, automobiles, trucks, vans ... [and] sport-utility vehicles," "motorized vehicles, namely, ... automobiles ... [and] all-terrain vehicles," "land vehicles, namely, automobiles, trucks, vans ... and sport utility vehicles," "apparatus for locomotion by land, ... namely, all-terrain vehicles; motor buses; motor coaches; automobiles; cars; [and] motor cars," "all terrain vehicles," "sports utility vehicles" and "off-road vehicles," on the one hand, and "tires," including "car tires," "tires for land vehicles," "motor vehicle tires" and "pneumatic tires for land vehicles," on the other. Although such registrations are not evidence that the different marks shown therein are in use or that the public is familiar with them, the Examining Attorney is nonetheless correct that the registrations have some probative value to the extent that they serve to suggest that the vehicles and tires therefor listed therein are the kinds of goods which may emanate from a single source. See, e.g., *In re Infinity Broadcasting Corp. of Dallas*,

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60 USPQ2d 1214, 1217-18 (TTAB 2001); In re Albert Trostel & Sons Co., 29 USPQ2d 1783, 1785-86 (TTAB 1993); and In re Mucky Duck Mustard Co. Inc., 6 USPQ2d 1467, 1470 n.6 (TTAB 1988), *aff'd as not citable precedent*, 864 F.2d 149 (Table, unpublished) (Fed. Cir. 1988).

While we understand and appreciate that applicant's armored military, security and mobility vehicles are highly specialized and sophisticated land vehicles which are extremely expensive relative to most automobiles, vans, sport utility vehicles, light trucks, all-terrain and/or off-road vehicles and the like for ordinary consumer use, it is still the case that applicant's goods, as shown by its product literature which is of record, utilize tires to run on just like general purpose consumer vehicles. In fact, such literature indicates that the "tyres" on applicant's specialty vehicles are "Low MMP Michelin 395/85 R20 with bead locks" and that a "push button central tyre inflation system allows the driver to adjust tyre pressures on the move for all terrains including highway, sand, mud/snow and emergency conditions." Such all-terrain capability is likewise encompassed by registrant's goods, which are identified as "tires, including all-terrain vehicle tires." Registrant's goods, therefore, must be broadly construed as including all terrain tires for armored military, security and mobility vehicles. Purchasers of applicant's military, security and mobility vehicles, as well as those in the market for replacement tires for such goods, would clearly regard registrant's tires as commercially related to applicant's goods. Like the tires with

which applicant's goods are equipped, registrant's goods would be available in the same channels of trade, including the aftermarket for replacement tires. Plainly, when applicant's specialty military, security and mobility vehicles and registrant's tires, including all-terrain vehicle tires, are marketed under the identical mark "BUSHMASTER," confusion as to source or sponsorship is likely to occur.

Applicant argues, however, that confusion is not likely, contending among other things that "BUSHMASTER" is a weak mark as shown by the coexistence with registrant's registration of the following two third-party registrations:

Reg. No. 2,168,336, issued on the Principal Register on June 23, 1998 for the mark "BUSHMASTER" for an "automatic[] cannon, namely, a large caliber machine gun for military or police use, not for sale to the general public" in International Class 13, and which sets forth a date of first use of the mark anywhere and in commerce of March 1982; renewed; and

Reg. No. 1,521,311, issued on the Principal Register on January 17, 1989 for the mark "BUSHMASTER" and design, as reproduced below,



for "mail order and telephone order services in the field of fire arms and related accessories" in International Class 42, and which sets forth a date of first use of the mark anywhere and in commerce of September 20, 1979; combined affidavit §§8 and 15.

According to applicant, "[t]he simultaneous registration of these two marks is further evidence of the fact that applicant's mark is fully registrable in spite of the existence of the '966 Registration," especially since "the goods at issue in this proceeding are less related one to another than are the goods at issue in the '336 and '311 Registrations."

The Examining Attorney counters by arguing that "third-party registrations for seemingly similar marks featuring goods dissimilar or unrelated to those in the application and the cited registration are of little probative value in determining the weakness of a mark," which she notes "is generally determined in the context of the number and nature of similar marks in use in the marketplace on similar goods." It is well settled, however, that third-party registrations are entitled to little weight on the issue of likelihood of confusion inasmuch as such registrations do not demonstrate use of the marks which are the subjects thereof in the marketplace or that the purchasing public is familiar with the use of those marks and has learned to distinguish between them. See, e.g., *Olde Tyme Foods, Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1545 (Fed. Cir. 1992); *Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462, 463 (CCPA 1973); *AMF Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973); and *In re Hub Distributing, Inc.*, 218 USPQ 284, 285-86 (TTAB 1983). Rather, there simply is no evidence in this case that the mark "BUSHMASTER" is weak in the field of vehicles of any sort for transportation and their component parts, such as tires.

Moreover, as the Examining Attorney also correctly points out, "the existence on the register of other seemingly similar marks does not provide a basis for registrability of the applied-for mark," citing *AMF Inc. v. American Leisure Products, Inc.*, supra; and *In re Total Quality Group Inc.*, 51 USPQ2d 1474, 1477 (TTAB 1999). As our principal reviewing court stated in *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001), "[e]ven if some prior registrations had some characteristics similar to [applicant's] application, the ... allowance of such prior registrations does not bind the Board or this court." See also, *In re Broyhill Furniture Industries Inc.*, 60 USPQ2d 1511, 1514 (TTAB 2001); and *In re Pennzoil Products Co.*, 20 USQP2d 1753, 1758 (TTAB 1991).

Applicant also stresses, with respect to the *du Pont* factors of the conditions under which and buyers to whom sales are made, i.e., "impulse" vs. careful, sophisticated purchasing, and the length of time during and conditions under which there has been contemporaneous use of the respective marks without evidence of actual confusion that "applicant's market is established as being absolutely sophisticated" inasmuch as its goods "cost, on the average, hundreds of thousands of dollars." Relying, as support for its position, on the December 3, 2007 declaration of record from Ian Cook, who is applicant's "General Manager -- Land Systems, Protected Mobility," Mr. Cook states among other things that:

9. [Applicant] ... has consistently and uniformly exhibited and promoted the product with reference to the trade mark BUSHMASTER

in Europe and other markets since the product was developed in 1997.

10 Articles regarding BUSHMASTER have been published and distributed in the USA in journals such as *Jane's Defense Weekly* and other publications since 1999. Furthermore, since February 2006, [applicant] ... and its agents ... have proactively marketed the vehicle in the USA at trade shows, field displays and other exhibitions, including various *Association of the United States Army* exhibitions.

....

11. In relation to the BUSHMASTER vehicle, [applicant's] ... target market in the USA is the United States Army, the United States Marine Corps, the United States Navy, the Department of Homeland Security and other military or paramilitary organizations.

....

15. The purchasing environment relevant to [applicant's] ... military vehicles is, to say the least, wholly strict. [Applicant] ... is subject to what are known as the International Traffic in Arms Regulations which mandate an extremely cautious and considered sales process when military-based products involving United States technology are sold or marketed. Therefore, if a United States government body purchases defense-related material from [applicant] ... that includes U.S.-made technology or innovations (some variants of the BUSHMASTER vehicle produced in the USA do contain U.S.-made technology) it is highly unlikely that any confusion could possibly arise as to the origin of the goods in question. As noted above, [applicant's] ... target market in the United States is primarily the United States military and its various branches, and it is extremely unlikely that any confusion between [applicant's] ... BUSHMASTER mark and the mark at issue in ... Registration No. 3,073,966 covering "tires, including all-terrain vehicle tires" could possibly occur. [Applicant] ... specifically does not mark, sell, or otherwise deal in tires in the USA. [Applicant] ... in no way considers the

registrant of ... Registration No. 3,073,966 ("Carlisle") to be its competitor.

16. [Applicant] ... is unaware of even one instance of confusion having occurred as between its BUSHMASTER military vehicles and tires sold by Carlisle under the BUSHMASTER trademark. This is to be expected given the completely sophisticated nature of [applicant's] ... goods and the marketing of the same, as well as the absolutely sophisticated market at issue as concerns [applicant's] ... goods. Simply stated, it is highly unlikely that any reasonable person would confuse or otherwise associate [applicant] ... with Carlisle as a result of [applicant] ... using its BUSHMASTER mark on and in connection with military vehicles sold to one of the most regulated and sophisticated markets imaginable.

We concur with the Examining Attorney, however, that even though applicant's goods are undoubtedly very expensive and the purchasers thereof are certainly highly sophisticated, such would not necessarily avoid a likelihood of confusion as to source or sponsorship with respect to registrant's goods, which in legal contemplation must be considered as replacement tires for the all-terrain tires on which applicant's armored military, security and mobility vehicles run. As the Examining Attorney persuasively observes, it is well established that while buyers may be knowledgeable and discriminating as to the goods required to meet or take care of their particular needs or procurement requirements, and thus would be expected to exercise care and deliberation in their choice of goods, such sophistication "does not necessarily preclude their mistaking one trademark for another" or that they otherwise are entirely immune from confusion as to source or sponsorship. *Wincharger Corp. v. Rinco, Inc.*, 297 F.2d 261, 132 USPQ 289, 292 (CCPA 1962). See

also In re Research & Trading Corp., 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986); In re Decombe, 9 USPQ 1812, 1814-15 (TTAB 1988); and In re Pellerin Milnor Corp., 221 USPQ 558, 560 (TTAB 1983). This would be especially so where, as here, the marks at issue are identical in all respects.

Similarly, as to the apparent absence to date of evidence of any incidents of actual confusion, the Examining Attorney notes that as stated by the Board in In re Kangaroos U.S.A., 223 USPQ 1025, 1026-27 (TTAB 1984):

[A]pplicant's assertion that it is unaware of any actual confusion occurring as a result of the contemporaneous use of the marks of applicant and registrant is of little probative value in an ex parte proceeding such as this where we have no evidence pertaining to the nature and extent of the use by applicant and registrant (and thus cannot ascertain whether there has been ample opportunity for confusion to arise, if it were going to); and the registrant has no chance to be heard from (at least in the absence of a consent agreement, which applicant has not submitted in this case).

In particular, it is pointed out that in order for an asserted lack of any incidents of actual confusion to be a meaningful factor, the record must demonstrate that there has been appreciable and continuous use by applicant of its mark in the same market(s) as those served by registrant under its mark. See, e.g., Gillette Canada Inc. v. Ranir Corp., 23 USPQ2d 1768, 1774 (TTAB 1992). Specifically, there must be evidence showing that there has been an opportunity for instances of actual confusion to occur and here the record is devoid of any such proof. See, e.g., Cunningham v. Laser Golf Corp., supra at 55 USPQ2d 1847 (Fed. Cir. 2000). As asserted by Mr. Cook in his

declaration, applicant and its agents "have proactively marketed" its "BUSHMASTER" vehicles in the United States at trade shows, field displays and other exhibitions, including various *Association of the United States Army* exhibitions, only since February 2006 and there is no indication whatsoever as to whether registrant has likewise marketed its "BUSHMASTER" tires at the same or similar marketing locales. The fact that applicant is thus unaware of any instances of actual confusion spanning a relatively short period of time involving an unknown sales volume is not a meaningful factor in the determination of whether confusion is likely to occur.

Accordingly, we conclude that purchasers who are familiar or otherwise acquainted with registrant's "BUSHMASTER" mark for "tires, including all-terrain vehicle tires," would be likely to believe, upon encountering applicant's identical "BUSHMASTER" mark for "military vehicles, namely, armored military vehicles, armored security vehicles for use by military personnel, [and] armored mobility vehicles for rapid deployment and protection of armored personnel," that such commercially related goods emanate from, or are sponsored by or affiliated with, the same source. For instance, as previously noted, purchasers could reasonably believe that registrant's "BUSHMASTER" tires are designed or otherwise manufactured for use with applicant's "BUSHMASTER" armored military, security and mobility vehicles. To the extent that there may nonetheless be any doubt as to our conclusion in this regard due to the very expensive nature of applicant's highly sophisticated goods and

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the manner in which they are marketed, we resolve such doubt, as we must, in favor of the registrant. See, e.g., In re Chatam International Inc., 380 F.3d 1340, 71 USPQ2d 1944, 1948 (Fed. Cir. 2004); In re Hyper Shoppes (Ohio), Inc., 837 F.2d 840, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988); In re Martin's Famous Pastry Shoppe, Inc., 748 F.2d 156, 223 USPQ 1289, 1290 (Fed. Cir. 1984; and In re Pneumatiques Caoutchouc Manufacture et Plastiques Kleber-Columbes, 487 F.2d 918, 179 USPQ 729, 729 (CCPA 1973).

Decision: The refusal under Section 2(d) is affirmed.