

THIS OPINION IS
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OF THE TTAB

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PTH

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

The Chamberlain Group, Inc.
v.
Lynx Industries, Inc.

Opposition No. 91160673
to application Serial No. 78281660
filed on July 31, 2003

Joseph T. Nabor and Tara M. Reedy of Fitch, Even, Tabin &
Flannery for The Chamberlain Group.

A. Blair Hughes and James M. McCarthy of McDonnell Boehnen
Hulbert & Berghoff for Lynx Industries.

Before Quinn, Hohein and Hairston, Administrative Trademark
Judges.

Opinion by Hairston, Administrative Trademark Judge:

Lynx Industries, Inc. has filed an application to
register the mark LYNX MASTER (in standard character form)
for "electric door openers; electric garage door openers;
and remote controls for garage doors" in International Class
9.¹

¹ Serial No. 78281660, filed on July 31, 2003, which is based on
an allegation of a bona fide intention to use the mark in
commerce.

Opposition No. 91160673

The Chamberlain Group, Inc. has opposed registration pursuant to Section 2(d) of the Trademark Act. Opposer alleges that since prior to the filing date of applicant's application, opposer has used the marks LIFTMASTER, LIFT-MASTER, ACCESSMASTER, and GARAGE MASTER in connection with overhead door operating systems and related products; that it owns registrations for each of the marks; that it has a prior family of MASTER marks; and that applicant's mark, when applied to applicant's goods, so resembles each of opposer's individual and family of MASTER marks, as to be likely to cause confusion. Opposer also has alleged, under the Federal Trademark Dilution Act, that each of its individual marks and its family of MASTER marks became famous prior to the filing date of applicant's application, and that registration of applicant's mark would impair, diminish and dilute opposer's goodwill and rights in its individual marks and family of MASTER marks.

Applicant, in its answer, has denied the salient allegations of the notice of opposition.

Preliminary and Evidentiary Matters

As indicated, opposer has pleaded a likelihood of confusion and dilution between each of its individual marks and family of MASTER marks and applicant's mark. In its brief on the case, however, opposer argues the issues of likelihood of confusion and dilution only as between its

Opposition No. 91160673

LIFTMASTER mark and applicant's mark. In view thereof, we consider opposer to have waived its likelihood of confusion and dilution claims as between each of its other individual marks and family of MASTER marks and applicant's mark.

Next, we turn to the parties' evidentiary objections. Opposer has objected to the admissibility of the testimony of applicant's witness Mark Schram and the documents (Exhibits MS14, MS15, and MS16) introduced therewith concerning an investigation by a private firm into third-party marks that include the word MASTER. Opposer objects on the ground that the testimony and the information in the documents are hearsay, and on the ground that the documents were requested, but not produced, during discovery. Applicant, in its brief, states that it does not contest opposer's objections. Thus, in reaching our decision herein, we have not considered this testimony and related exhibits.

Applicant has objected to the admissibility of the testimony of opposer's witness Sarah Anderson and two documents (Exhibits SA48 and SA49) introduced therewith concerning purported distributors of opposer's goods. The documents at issue are Internet printouts of web pages. During Ms. Anderson's deposition, applicant's counsel objected to the documents on the ground that they lacked proper foundation, and to Ms. Anderson's testimony on the

ground that she had not seen the documents prior to her testimony. Indeed, Ms. Anderson admitted that she was not familiar with the documents. Further, she did not provide the parameters of the search associated with the Internet printouts and did not name the individual who conducted the Internet search. Under the circumstances, the evidence was not properly authenticated, and we have given it no consideration. See *Raccioppi v. Apogee, Inc.*, 47 USPQ2d 1368 (TTAB 1998).

Finally, applicant has filed a motion to strike opposer's reply brief as untimely, or in the alternative, to strike a portion of the reply brief on the ground that it contains impermissible arguments. Opposer filed a brief in response to the motion, or in the alternative, a motion to reopen the time to file its reply brief. Accompanying opposer's response is the declaration of its counsel.

Trademark Rule 2.128(a)(1) states:

The brief of the party in the position of plaintiff shall be due not later than sixty days after the date set for the close of rebuttal testimony. The brief of the party in the position of defendant, if filed, shall be due not later than thirty days after the due date of the first brief. A reply brief by the party in the position of plaintiff, if filed, shall be due not later than fifteen days after the due date of the defendant's brief.

In addition, Trademark Rule 2.196 provides:

When the day, or the last day fixed by statute or by regulation under this part for taking any action . . . falls on a Saturday, Sunday, or

Opposition No. 91160673

Federal holiday within the District of Columbia, the action may be taken . . . on the next succeeding day that is not a Saturday, Sunday, or a Federal holiday.

A review of the last trial order herein reveals that opposer's rebuttal testimony period closed April 24, 2006. Thus, opposer's brief was due June 23, 2006; applicant's brief was due July 24, 2006; and opposer's reply brief was due August 8, 2006. Opposer's brief was filed by certificate of mailing dated June 23, 2006; applicant's brief was filed by certificate of mailing dated July 28, 2006; and opposer's reply brief was filed by certificate of mailing dated August 21, 2006. Opposer's counsel states that she relied upon Trademark Rules 2.119(c) and 2.196 in calculating August 21, 2006 as the due date of opposer's reply brief. Trademark Rule 2.119(c) provides, in relevant part that (1) when service of a paper is made by first-class mail, the date of mailing will be considered the date of service, and (2) whenever a party is required to take action within a prescribed period after the service of a paper upon the party by another party and the paper is served by first-class mail, 5 days shall be added to the prescribed period. As previously noted, Trademark Rule 2.196 provides, in relevant part, that when the day for taking any action in the Patent and Trademark Office falls on a Saturday, Sunday or Federal holiday, the action may be taken on the next business day.

Opposition No. 91160673

Trademark Rule 2.119(c), however, is not applicable to briefs on the case. Moreover, opposer's counsel incorrectly interfaced Trademark Rules 2.119(c) and 2.196. In short, opposer's counsel improperly calculated the due date of opposer's reply brief. Also, we note that applicant's counsel, in relying upon Trademark Rule 2.119(c), improperly calculated the due date of applicant's brief. In other words, both applicant's brief and opposer's reply brief are technically untimely.

Under the circumstances of this case, and since it benefits the Board in its ability to make a just determination of the case to have the briefs of both parties of record, the motion to strike opposer's reply brief is denied. Moreover, in our discretion, opposer's reply brief filed August 21, 2006 is accepted as if timely filed. Further, applicant's brief filed July 28, 2006 is accepted as if timely filed.

Insofar as applicant's alternative motion to strike a portion of opposer's reply brief is concerned, where as here, the reply brief was regularly filed, the Board will not strike a portion thereof simply because applicant objects to certain arguments therein. See TBMP §539 (2d ed. rev. 2004). Thus, applicant's alternative motion to strike a portion of opposer's reply brief is denied.

The Record

The record therefore consists of the pleadings and the file of the involved application. In addition, opposer submitted the testimony depositions (with exhibits) of Sarah Anderson, its vice-president of marketing communications; Mark Tone, its executive vice-president for Law and Human Resources; and James H. Nelems, a marketing and survey expert and chief executive officer of The Marketing Workshop. In addition, opposer submitted notices of reliance on, inter alia, its pleaded LIFTMASTER Registrations Nos. 863447 and 2724638, with the certified copies thereof showing such registrations to be subsisting and owned by opposer; applicant's responses to opposer's first set of interrogatories; and the discovery deposition (with exhibits) of Mark Schram, applicant's vice-president and general manager.

Applicant submitted the testimony depositions (with exhibits) of its officer Mr. Schram; and George Mantis, a survey expert and president of The Mantis Group. Applicant submitted notices of reliance on third-party MASTER registrations and applications; opposer's responses to applicant's first set of interrogatories; and the discovery depositions (with exhibits) of opposer's officers Ms. Anderson and Mr. Tone. Finally, pursuant to the parties'

stipulation, applicant submitted copies of three documents, each titled "Liftmaster Advertising Test."

Both parties filed briefs on the case.

Standing

Opposer's evidence of its registrations and use of the LIFTMASTER mark establishes opposer's standing to oppose the involved application. *Cunningham v. Laser Golf Corp.*, 222 F.33d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); *Lipton Industries Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982).

Priority

Because opposer's pleaded LIFTMASTER registrations are of record, priority is not in issue. See *King Candy Co., Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 105 (CCPA 1974). Moreover, the evidence shows that opposer began using its LIFTMASTER mark prior to the filing date of applicant's intent-to-use application in July 2003, which is the earliest date on which applicant can rely. See *Zirco Corp. v. American Telephone and Telegraph Co.*, 21 USPQ2d 1542 (TTAB 1991).

Likelihood of Confusion

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

Opposition No. 91160673

USPQ 563 (CCPA 1973). See also *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). The du Pont factors for which there is relevant evidence in this proceeding are discussed below.

We turn first to the du Pont factors which pertain to the similarity or dissimilarity of the goods, the similarity or dissimilarity of the classes of purchasers and the similarity or dissimilarity of the channels of trade. In this regard, it is well settled that the registrability of an applicant's mark must be determined on the basis on the identification of its goods as set forth in the involved application and the identification of goods as set forth in the pleaded registrations made of record by a plaintiff for its marks, regardless of what the record may reveal as to the particular nature of the respective goods, their actual or asserted channels of trade, or the classes of purchasers to which they are in fact or intended to be directed and sold. See e.g., *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990); and *Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987).

Here, applicant's goods are identified in its application as "electric door openers; electric garage door openers; and remote controls for garage doors." Opposer's LIFTMASTER registrations cover, inter alia, "residential

Opposition No. 91160673

electrical garage door controllers" (Registration No. 863447); and "remote control systems and components thereof - namely radio controls for garage and warehouse entrance doors or gates, automatic garage door openers, lights, motors, antennas, transmitters, receivers and controllers responding thereto and used in such systems" (Registration No. 2724638). Clearly, these goods of the parties are legally identical in part and otherwise closely related. Indeed, the record shows that both parties are in the business of selling garage door openers and parts and accessories therefor.

As identified, neither parties' garage door openers and related products contain any limitations or restrictions as to types of purchasers or channels of trade. Thus, we must presume that the parties' goods move in all channels of trade that would be normal for such goods, and that the goods would be purchased by all potential customers. See, e.g., *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198 (Fed. Cir. 1983); *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ2d 937 (Fed. Cir. 1983); and *Paula Payne Products Co. v. Johnson Publishing Co., Inc.*, 473 F.2d 901, 177 USPQ 76 (CCPA 1973). This is so despite the fact applicant intends to sell its products only to dealers, distributors and professional installers of garage door openers. As to the classes of purchasers, it appears that they are of several

Opposition No. 91160673

types, one being professionals who install garage door openers, another being residential and commercial builders who purchase garage door openers for their projects, and still another being the ultimate consumers, that is, homeowners and building owners whose properties have garages. Insofar as the trade channels are concerned, they would include wholesale distributors and dealers of garage door openers and big-box home improvement centers. The du Pont factors of the similarity of the goods, the similarity of the purchasers and the similarity of the trade channels thus favor opposer.

With respect to the conditions under which the parties' goods would be purchased, as previously noted, goods of this type are sold to several types of purchasers. While professional garage door opener installers and residential and commercial builders would be expected to be knowledgeable in the field, there is no evidence to suggest that homeowners and building owners are particularly knowledgeable or discriminating when purchasing garage door openers. Garage door openers would not be expected to be purchased on impulse inasmuch as the record shows that some garage door openers have a wholesale price of several hundred dollars. We cannot conclude on this record, however, that building owners and homeowners are necessarily so careful or that the purchasing process is so controlled

Opposition No. 91160673

that any likelihood of confusion that otherwise would exist is eliminated or decreased as a result. Thus, the du Pont factor of the conditions under which the parties' goods are purchased is considered neutral in this case.

The next du Pont factor to consider is the fame of opposer's LIFTMASTER mark. The fame of a prior mark plays a dominant role in likelihood of confusion cases featuring a famous mark. *Bose Corp. v. QSC Audio Products Inc.*, 293 F.3d 1367, 63 USPQ2d 1303 (Fed. Cir. 2002); *Recot Inc. v. M.C. Becton*, 214 F.3d 132, 54 USPQ2d 1894 (Fed. Cir. 2000); and *Kenner Parker Toys, Inc. v. Rose Art Industries, Inc.*, 963 F.2d 350, 22 USPQ2d 1453 (Fed. Cir. 1992). Fame for likelihood of confusion purposes arises "as long as a significant portion of the relevant consuming public recognizes the mark as a source indicator." *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1694 (Fed. Cir. 2005). That is, we look to the class of customers and potential customers of a product or service. Here, the relevant consuming public comprises professional installers of garage door openers, residential and commercial builders, building owners, and homeowners.

The LIFTMASTER mark has been in use for over thirty-nine years, and opposer has promoted the mark and the goods offered thereunder to ultimate consumers through national

Opposition No. 91160673

advertising in consumer magazines, the creation of television and radio advertisements, and Internet advertising; and to the industry through trade magazine advertisements; cooperative advertising with dealers and distributors; and attendance and exhibitions at trade shows. In addition, articles discussing and/or touting opposer's LIFTMASTER products have appeared in trade and consumer publications.

The information relating to opposer's current revenues, advertising expenditures and market share has been designated confidential. We can say, however, that opposer's LIFTMASTER products presently dominate in the professionally installed residential and commercial garage door opener markets.²

The indirect evidence pertaining to opposer's current sales and advertising figures, market share and length of use of its LIFTMASTER mark lends support for opposer's claim that the mark is famous. Applicant, however, argues that opposer's LIFTMASTER mark is not a famous mark and maintains that there is direct evidence that undercuts opposer's claim in this regard. Specifically, applicant

² Although opposer's witnesses did not say what percentage of garage door openers are installed by professionals as opposed to do-it-yourself types, it is reasonable in view of opposer's dominance to assume that it is a significant percentage.

Opposition No. 91160673

relies on three "Liftmaster Advertising Tests" conducted by opposer in the years 2003, 2004 and 2005. The results of the studies were introduced pursuant to the parties' stipulation. Opposer, however, did not provide any testimony regarding the results of the studies. In addition, the studies have been marked "Attorneys' Eyes Only" and the pertinent information was redacted in copies of the parties' briefs.

We can say, however, in general terms, that among homeowners with garages, the study results characterized the unaided awareness of opposer's LIFTMASTER radio and television advertising in the single digits for each of the years 2003, 2004 and 2005; and the aided awareness of such advertising in the moderate double digits for each of the same years.

Because these studies were designed to gauge the effect of opposer's radio and television advertising, in particular, they are somewhat different from the typical brand awareness study. Nonetheless, we agree with applicant that these studies undercut opposer's claim that the LIFTMASTER mark is a famous mark. With unaided awareness of opposer's LIFTMASTER radio and television advertising in the single digits, this points to low recognition of the LIFTMASTER brand among ultimate consumers. While we note that the aided awareness question garnered higher numbers,

Opposition No. 91160673

this provides little support for opposer's claim that the LIFTMASTER mark is a famous mark. In this regard, the Board has held that aided awareness questions in a typical brand awareness study provide little support for a claim that a mark is famous. See *Carefirst of Maryland, Inc. v. FirstHealth of the Carolinas Inc.*, 77 USPQ2d 1492, 1507 (TTAB 2005). See also generally 6 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, §32:173 (4th ed. 2007).

We find, therefore, when we consider the indirect and direct evidence in this case, the du Pont factor of the strength of the LIFTMASTER mark favors opposer, but not to the extent that it would if the mark truly enjoyed extensive public recognition and renown as a famous mark.

The next du Pont factor to consider is the number and nature of similar marks in use on similar goods. In this regard, applicant submitted copies of the following third-party registrations and applications for marks that include the word MASTER: (1) Registration No. 2579009 for the mark LIFTMASTER for, inter alia, lifting equipment; (2) Registration No. 2570603 for the mark TORQUEMASTER for mechanically actuated overhead garage door operating systems; (3) Registration No. 2427098 for the mark DOORMASTER for automatic garage door operators; (4) Registration No. 2830833 for the mark STEELMASTER for metal

Opposition No. 91160673

high speed roll up doors; (5) Registration No. 2734908 for the mark SPEED-MASTER for roll up doors; (6) Registration No. 2491031 for the mark FLEX-MASTER for roll up doors; (7) Registration No. 2169397 for the mark REDI-MASTER for electric motors and associated hardware sold therewith for raising and lowering rolling steel doors; (8) Registration No. 1297425 for the mark POWERMASTER for electric and pneumatic controls and control valves for opening and closing doors; (9) Application Serial No. 78183741 for the mark HOMEMASTER for, inter alia, electronic door openers; and (10) Application Serial No. 78254228 for the mark MASTER CODE for, inter alia, electric door openers and electric garage door openers. In addition, applicant submitted Internet printouts of web pages that appear to be web sites posted by the owners of the TORQUEMASTER, SPEEDMASTER, FLEX-MASTER, DOORMASTER and REDI-MASTER registrations above. Finally, applicant submitted a Thomson & Thomson search report with listings of applications and registrations for marks that include the word MASTER; common law marks that include the word MASTER; and business names and domain names that include the word MASTER.

With respect to this evidence, opposer has offered evidence which shows that it monitors the marketplace for marks that are confusingly similar to its LIFTMASTER mark; and that it takes enforcement actions ranging from cease and

Opposition No. 91160673

desist letters to filing civil lawsuits against marks to which it objects. The record shows that opposer took action against the owner of the TORQUEMASTER and DOORMASTER registrations, resulting in a settlement agreement with respect to the use of these marks. Further, opposer argues that the remaining third-party registrations and applications, Internet printouts and search report are not evidence of use of the marks shown therein.

It is well settled that third-party registrations are not evidence of use of the marks shown therein, or that consumers have been exposed to them. *AMF Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 177 USPQ 268 (CCPA 1973).³ Moreover, third-party applications have no evidentiary value other than to show that they were filed. *In re Juleigh Jeans Sportswear Inc.*, 24 USPQ2d 1694, 1699 (TTAB 1992). Insofar as the Internet printouts are concerned, they are of limited probative value because there is no information concerning actual sales under the marks shown therein, when such marks were adopted, or customer familiarity with the marks. With respect to the Thomson and Thomson search report, we note that the listings therein are of essentially no probative value because they do not

³ It would appear, however, from the settlement agreement that the TORQUEMASTER and DOORMASTER registered marks have been put to some use.

include information about the goods and/or services purportedly offered in connection with the marks and names.

Third-party registrations, however, may be relied on to show that a word common to each mark has a readily understood and well-known meaning and that it has been adopted by third parties to express that meaning. *Ritz Hotel Ltd. v. Ritz Closet Seat Corp.*, 17 USPQ2d 1467 (TTAB 1990). In this case, the third-party registrations for marks that include the word MASTER for garage door openers and parts show that those in the field use MASTER in a manner intending to connote "control." In this regard, we judicially notice that the word "master" is defined as, inter alia, "n. 1. [o]ne that has control over another or others;" adj. 3. [c]ontrolling all other parts of a mechanism: *a master switch.*" The American Heritage Dictionary of the English Language (Fourth Edition 2006). Such use tends to show that MASTER is slightly suggestive. However, this does not appreciably weaken the strength of opposer's LIFTMASTER mark. We find therefore that this du Pont factor is neutral.

Next, we turn to the du Pont factor focusing on the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation, and commercial impression. In this regard, the Court of Appeals for the Federal Circuit has held that when marks 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).

In this case, both marks - LIFTMASTER and LYNX MASTER - consist of compound words with three syllables having a similar cadence. In addition, both marks begin with the letter "L" and end in the word MASTER. This serves to create similarities in appearance and sound. In terms of meaning, we recognize that the specific connotations of the marks LIFTMASTER and LYNX MASTER are different due to the prefixes LIFT and LYNX. However, similarity in any one of the elements of sound, appearance and meaning may be sufficient to support a finding of likelihood of confusion. See Block Drug Co. inc. v. Den-Mat Inc., 17 USPQ2d 1315 (TTAB 1980). In this case, when the marks LIFTMASTER and LYNX MASTER are considered in their entirety, they are similar in sound, appearance and commercial impression. We find therefore that the du Pont factor of the similarity of the marks favors a finding of likelihood of confusion.

In reaching our conclusion on likelihood of confusion, we have taken into consideration the survey introduced by opposer. In November 2005, opposer retained James Nelems, a marketing and survey expert and chief executive officer of

Opposition No. 91160673

The Marketing Workshop, Inc., to design and supervise a mall intercept survey to determine whether there is a likelihood of confusion between the parties' marks. The study took place in shopping malls in eight geographically dispersed metropolitan areas. A total of 400 persons were interviewed. In terms of the survey universe, potential survey participants were first asked if they "have a garage door at your residence or not?" Respondents answering "no" were disqualified from the survey. Respondents who answered "yes" to this question were asked "does this garage door have an automatic garage door opener?" Respondents who answered "yes" were invited to participate in the survey. Respondents who answered "no" to this question were then asked "how likely, if at all, is anyone in your household to purchase an automatic garage door opener within the next 2 or 3 years or so?" Respondents were given five answering options to this final qualifying question - (1) Very likely, (2) Somewhat likely, (3) May or may not be likely, (4) Somewhat unlikely, and (5) Very unlikely. Respondents answering "very likely," "somewhat likely," or "may or may not be likely" were invited to participate in the survey. Each respondent was shown two names, in a rotated presentation order. The survey included a test cell (201 respondents) and a control cell (199 respondents). In the test cell, half of the respondents saw LIFTMASTER followed

Opposition No. 91160673

by LYNX MASTER, and the other half saw LYNX MASTER followed by LIFTMASTER; in the control cell, half of the respondents saw LIFTMASTER followed by GENIE, and the other half saw GENIE followed by LIFTMASTER. The questionnaire itself was as follows:

HAND RESPONDENT PRODUCT CARD

1. Here is a brand name of an automatic garage door opener. Have you heard of this brand before?

Yes

No

Don't know

(RECORD ALL ANSWERS VERBATIM (PRODUCT CARD IS TO REMAIN IN VIEW THROUGH Q. 2B. BELOW)

2.a As far as you know, who puts out this product?

2.b Why do you say that? (PROBE AND CLARIFY)

(REMOVE FIRST PRODUCT CARD FROM VIEW)

HAND RESPONDENT PRODUCT CARD

3. Here is a brand name of an automatic garage door opener. Have you heard of this brand before?

Yes

No

Don't know

(RECORD ALL ANSWERS VERBATIM (PRODUCT CARD IS TO REMAIN IN VIEW THROUGH Q. 4B. BELOW)

4.a As far as you know, who puts out this product?

4.b Why do you say that? (PROBE AND CLARIFY)

(REMOVE SECOND PRODUCT CARD FROM VIEW)

5.a Would you say these two brands you've just seen are put out by two different companies, both put out by the same company, or you do not have an opinion on that?

Same company -

Ask Q's 5b, 5c, and 5d

THEN SKIP TO CLOSE

Two different companies -

Skip to Q.5c

Don't know/No opinion -

Skip to Q.5c

5.b What one company would that be?" (RECORD VERBATIM)

5.c Why do you say that? (RECORD VERBATIM) (CLARIFY)

5.d Any other reasons (RECORD VERBATIM) (PROBE AND CLARIFY)

6. If answer in Q.5A IS TWO DIFFERENT COMPANIES OR DON'T KNOW/NO OPINION, ASK: Do you think the companies that put out these two automatic garage door openers are associated, affiliated, or connected in any way, or not?

Yes - Why do you say they are?" (PROBE AND CLARIFY)

No - Why do you say they are not? (PROBE AND CLARIFY)

Don't know/no opinion - CONTINUE TO CLOSE

With respect to the study results, Mr. Nelems testified as follows:

Q. Now turn to Page 8 of your survey report, that chart titled, "Likelihood of Confusion Summary."

A. This chart shows us the results of different questions on the survey. It first shows us that in the test cell Liftmaster versus Lynxmaster, 31 percent of the respondents in that cell said they were - they thought they were put out by the same company compared to 14 percent in the control cell [Liftmaster versus Genie].

Another 8 percent in the test cell and 7 percent in the control cell said they were associated, affiliated or connected, so the total possible likelihood of confusion was 39 percent and 21 percent; 39 for the test cell, 21 for the control.

In reality, however, if you look at the verbatim answers to these questions, there were a number of people in the test cell as well as a number of people in the control cell that gave answers that were not really due to the name itself. We deleted those respondents.

Q. Where would that be found in this table titled "Likelihood of Confusion Summary?"

A. The overall conclusion says likelihood of confusion twenty-four percent for the test cell and zero percent for the control cell.

Q. What does that mean, likelihood of confusion 24 percent for the test cell?

A. It means that 24 percent of the sample felt that these two brands, Liftmaster and Lynxmaster, were either put out by the same company or were

Opposition No. 91160673

associated, connected or affiliated in some way relative to the names themselves.

(Nelems Dep. at 44-45)

Not surprisingly, applicant has criticized the survey for the following reasons among others:

1. The survey universe was not proper. It was over-inclusive in that the respondents consisted of anyone who had a residence with a garage door opener at their residence regardless of whether or not the person was involved in the purchase of a garage door opener. It was under-inclusive in that it did not include professional garage door installers or purchasers of commercial garage door openers.
2. The survey did not reflect actual marketing conditions. In the marketplace, opposer uses the composite mark CHAMBERLAIN LIFTMASTER PROFESSIONAL in connection with its garage door openers. The survey, however, did not expose respondents to the LIFTMASTER mark used in conjunction with opposer's house mark CHAMBERLAIN and the term "PROFESSIONAL."
3. The survey data was not properly interpreted/analyzed by the interviewers. There were several "equivocal" responses on whether there was an association, affiliation or connection between the companies that put out the LIFTMASTER and LYNXMASTER brands that were counted as instances of confusion.

Opposition No. 91160673

4. Follow-up question no. 6 (Do you think the companies that put out these two garage door openers are associated, affiliated or connected in any way, or not?) is prejudicial.

As the Board noted in *Marshall Field & Co. v. Mrs. Fields' Cookies*, 25 USPQ2d 1321, 1334 (TTAB 1992), "[s]urvey evidence is often controversial, if only because there are so many factors to be considered in determining the weight to be given to this type of evidence." See also generally *McCarthy*, supra at Section 32.50. In the recent case of *Starbucks U.S. Brands LLC v. Ruben*, 78 USPQ2d 1741 (TTAB 2006), the Board found the survey conducted by the opposer therein to be probative of likelihood of confusion given that the survey carefully followed the Ever-Ready⁴ survey format. Here, opposer's survey does not follow that approved format. In addition, we agree with several of applicant's criticisms of the survey. Where as here, the involved goods are of a type that are bought by several classes of purchasers, the survey universe certainly should have been more representative of those classes of purchasers. For example, it would have better if the survey universe had included professional garage door installers at the very least. Moreover, it seems to us that the survey

⁴ In *Union Carbide Corp. v. Ever-Ready, Inc.*, 531 F.2d 366, 188 USPQ 623 (7th Cir. 1976), cert. denied, 191 USPQ 416 (1976), the plaintiff conducted a survey to determine whether there was a likelihood of confusion between defendant's EVER-READY lamps and plaintiff's EVEREADY batteries, flashlights and bulbs.

Opposition No. 91160673

universe was over-inclusive to the extent that it included persons who indicated that it "may not be likely" someone in their household would purchase a garage door opener in the next 2 or 3 years. See, McCarthy, supra at Section 32.47 ["A universe may be improperly over-inclusive by encompassing a group of people that includes those whose perceptions are not relevant, thus skewing the results by introducing irrelevant data." (footnote omitted)]. Further, follow-up question no. 6 was a leading question in that it directed respondents to conclude that the companies that put out the two automatic garage door openers were associated, affiliated or connected in some way. See Marshall Field & Co., supra at 1334 [The Board held that the initial inquiry of "Would you say that the store whose things come in this bag and the store whose things come in this bag have a business connection or business association with one another or not?" was a leading question]. Further, our review of the study results reveals that there were several "equivocal" responses on the question of whether there was an association, affiliation or connection between the companies which put out the LIFTMASTER and LYNXMASTER brands.

Thus, although the survey results of 24% likelihood of confusion because of the marks is certainly not de minimis,

Opposition No. 91160673

in reaching our decision on likelihood of confusion, we have accorded limited weight to the survey results.

Having considered the evidence of record as it pertains to the relevant du Pont factors, and for the reasons discussed above, we conclude that a likelihood of confusion exists. We acknowledge that the involved marks, LIFTMASTER and LYNX MASTER, differ in their specific connotations. Nonetheless, given the demonstrated strength of opposer's LIFTMASTER mark, and the identity of the goods, trade channels and purchasers, we find that applicant's LYNX MASTER mark is sufficiently similar to opposer's LIFTMASTER mark in sound, appearance and commercial impression that confusion is likely to result.

To the extent that any doubt as to the correctness of this result exists in view of the differences in the specific connotation of the marks, such doubt must be resolved in favor of opposer, the prior user and registrant, and against applicant. See *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993); and *In re Hyper Shoppes (Ohio) Inc.*, 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988); and *Envirotech Corporation v. National Service Industries, Inc.*, 197 USPQ 292 (TTAB 1977).

In view of our finding that the opposition should be sustained on the ground of likelihood of confusion, we

Opposition No. 91160673

decline to address the dilution claim with respect to
opposer's LIFTMASTER mark.

Decision: The opposition is sustained on the ground of
likelihood of confusion.