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May 11, 2004  
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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

RaceTrac Petroleum, Inc.

v.

ETW Corp.

Opposition No. 91117623 to application Serial No. 75321745  
filed on July 9, 1997

Joan L. Dillon of Joan Dillon Law, LLC for RaceTrac Petroleum,  
Inc.

Barbara A. Murphy of Adduci, Mastriani & Schaumber, LLP for ETW  
Corp.

Before Quinn, Hohein and Bottorff , Administrative Trademark  
Judges.

Opinion by Hohein, Administrative Trademark Judge:

ETW Corp. has filed an application to register the mark



"RACE WAY" and design, as reproduced below

for the following goods:<sup>1</sup>

"air powered tools, namely, paint guns, pop riveters, drills, impact wrenches, ratchet wrenches, grinders, sanders and cut-off tools; replacement parts for the above-specified air tools; [and] hydraulic pop riveters" in International Class 7;

"hand-tools, namely, bolt cutters; hammer and dolly sets comprised of hammers of varying sizes and dollies; hammers sold in sets of varying sizes; punches and chisels sold in sets of varying sizes; pry bars sold in sets of varying sizes; wrenches sold in sets of varying sizes; sockets sold in sets of varying sizes; pliers sold in sets of varying sizes; screwdrivers sold in sets of varying sizes; files sold in sets of varying sizes; specialty hand-tools, namely, chisels, taps and dies, hammers[, ] punches, scrapers, screwdrivers, socket sets sold in sets of varying sizes, and wrenches for use in body, engine[, ] brake and undercar repair" in International Class 8;

"hand-held diagnostic equipment for motor vehicles, namely, multi-meters, timing lights, battery testers, and compression testers" in International Class 9;

"mobile tool carts and mobile stands for dispensing masking paper and tape" in International Class 12;

"air hoses for pneumatic tools" in International Class 17; and

"tool chests and tool roll cabinets" in International Class 20.

Registration has been opposed by RaceTrac Petroleum, Inc. on the ground that it is the owner of the following: (i)

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<sup>1</sup> Ser. No. 75321745, filed on July 9, 1997, which with respect to the goods in each class is based on an allegation of a date of first use anywhere of February 1995 and a date of first use in commerce of March 1995. The mark is described as consisting of "the word 'RACEWAY' within a circle against a checkered flag on a flagpole."

registrations for the mark "RACEWAY" for (a) "automobile filling station services;"<sup>2</sup> (b) "convenience store services";<sup>3</sup> and (c) "motor oil";<sup>4</sup> and (ii) an application for registration of the mark "RACEWAY" and design, as illustrated below,



for "retail convenience store services" and "automobile filling station services";<sup>5</sup> that it "has used RACEWAY as a service mark for automobile filling station services, convenience store services and motor oil since a date long prior to [applicant's] claimed date of first use] of March 1995"; that it "operates more than 110 automobile filling station services, many of which have convenience store services offered as an adjunct, throughout a large portion of the United States"; that "the use of the mark RACEWAY ... in association therewith has caused the mark RACEWAY to become well-known, well-reputed and famous"; and that, on information and belief, "Applicant's Goods" (i.e., the various

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<sup>2</sup> Reg. No. 1,784,457, issued on July 27, 1993, which sets forth a date of first use anywhere and in commerce of November 21, 1968; renewed.

<sup>3</sup> Reg. No. 2,288,357, issued on October 26, 1999, which sets forth a date of first use anywhere and in commerce of November 21, 1968.

<sup>4</sup> Reg. No. 1,136,548, issued on June 3, 1980, which sets forth a date of first use anywhere and in commerce of November 24, 1976; renewed.

<sup>5</sup> Ser. No. 75747773, filed on July 12, 1999, which the record shows matured into Reg. No. 2,350,123, issued on May 16, 2000, which for each of the above services sets forth a date of first use anywhere and in commerce of April 1999.

goods for which registration is sought) "are automotive car[e] and repair products and are of a nature substantially similar to and related to the goods and services sold at Opposer's locations under its mark RACEWAY, are sold to the same class of purchasers through the same or similar channels of trade, are used at automobile filling station service facilities, and are provided for, and are especially made for, the maintenance of automotive vehicles."

In view thereof, opposer further alleges that its "mark RACEWAY is famous throughout a great portion of the United States"; that, on information and belief, "Applicant's Goods are likely to be sold to and/or used by automotive filling station service providers, and, because of the repute of Opposer's mark RACEWAY, the purchasing public is likely to mistakenly believe Applicant's Goods are associated with, sponsored by or emanate from Opposer"; and that, "[i]n view of the aforesaid circumstances, purchasers are likely to encounter Opposer's mark RACEWAY and Applicant's mark RACE WAY under conditions that are likely to, because of the similarities between the marks and the strong public association of Opposer with automotive services, cause confusion or mistake as to their respective sources and lead those purchasing Applicant's Goods to mistakenly assume that they are sponsored by or emanate from Opposer."<sup>6</sup>

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<sup>6</sup> Although opposer also alleges that "the use by Applicant of the mark [RACE WAY and design] in association with Applicant's Goods will dilute the distinctive quality of Opposer's mark RACEWAY to its detriment," no evidence with respect to a claim of dilution was presented by opposer at trial and it offered no argument with respect to such a claim in its brief. In view thereof, and since it is clear

Applicant, in its answer, has admitted that "some of the goods sold under its mark may be used for automotive car[e] and repair," but has otherwise denied the salient allegations of the opposition. Only opposer has filed a brief<sup>7</sup> and neither party has requested an oral hearing.

The record includes the pleadings; the file of the opposed application; and, as opposer's case-in-chief, the testimony, with exhibits, of Jeffrey T. Hassman, opposer's executive director of marketing, and a notice of reliance on certified copies of four registrations for its pleaded "RACEWAY" marks. Applicant, however, did not take testimony or present any other evidence in its behalf, although its counsel did attend Mr. Hassman's deposition and cross-examined such witness.

Priority of use is not in issue in this proceeding with respect to the goods and services which are the subjects of opposer's registrations for its pleaded "RACEWAY" marks since, as shown by the certified copies thereof, such registrations are subsisting and owned by opposer. See King Candy Co. v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974). Accordingly, the focus of our determination is on the issue of whether applicant's "RACE WAY" and design mark, when used in connection with the goods set forth in its application, so resembles opposer's "RACEWAY" marks for any or all of its

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from opposer's brief that it regards the claim of priority of use and likelihood of confusion as its sole ground for opposition, the claim of dilution is deemed to be waived and will not be further considered.  
<sup>7</sup> Opposer's uncontested request for correction of an error on the fourth page of its brief is granted.

various goods and services as to be likely to cause confusion, mistake or deception as to source or sponsorship.

The record reveals that opposer, which has been in business since the 1930s, developed the concept of "high volume gasoline at a low price, easy in and easy out," for its "RACEWAY" automobile filling station services in 1967 and has continuously used such mark in connection therewith since 1968. (Hassman dep. at 5.) While its "RACEWAY" automobile filling stations also include convenience store services which are rendered under its "RACEWAY" mark, such stations principally sell gasoline. As testified to by Mr. Hassman, a stylized version of such mark, i.e., the "RACEWAY" and design mark reproduced earlier, has been "used as part of a reimagining of our stores" since 1999. (Id. at 10.) So far, opposer has spent "in excess of \$1.5 million" on the "reimagining" of its automobile filling stations and convenience stores and "plan[s] to reimage the majority" of such stores "over time." (Id. at 11.) In addition, as opposer "build[s] new Raceway stores, they have all the same image that's represented in that logo mark." (Id.) However, "[a]t one point" opposer also used, like applicant's "RACE WAY" and design mark, a checked flag design in association with its "RACEWAY" mark and, according to Mr. Hassman, there is "a high probability that there is a Raceway out there with a checked flag" in use. (Id. at 15.) The reason therefor is that opposer is "just starting to reimage" and thus "the majority of ... stores are still in existing tradedress [sic] of when they were built" and "the checked flag was part of that tradedress [sic]." (Id. at 15-16.)

Testifying that "at one point there used to be separate convenience stores from gas stations, and that over time we've seen those two retail entities merge," Mr. Hassman indicated that opposer operates its "RACEWAY" automobile filling stations and convenience stores as merged entities. (Id.) He also testified with respect to the product mix available as follows:

Q. What kinds of products are typically found in your convenience stores?

A. Cigarettes, beer where it's allowed, groceries, snacks and then convenience items and stuff that's associated with a filling station. So [there's] oil, automotive repair stuff, tools, that kind of stuff that's related to convenience, related to cars.

Q. By automotive repair stuff, what do you mean?

Like, for instance, stores may have ... oil filters. Stores may have anything that would be applied to an owner's maintenance of cars. Windshield wipers, for example, those kinds of owner stuff, as well as oil, petroleum products, antifreeze, ... things that people would expect to buy in a place where they can get gasoline.

Q. Are any tools sold in these convenience stores?

A. Yes, yes. .... Some stores will only sell maybe wrenches, screwdrivers, things like that. Other convenience stores will dedicate more space and have more elaborate and more advanced toolsets.

Q. And, to your knowledge, how long have these kinds of products been sold in the Raceway convenience stores?

A. Certainly within recent history. I would say that in all probability when the stores were first opened because the concept from the [late] 1960s was more centered around the automobile and less centered

around the other convenience items. So it would be a greater probability that that kind of stuff would be in there.

(Id. at 12-13.)

Moreover, while noting that in terms of customer expectations, some gasoline stations typically offer a diverse mix of services which include car washes and auto repair services in addition to convenience store services, Mr. Hassman testified as follows with respect to the services which opposer offers:

Q. Would you expect people to come into a Raceway station and ask for, say, minor auto repairs?

A. They may come in and ask. We do not have mechanics there to do the kind of services that other gas stations have, but certainly, as with any gas station, people come in to perform, especially if they are on long road trips, ... user maintenance, whether that's to check their oil, replace lights, replace windshield wipers and that kind of thing.

Q. And you've already said ... that the Raceway stores sell those kinds of products?

A. Yes.

(Id. at 17-18.) Although opposer does not have any records as to the number of customers who annually patronize its "RACEWAY" gasoline and convenience stores since it does not have the ability to track such, it does keep track of its "consistently growing" gasoline sales. (Id. at 18.) In 2001, for example, it "did just over \$240 million in sales in gasoline across 140 or so stores ... with the Raceway name, and that was up about \$35 million from the year before." (Id.) As to its sales of

convenience store items, however, opposer "do[es] not track the sales inside the stores." (Id.)

Opposer's customers are primarily "individual consumers." (Id. at 24.) However, its customer base also includes truckers, bus drivers and commercial carriers. Opposer operates its "RACEWAY" gasoline and convenience stores "primarily in the southeast, sort of from Texas, Kentucky over to the eastern seaboard and down through Florida," an area covering "about 12 or 13" states including "Mississippi, Louisiana, ... Carolinas, Virginia, [and] Tennessee." (Id. at 19.) As of the deposition of its witness on March 27, 2002, opposer has "about 140" such stores, with plans for expanding that number by not only "taking RaceTrac stores and reimaging them into the Raceway stores" but also, as indicated previously, "build[ing] Raceway stores on the location properties" which it owns.<sup>8</sup> (Id. at 19-20.) In the latter case, opposer expects to build from "five to ten or more a year." (Id. at 20.)

However, as to the extent that opposer has advertised and promoted its "RACEWAY" goods and services, there is little information of record with respect thereto other than the testimony that opposer (i) "do[es] not support the Raceway brand with an extended amount of advertising" and (ii) does not sponsor

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<sup>8</sup> Opposer's "RaceTrac stores" and its "Raceway stores" both sell gasoline, although the latter "typically are smaller with fewer pumps." (Hassman dep. at 26.) Their primary difference, however, is that the former "are larger convenience stores" which offer "a greater selection of inside sales." (Id.) Thus, while both sell snack foods and "things associated with car and car care like ... oil and ... tools and ... , depending on the local laws, beer and cigarettes," the "RaceTracs will have a much larger selection of grocery items." (Id. at 27.)

any events as part of its current marketing strategy. (Id. at 31-32.) The reason for the former, according to Mr. Hassman, is that "the brand is really established with the appearance and dress of the store as people are driving by, and people use that." (Id. at 32.) As to the latter, he explained that "in gasoline marketing and in convenience store retailing, advertising promotions are primarily used to drive traffic and not necessarily to build a brand." (Id. at 16.)

On cross-examination, Mr. Hassman conceded that opposer does not sell any goods bearing the "RACEWAY" mark other than motor oil. He noted, instead, that in particular:

Raceway stores are primarily gasoline marketers. A huge percentage of their sales are gasoline. They have smaller convenience stores in the inside. The expectation from a consumer's perspective is that you wouldn't be able to get a lot of grocery items in there.

(Id. at 26.) Furthermore, he admitted that such stores do not sell any air-powered tools and testified, with respect to the other kinds of goods for which applicant seeks to register its "RACE WAY" and design mark, as follows:

Q. Do the Raceway stores sell any hand-held diagnostic equipment for motor vehicles?

A. That I don't know.

Q. Do the Raceway stores sell any toolsets?

A. Yes.

Q. Could you specify what toolsets they sell?

A. Well, it's going to vary ... store by store, but typically stores will carry wrenches, screwdrivers, things that people would expect to do minor repairs in their cars while they are on the road.

....

Q. Do the Raceway stores sell air hoses for pneumatic tools?

A. I don't know.

Q. Do the Raceway stores sell tool chests or tool roll cabinets?

A. I don't know.

Q. Do the Raceway stores sell mobile tool carts?

A. I don't know.

(Id. at 27-28.) Nonetheless, although contradicting himself in part, on redirect examination he further testified as follows:

Q. Are you familiar with a tire pressure gauge?

A. Yes.

Q. Do you know if those are likely to be found in convenience stores?

A. Very, very likely to be found in convenience stores.

Q. Would you also call that a hand-held diagnostic equipment?

A. Yes, I would. Yes, I would.

(Id. at 34-35.)

With respect to opposer's plans for possible private branding under its "RACEWAY" mark in the convenience store area, Mr. Hassman testified that opposer has "not looked actively at automobile products" and thus has "no hard plans" to private

label any tools or automotive repair items. (Id. at 29.) Opposer believes, instead that "the first thing" that it "should do is in the grocery items." (Id.) Nonetheless, opposer claims to have some long-range plans for private branding of tools and automotive repair items since, according to Mr. Hassman, "that is an area that in the long-term we have to get into, and when I talk about long-term, I talk about in the next five years because that's a natural extension ...[and] an opportunity that the company has missed in the past." (Id.) He added, however, that:

But we haven't contacted any vendors. We haven't costed out any things. We haven't had any specific plans to do that yet because we've started with the grocery plans.

(Id.)

There is essentially no information of record about applicant, or the use of its "RACE WAY" and design mark in connection with the goods for which registration thereof is sought, other than the following. Mr. Hassman, while looking at the list of goods set forth in applicant's application, offered the observation on direct examination that such listing "looks like a lot of automobile repair kinds of tools," including "standard kinds of tools and then some more specialty tools, air-powered tools, paint guns, pop riveters; then diagnostic equipment and auto repair equipment." (Id. at 21.) He conceded on cross-examination, however, that he knew nothing about applicant, testifying as follows:

Q. Are you familiar at all with ETW Corporation?

A. No.

Q. Apart from this opposition proceeding, do you have any knowledge of the ETW trademark for Raceway [sic] and Design that was shown to you in ... [an exhibit]?

A. No.

(Id. at 30.) He also conceded that the particular products which are carried in each of opposer's convenience stores is a decision made by the "contract operator" of the store rather than opposer, although his knowledge of what is sold therein comes from his having "been in Raceway stores." (Id. at 28.) Finally, Mr. Hassman admitted that he was not aware of any incidents of actual confusion between applicant and opposer or between their respective marks.

Upon consideration of the pertinent factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973), for determining whether a likelihood of confusion exists, we find that opposer has not met its burden of demonstrating that confusion as to source or sponsorship is likely to occur. Here, the sole *du Pont* factor in its favor is the similarities in the marks at issue. Specifically, we agree with opposer that, as argued in its brief, "[t]he word portion of Opposer's and Applicant's marks are identical in pronunciation, meaning and appearance." Inasmuch as it is the word portion which would be used by customers when asking for or otherwise inquiring about the respective goods and services, see, e.g., *Ceccato v. Manifattura Lane Gaetano Marzotto & Figli S.p.A.*, 32 USPQ2d 1192, 1197 (TTAB 1994) and *In re Appetito Provisions Co. Inc.*, 3 USPQ2d 1553, 1554 (TTAB 1987), and because the words

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"RACE WAY" are virtually identical to the term "RACEWAY" and form the dominant portion of applicant's mark, the presence of a checked flag design in applicant's "RACE WAY" and design mark does nothing to distinguish such mark from opposer's "RACEWAY" mark. Such marks, therefore, are essentially the same in overall commercial impression and would be virtually indistinguishable when opposer's "RACEWAY" mark is used in connection with a checked flag design, which would be the case at its automobile filling stations and convenience stores which have not yet been "reimagined" through the use of opposer's "RACEWAY" and design mark. Similarly, despite differences in the design features, it is the word portions of applicant's "RACE WAY" and design mark and opposer's "RACEWAY" and design mark which constitute the dominant elements thereof. Coupled with the fact that the letter "W" in opposer's "RACEWAY" and design mark is displayed in the same larger size as the letter "R" in such mark, so as to create in effect the two words "RACE WAY", the respective marks in their entireties project substantially the same commercial impression. Clearly, if applicant's "RACE WAY" and design mark and opposer's "RACEWAY" marks were to be used in connection with the same or related goods and/or services, confusion as to the source or sponsorship thereof would be likely to occur.

Nevertheless, before turning to consideration of the goods and services at issue herein, it should be pointed out that the record does not contain evidence sufficient to establish, as alleged in the opposition, that opposer's "mark RACEWAY is famous throughout a great portion of the United States" with respect to

its automobile filling station services and the convenience store services which are often available as an adjunct thereto. As noted by our principal reviewing court in *Kenner Parker Toys Inc. v. Rose Art Industries Inc.*, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992), *cert. denied*, 506 U.S. 862, 113 S.Ct. 181 (1992), "the fifth *duPont* factor, fame of the prior mark, plays a dominant role in cases featuring a famous or strong mark. Famous or strong marks enjoy a wide latitude of legal protection." The Federal Circuit reiterated these principles in *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1897 (Fed. Cir. 2000), stating that "the fifth *DuPont* factor, fame of the prior mark, when present, plays a 'dominant' role in the process of balancing the *DuPont* factors," *citing, inter alia, Kenner Parker Toys*, 22 USPQ2d at 1456, and reaffirmed that "[f]amous marks thus enjoy a wide latitude of legal protection."

In this case, however, while the record reveals that opposer has used its "RACEWAY" mark continuously since 1968 and has used its "RACEWAY" and design mark since it began the "reimaging" of such outlets in 1999, the only sales figures testified to were gasoline sales under its "RACEWAY" marks of just over \$240 million in 2001, representing an increase from the previous year of about \$35 million. Moreover, although the record shows that opposer's sales have been made through about 140 stores located solely in a 12 to 13 state area consisting principally of the southeastern United States, such facts do not suffice to show even regional or niche fame, much less that the "RACEWAY" marks are famous nationwide or substantially so as

alleged by opposer. Furthermore, while the record indicates that opposer has spent in excess of \$1.5 million on the "reimaging" of its gasoline and convenience stores to display its "RACEWAY" and design mark, there is no indication that it has otherwise promoted the "RACEWAY" brand. In fact, the record reveals that opposer does not actively support such brand with an extended amount of advertising and does not sponsor any events as part of its current marketing strategy. Collectively, therefore, the evidence simply does not establish that, through widespread and substantial use and sustained advertising and promotional efforts, opposer's "RACEWAY" marks have become famous and synonymous with opposer's goods and services and, thus, would be entitled to "a wide latitude of legal protection." See, e.g., Kenner Parker Toys Inc. v. Rose Art Industries Inc., supra at 22 USPQ2d 1456.

Considering next whether any of applicant's various tools and other equipment are so related in a commercial sense to opposer's motor oil and/or its automobile filling station services and convenience store services as to be likely to cause confusion, opposer maintains in its brief that "the parties goods and services are highly related and will be thought to emanate from or be sponsored by the same source." Opposer emphasizes that applicant "seeks to register its mark to cover a number of goods, all of which might best be described as automotive repair tools, and which would be expected to be found at a gasoline filling station by the general public, and by such commercial or industrial users as truck drivers, bus drivers and commercial

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carriers." Noting, in addition, that "[c]ertain of the products described within the Applicant's specification of goods are identical to and fall directly within those categories of products sold through Opposer's Raceway stations" and asserting that "all of the goods are related to automotive care," opposer contends that "there is sufficient overlap in the respective goods and services as to find that this factor weighs in favor of a finding of a likelihood of confusion." Opposer also insists that even if such "were not so, Opposer is entitled to protection against use of its mark on any product that would reasonably be thought by the buying public to come from the same source, or be thought to be affiliated with, connected with, or sponsored by Opposer."

We observe, however, that on their face, applicant's goods are distinctively different from opposer's goods and services. This is the case even though certain of applicant's goods are identified, for example, as "specialty hand-tools ... for use in body, engine[,] brake and undercar repair," such as "screwdrivers" and "wrenches," and "hand-held diagnostic equipment for motor vehicles, namely, multi-meters, timing lights, battery testers, and compression testers." In a sense, those goods, like opposer's "motor oil," "automobile filling station services" and such items as the screwdrivers, wrenches and tire gauges which are available through its "convenience store services," are at least arguably "related to automotive care" inasmuch as such are obviously used in the maintenance of automotive vehicles. It is well settled, however, that the mere

fact that terminology may be found which encompasses the parties' goods and services does not mean that customers therefor will view the goods and services as related in the sense that they will assume that they emanate from or are associated with or sponsored by a common source. See, e.g., *General Electric Co. v. Graham Magnetics Inc.*, 197 USPQ 690, 694 (TTAB 1977); and *Harvey Hubbell Inc. v. Tokyo Seimitsu Co., Ltd.*, 188 USPQ 517, 520 (TTAB 1975). Simply put, the fact that in tandem opposer's "RACEWAY" gasoline filling stations and convenience stores may on occasion sell a screwdriver, wrench or tire gauge to motorists in addition to their principal products of gasoline, motor oil and certain basic grocery items like beer and snacks does not mean that customers would regard those services and goods as being related, in terms of sharing a common source, to applicant's "RACE WAY" and design brand of tools and equipment or vice versa. The goods bearing applicant's "RACE WAY" and design mark, moreover, appear on their face to be intended for sale to and use in industrial plants, such as factories, and commercial repair shops, including service stations and other automotive repair facilities, and would not even be encountered by customers for the goods and services sold by opposer under its "RACEWAY" marks, particularly since its automobile filling station services, as the record reveals, are primarily "gas and go" operations which feature only the most basic of convenience store services.

In addition, there is no showing that goods of the kinds offered by applicant are a natural area of expansion for opposer's goods and services or vice versa. The record, instead,

indicates that while opposer has plans for possible private branding under its "RACEWAY" mark of grocery items for sale in the convenience store area, it has not actively looked at expanding into what Mr. Hassman referred to as "automobile products" and, consequently, has "no hard plans" to private label any tools or automotive repair items. (Id. at 29.) Opposer's vague claims to have some long-range plans for private branding of tools and automotive repair items, based on Mr. Hassman's testimony that such "is an area that in the long-term we have to get into," is simply too speculative to demonstrate that an expansion into those areas would be likely or that consumers would view the respective goods and services as being related in a commercial sense.

We find, therefore, that just because applicant's goods and opposer's goods and services arguably may be subsumed under the broad rubric of involving matters pertaining to "automotive care" does not mean that such diverse products and services would be likely to be regarded by consumers as related, in the sense of coming from or being sponsored by or affiliated with the same source, when marketed respectively under the substantially identical marks at issue herein. As our principal reviewing court has repeatedly cautioned:

We are not concerned with mere theoretical possibilities of confusion, deception, or mistake or with de minimis situations but with the practicalities of the commercial world, with which the trademark laws deal.

Electronic Design & Sales Inc. v. Electronic Data Systems Corp.,  
954 F.2d 713, 21 USPQ2d 1388, 1391 (Fed. Cir. 1992), quoting from

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Witco Chemical Co., Inc. v. Whitfield Chemical Co., Inc., 418 F.2d 1403, 164 USPQ 43, 44-45 (CCPA 1969). In view thereof, and in the absence of a showing of fame for opposer's "RACEWAY" marks, we conclude that opposer has failed to satisfy its burden of demonstrating that confusion as to source or sponsorship is likely to occur with respect to the contemporaneous use by applicant of the mark "RACE WAY" and design for its various tools and associated equipment and the use by opposer of the substantially identical marks "RACEWAY" for "motor oil," "automobile filling station services" and "convenience store services" and "RACEWAY" and design for "automobile filling station services" and "retail convenience store services."

**Decision:** The opposition is dismissed.