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Paper No. 27  
AD

UNITED STATES PATENT AND TRADEMARK OFFICE

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**Trademark Trial and Appeal Board**  
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Posi Lock Puller, Inc.  
v.  
Swenco Products, Inc.

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Opposition No. 108,697  
to application Serial No. 75/222,358  
filed on January 6, 1997  
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David A. Lingbeck for Posi Lock Puller, Inc.

Jim Zeeger for Swenco Products, Inc.

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Before Wendel, Rogers, and Drost, Administrative  
Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

Swenco Products, Inc. (applicant) has applied to register the mark POSI-LOCK (in typed form) for goods ultimately identified as "electrical connectors for splicing 8 gauge or smaller stranded wires" in International Class 9."<sup>1</sup>

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<sup>1</sup> Serial No. 75/222,358, filed January 6, 1997, which alleges a date of first use and a date of first use in commerce of October 1991.

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Posi Lock Puller, Inc. (opposer) has opposed registration on the ground that applicant's mark, when used on or in connection with the identified goods, so resembles opposer's previously used and registered mark POSI LOCK (in typed form) for "hand-operated gear and bearing pullers" in International Class 8<sup>2</sup> as to be likely to cause confusion or mistake or deception. Applicant has denied the salient allegations of the notice of opposition.

The Record

The record consists of the file of the involved application; five trial testimony depositions taken upon written questions of opposer's employees (Tamara Timor, Tammy Jacobson, Wendy Serr, Robin Eckman, and Stephanie

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<sup>2</sup> Registration No. 1,625,655, issued December 4, 1990; renewed. Opposer has not submitted a status and title copy of its registration. Applicant admitted that the registration is owned by opposer and it has discussed the merits of the likelihood of confusion issue involving the goods in its application and opposer's registration. Therefore, inasmuch as applicant has treated the registration as being of record, it is "deemed by the Board to be of record in the proceeding." TBMP § 703.02. See also Tiffany and Company v. Columbia Industries, 455 F.2d 582, 173 USPQ 6, 8 (CCPA 1972) ("Since appellee had fair notice of the case it had to meet, it would work an injustice on appellant to deprive it of the right to rely on the statutory presumptions flowing from [the] registration" that was not properly submitted.); Crown Radio Corp. v. Soundsciber Corp., 506 F.2d 1392, 184 USPQ 221, 222 (CCPA 1974) ("Appellee did not submit copies of its aforementioned registrations with the verified petition for cancellation ... We agree with the board that appellant has admitted the existence of appellee's "SOUNSCRIBER" registrations. Therefore, we agree with the

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Halvorson); the trial testimony depositions, with accompanying exhibits, of Guy Tomasino and Rene Tomasino, employees of applicant; sixteen third-party registrations and selected interrogatories and requests for admissions by applicant and opposer's responses thereto submitted under a notice of reliance.

Both parties have filed briefs. An oral hearing was requested by applicant and subsequently scheduled. The oral hearing was cancelled at the parties' request.

Priority

Priority is not an issue here in view of opposer's ownership of Registration No. 1,625,655. See King Candy Co. v. Eunice King's Kitchen, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

Facts

On January 6, 1997, applicant filed an application to register the mark POSI-LOCK for goods eventually identified as "electrical connectors for splicing 8 gauge or smaller stranded wires." On November 17, 1997, opposer filed its opposition to the registration of applicant's mark on the ground that "the above-identified trademark is displayed almost identical to and sounds the same as the registered trademark 'POSI LOCK' (#1,625,655)

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board that the sole issue to be determined in this proceeding is

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which is owned by Posi Lock Puller, Inc. and has caused great confusion to not only ... the customers of Posi Lock Puller, Inc., but also to its distributors." Notice of Opposition, p. 1. In response, applicant admitted that Registration No. 1,625,655 was owned by opposer, but otherwise denied the allegations of the notice of opposition.

Applicant's goods are electrical connectors for splicing wires together. Opposer's goods are hand-operated gear and bearing pullers. Applicant's goods sell for \$1 or less. G. Tomasino testimony dep., p. 19. Applicant's advertising describes its goods as follows:

No more crimping or loose connections!

The truly amazing Posi-Lock™ Connector can connect two or more wires anywhere with only a pocket knife or wire stripper!

No tools required!

Installs in seconds!

4 times stronger than crimp connectors!

Re-Usable and reconnectable!

Multiple splice connections!

High Temperature and Chemical Resistant!

Applicant's Ex. J.

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whether there is a likelihood of confusion").

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Opposer's goods are a line of gear and bearing pullers. Halvorson testimony dep., p. 6. The selling prices for these items range from approximately \$55 to \$14,000. Tibor testimony dep., p. 12. Opposer does not manufacture, distribute, or sell electrical connectors. Id. at 13. Opposer is one of approximately "seven vendors that are allowed to sell directly to the [auto parts] stores and to NAPA. All other vendors have to go through somebody that's already established." Tibor testimony dep., p. 4. Opposer was interested in distributing applicant's electrical connector to the NAPA auto parts store chain.

We were aware that they [applicant] were selling to NAPA and Posi Lock is always aggressively looking for new products to add to our product line. So I called him [Guy Tomasino] to see if he would be interested in selling the product to Posi Lock Puller first and in turn we would market the product through the NAPA system and to our other distributors.

Tibor testimony dep., p. 7.

Opposer's employees testified that they received numerous calls and faxes for applicant's products.

[W]hen the POSI-LOCK connectors first hit the market, we received maybe 20 to 30 phone calls in a row within a matter of two weeks. They also, a lot of our NAPA jobbers, they would fax us in the literature or the ad.

Id. at 5.

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When we first found out about them, it was at least three or four calls a week. Now [deposition taken March 30, 1999] it's probably, I still get a call about once a month.

Eckman testimony dep., p. 5.

These calls and faxes seem to have originated primarily from NAPA-related entities. Jacobson testimony dep., p. 5. None of opposer's five employees could recall the name of any of the entities inquiring about the electrical connectors nor did any of them save any of the faxed orders.

Likelihood of Confusion

Both parties have analyzed this case by considering at least some of the factors the Court of Customs and Patent Appeals, one of the predecessor courts of the Court of Appeals for the Federal Circuit, articulated in the case of In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 1361, 177 USPQ 563, 567 (CCPA 1973). The first factor concerns the similarity or dissimilarity of the marks as to appearance, sound, connotation, and commercial impression. In this case, the marks are virtually identical, except that opposer's mark has a space between the words "posi" and "lock," while applicant's mark has a hyphen. Applicant admits that the marks are identical in sound and in appearance except for the hyphen. Applicant's Br., p. 8. It argues that the

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commercial impressions are different because applicant's mark suggests a positive electrical connection or locking between two wires while opposer's gives the commercial impression of "a tool, a positive locking gear puller." Applicant's Br., pp. 8-9. We cannot agree with applicant that the commercial impressions of the marks would be significantly different. Both would suggest "positive" and "locking." It is doubtful whether potential purchasers would engage in the semantic debate that applicant suggests and reach the conclusion that the marks have different commercial impressions. Thus, because the marks are virtually identical in sound and appearance and there are no significant differences in commercial impression, this du Pont factor favors opposer.

Next, we look at the similarities and dissimilarities between the goods on which the marks of opposer and applicant are used. Here, we find that there are significant differences between applicant's "electrical connectors for spicing 8 gauge or smaller stranded wires" and opposer's "hand-operated gear and bearing pullers." Opposer argues that:

[B]oth the applicant's good and the opposer's good are tools used to either connect wires together as identified by the applicant's good or pull bearings as identified by the opposer's good. The

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applicant's good[s] would more than likely be used on the same machinery being vehicles, engines, motors, or other electrically-powered machines having wires and bearings where the opposer's good is being used to pull a bearing off the machine and the applicant's good is being used to connect wires on the same machine.

Opposer's Br., p. 6.

It is a stretch for opposer to describe applicant's electrical connector, which is similar to an electrical part or electrical tape, as a tool. Second, the mere fact that applicant's and opposer's goods can both be used on servicing vehicles or other equipment does not mean that the goods are related. Other than opposer's argument in its brief, it is not clear why the goods would be used together. It is not clear from the record what type of purchaser would use a gear or bearing puller or why the same purchaser would also use an electrical connector for splicing wires together. There is no per se rule that all tools or products that can be used to service engines are related goods. Opposer reads In re Jeep Corp., 222 USPQ 333 (TTAB 1984), too broadly. In that case, the Board found that land vehicles and structural parts therefor were closely related to pneumatic tires. The Board noted that there is a close relationship between vehicles on one hand and vehicle parts and accessories on the other. Merely because it is



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possible to envision a scenario where the goods of applicant and opposer can be used together does not mean that the goods are related. Indeed, even if the goods are sold in the same store, this fact does not establish that the goods are closely related.

It is common knowledge that there are sold in many hardware, grocery, variety and drug stores an almost unlimited variety of goods including tools, housewares, electrical appliances, seed, fertilizer, furniture and toys. The public being well aware of the diversity of goods to be found in such stores is not going to believe that all of those goods could originate with a single source.

Irwin Auger Bit Co. v. Irwin Corp., 134 USPQ 37, 39 (TTAB 1962).

In a related case, the Court of Customs and Patent Appeals held that merely because herb tea and cakes are sold in the same stores to the same purchasers, there was no likelihood of confusion when the marks RED ZINGER and ZINGERS were used on these goods.

The fact that goods of different types may be sold in the same stores has been placed in a proper perspective by the Court in Federated Foods, Inc., d.b.a. Hy-Top Products Division v. Fort Howard Paper Company, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976) wherein it stated at p. 29 "A wide variety of products, not only from different manufacturers within an industry but from also diverse industries, have been brought together in the modern supermarket for the convenience of the consumer. The mere existence of such an environment should not foreclose further inquiry into the likelihood of confusion arising from the use of similar marks on any goods so displayed. See: Canada Dry Corp. v. American Home Products Corp., 468 F.2d 207, 175 USPQ

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557 (CCPA 1972). The means of distribution and sale although certainly relevant, are areas of peripheral inquiry. The fundamental inquiry mandated by Sec. 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." 196 USPQ at 324-25.

Interstate Brands Corporation v. Celestial Seasonings, Inc., 576 F.2d 926, 198 USPQ 151, 152-53 (CCPA 1978).

Similarly, the Federal Circuit held that there was no likelihood of confusion when the same marks were used on fresh citrus fruit and candy bars. In re Mars, Inc., 741 F.2d 395, 222 USPQ 938 (Fed. Cir. 1984). Opposer's evidence and argument that the buyers of the goods of the parties would be one and the same is unsupported by the record. Merely because applicant's and opposer's goods may both be sold in auto parts stores does not demonstrate that confusion is likely.

While opposer has argued that it has "gained prestige in the business community especially in the same marketing channels pursued and used by applicant" (Opposer's Br., p. 7), the evidence of this prestige consists almost entirely of the fact that opposer is one of approximately seven direct vendors to NAPA stores. That, in and of itself, does not establish fame for opposer's mark on which it has based its notice of opposition. Opposer has not included any other significant evidence to support its claim of fame.

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Therefore, we decline to find that opposer's mark has achieved any significant public recognition and renown.

However, opposer has submitted evidence that there has been actual confusion between its mark and applicant's mark. Evidence of actual confusion is normally very persuasive evidence of likelihood of confusion. Exxon Corp. v. Texas Motor Exchange, Inc., 628 F.2d 500, 208 USPQ 384, 389 (5<sup>th</sup> Cir. 1980) ("The best evidence of likelihood of confusion is provided by evidence of actual confusion").

In this case, the evidence of actual confusion consists of statements in five depositions by written questions of employees of opposer. The depositions contain similar information. When applicant's goods with the mark POSI-LOCK on them were initially marketed in 1997, opposer received numerous phone calls. Tibor testimony dep., pp. 4-5 ("maybe 20-30" in two weeks); Eckman testimony dep., p. 5 ("at least three or four a week"); Serr testimony dep., p. 4 ("a bunch of phone calls"). Opposer's employees also testified that opposer received faxes concerning applicant's goods. Serr testimony dep., p. 5 ("By fax"); Tibor testimony dep., p. 5 ("a lot of our NAPA jobbers, they would fax us in the literature or the ad"). Some misdirected phone calls

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were continuing to be received in March 1999, the date of the depositions. Tibor testimony dep., p. 9 ("To this date we still get calls but I'd say it's averaging two calls a week"); Eckman testimony dep., p. 5 ("Now it's probably, I still get a call about once a month").

On May 21, 1997, counsel for opposer faxed applicant and advised it that opposer "has been receiving numerous phone calls from its distributors and your use of the name 'POSI-LOCK' is causing tremendous confusion." Applicant's Ex. HH. However, when its employees' depositions were taken more than eighteen months later, none of opposer's employees could provide a name of any individual who called attempting to order applicant's goods nor did they save any of the misdirected faxes.

In this case, while at first glance, the evidence of actual confusion appears significant, upon closer review, we are not persuaded that it demonstrates that there is a likelihood of confusion. First, opposer is one of approximately seven vendors that are allowed to sell directly to NAPA-affiliated stores. Tibor testimony dep., p. 5. While opposer does not distribute electrical connectors (Tibor testimony dep., p. 13), it offered to distribute applicant's products. Tibor testimony dep., p. 7 ("we would market the [electrical connector] product

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through the NAPA system and to our other distributors"); Applicant's Ex. GG ("We are always looking to add new products to our line and would be very interested in taking a look at your 'flywheel saver'").

Second, it is not clear whether the phone calls were a result of distributors assuming that there was a single source of electrical components and gear and bearing pullers or distributors assuming opposer's distributorship services would also be the source of the electrical connectors. Since opposer is a direct vendor to NAPA stores who seeks to distribute the products of others, stores may have thought that the electrical connectors were another part that was available through opposer's distribution services.

While we have considered opposer's distribution services to aid our determination of how much weight to give to the evidence of actual confusion, opposer has not pleaded any registration or common law rights in a mark for such services, and opposer based its opposition solely on its ownership of a registration for hand-operated gear and bearing pullers. Nor was it tried by the express or implied consent of the parties. Therefore, the question of likelihood of confusion

between applicant's goods and opposer's distributorship services is not before us.

Therefore, we must determine only whether there is a likelihood of confusion between applicant's POSI-LOCK mark for electrical connectors and opposer's POSI LOCK mark for gear and bearing pullers. We note that despite the involvement of counsel for more than eighteen months before the depositions were taken, opposer failed to document any caller's identity or to retain a copy of any misdirected faxes. Hi-Country Foods Corp. v. Hi Country Beef Jerky, 4 USPQ2d 1169 (TTAB 1987) ("[T]estimony from opposer's deponent, Mr. Harlan, that he received a phone call asking for beef jerky is, apart from being inadmissible hearsay, vague and unclear. The identity of the caller is unknown and the circumstances surrounding the incident are unexplained"). Courts have found vague evidence of misdirected phone calls hearsay and inadmissible. Duluth News-Tribune v. Mesabi Publishing Co., 84 F.3d 1093, 38 USPQ2d 1937, 1941 (8<sup>th</sup> Cir. 1996) ("[V]ague evidence of misdirected phone calls and mail is hearsay of a particularly unreliable nature given the lack of an opportunity for cross-examination of the caller or sender regarding the reason for the 'confusion.'"). However, if it is otherwise reliable,

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employee testimony on the subject of misdirected calls can be admissible. Armco, Inc. v. Armco Burglar Alarm Co., 693 F.2d 1155, 217 USPQ 145, 149 n. 10 (5<sup>th</sup> Cir. 1982) (Testimony of plaintiff's employees about purchasers attempting to reach defendant admissible because it was not used "to prove the truth of the matter asserted" (Fed. R. Evid. 801(c)) or under the state of mind exception (Fed. R. Evid. 803(3))); CCBN.com Inc. v. c-call.com Inc., 53 USPQ2d 1132, 1137 (D.C. Mass. 1999) ("[S]tatements of customer confusion in the trademark context fall under the 'state of mind exception' to the hearsay rule. See Fed. R. Evid. 803(3)"). Because opposer's employees' testimony is not so vague as to be inadmissible, we overrule applicant's hearsay and leading question objections. However, the probative value of this testimony is lessened by its lack of specifics.

Applicant, on the other hand, has introduced evidence of other uses and registrations for the term "Posi-Lock" and its variations used by third parties. Applicant alleges that "the record is replete with instances of actual commercial uses of the Posi-Lock mark and variations thereof on a wide variety of goods including automotive supplies, tools, and appurtenances." Applicant's Br., p. 12. Examples of these uses include:

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ITT Industries' Fluid System division was honored as a semi-finalist for its "Posi-Lock" quick connect system, used in making connection between tubing in automotive fuel, cooling or other systems. (Applicant's Ex. KK).

What's new at General Pneumatics...  
New Optimizer Series Compressed Air Filters  
\* \* \*

Posi-Lock (patent pending) method for easy element installation. (Appellant's Ex. NN).

Model SJ  
Medium Duty Jackshaft Operator  
\* \* \*

Mechanical Specifications  
\* \* \*  
Posi-Lock Brake (Solenoid Brake Not Required)  
(Appellant's Ex. PP).

Dura Blue  
Posi-Lock Axle Nut  
\* \* \*  
The Dura-Blue Posi-Lock axle nut is a two-piece assembly with the center threaded piece having flats for a wrench. (Appellant's Ex. RR).

Performance Race Equipment Posi-Locks (Appellant's Ex. SS).  
Shelby Industries Trailer Couplers  
Posi-Lock Couplers  
(Applicant's Ex. YY and ZZ).

Applicant's evidence of other uses by third parties in the automotive parts and machinery industries indicates that opposer's mark is hardly a unique term in these industries. This factor favors applicant's argument that there is no likelihood of confusion.

After we consider all the du Pont factors and the evidence of the parties, we conclude that there is no likelihood of confusion. Likelihood of confusion is



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decided upon the facts of each case. In re Dixie Restaurants Inc., 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997); In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993). The various factors may play more or less weighty roles in any particular determination of likelihood of confusion. Shell Oil, 992 F.2d at 1206, 26 USPQ2d 1688; du Pont, 476 F.2d at 1361, 177 USPQ at 567.

We consider the facts that the marks of the parties are virtually identical, the goods are sold in the same stores, and opposer has submitted some evidence of actual confusion. On the other hand, the goods of the parties are distinctly different and there is no evidence that the purchasers overlap. The evidence of misdirected phone calls is undercut by the lack of information concerning the callers and the fact that there is no evidence that the calls resulted from confusion between opposer's registered mark for gear and bearing pullers and applicant's mark as used for electrical connectors. Our likelihood of confusion determination must be based on the goods and services as they are identified in applicant's application and in the cited registration, not on the basis of what the actual goods and services of the parties might be. See Canadian Imperial Bank of

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Commerce v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). Our determination that there is no likelihood of confusion is based on the goods as identified in the registration (bearing and gear pullers) and the application (electrical connectors). In addition, the evidence of third party uses of the term "Posi-Lock" for goods relating to automobile parts and machinery provides additional support for our ultimate determination here. Since opposer has failed to meet its burden of establishing that there is a likelihood of confusion when the marks of the parties are used on the identified goods, opposer cannot prevail.

Decision: The opposition is dismissed.