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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re *Simulation Techniques, Inc.*

Serial No. 75/271,392

Molly B. Markley of Young & Basile, P.C. for *Simulation Techniques, Inc.*

Richard F. White, Trademark Examining Attorney, Law Office 103
(Michael Hamilton, Managing Attorney).

Before *Cissel, Hohein* and *Rogers*, Administrative Trademark Judges.

Opinion by *Hohein*, Administrative Trademark Judge:

Simulation Techniques, Inc. has filed an application to register the term "SIMTEST" for "computer software, namely, software that provides control capabilities for laboratory simulation test equipment in the nature of road simulators."¹

Registration has been finally refused under Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1), on the ground that, when used in connection with applicant's goods, the term "SIMTEST" is merely descriptive of them. Registration also has been finally refused under Section 2(d) of the Trademark Act,

¹ Ser. No. 75/271,392, filed on April 8, 1997, which alleges a date of first use, both anywhere and in commerce, of May 20, 1995.

15 U.S.C. §1052(d), on the ground that applicant's mark, when applied to its goods, so resembles the mark "CIMTEST," which is registered for "computer software for use in the electronic manufacturing market and used as a control system to ensure that automotive test equipment properly performs its functions,"² as to be likely to cause confusion, or mistake or to deceive.

Applicant has appealed. Briefs have been filed, but an oral hearing was not requested. We affirm the refusal on the ground of mere descriptiveness, but reverse the refusal on the ground of likelihood of confusion.

Inasmuch as the strength of a mark has a bearing upon whether it is likely to cause confusion with another mark, we turn first to the refusal on the ground of mere descriptiveness. It is well settled that a term is considered to be merely descriptive of goods or services, within the meaning of Section 2(e)(1) of the Trademark Act, if it forthwith conveys information concerning any significant ingredient, quality, characteristic, feature, function, purpose, subject matter or use of the goods or services. See, e.g., *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987) and *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). It is not necessary that a term describe all of the properties or functions of the goods or services in order for it to be considered to be merely descriptive thereof; rather, it is sufficient if the term describes a significant attribute or idea about them. Moreover,

² Reg. No. 2,221,179, issued on February 2, 1999, which sets forth a date of first use, both anywhere and in commerce, of March 10, 1992.

whether a term is merely descriptive is determined not in the abstract but in relation to the goods or services for which registration is sought, the context in which it is being used or is intended to be used on or in connection with those goods or services and the possible significance that the term would have to the average purchaser of the goods or services because of the manner of such use. See *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979). Thus, "[w]hether consumers could guess what the product [or service] is from consideration of the mark alone is not the test." *In re American Greetings Corp.*, 226 USPQ 365, 366 (TTAB 1985).

Applicant, citing an attached excerpt from Random House Webster's Unabridged Dictionary (2d ed. 2001) which shows no listing for the term "simtest" and defines "sim." as meaning only "1. similar. 2. simile,"³ argues in its brief that the term "SIMTEST" "is a coined word that does not have any meaning, and, therefore, cannot be descriptive of anything." Relying on an unpublished case,⁴ applicant additionally contends that:

³ Although the submission thereof is technically untimely under Trademark Rule 2.142(d), we have considered such evidence inasmuch as it is 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).

⁴ Specifically, applicant cites to *In re On Technology Corp.*, 41 USPQ2d 1475 (TTAB 1996), a case in which the Board found the mark "AUDITTRACK" to be suggestive, rather than merely descriptive, of computer software for monitoring activity on a computer network because the combination of the words "audit" and "track" created an ambiguity which required customers to pause and reflect upon the significance of the combined term as used in connection with such goods. However, as indicated in the "Editor's Note" thereto, the

Applicant's mark is ... a word combination that is not readily recognizable as describing a particular characteristic of Applicant's goods and ... does not convey any immediate and unambiguous meaning. The Examining Attorney sets forth many examples of "simulation test" software found in a *Lexis-Nexis* computerized database search. None of the articles set forth show[s] Applicant's mark SIMTEST. Applicant does not argue that there may be other computer programs that run simulation tests in various capacities. However, Applicant does not see any evidence that the term "simulation" or any derivation of the term is interchangeable with "sim". The *Random House Dictionary* shows that the term "sim" means 1) similar and 2) simile. No reference in the articles is made to the term "sim" or the word combination "simtest" with reference to software testing products. Applicant's mark is not a known phrase that is used to describe Applicant's goods. Applicant's customers would need to pause and reflect on the significance of the combined designation of "simtest" to understand that the nature of the goods is testing software that actually simulates the products or designs in order to conduct tests on such products.

The Examining Attorney, on the other hand, asserts that the term "SIMTEST is merely descriptive ... because it identifies the purpose of the applicant's computer software, specifically, provid[ing] control capabilities for laboratory simulation test equipment in the nature of road simulators" (underlining in original). Although the Examining Attorney contends, in particular, that "dictionary definitions accompanying [the] July 5, 2000 ... office action establish that SIM is [a] recognized, short form of the term 'simulation' while the term TEST is defined [according to The American Heritage Dictionary of the English Language (3rd ed. 1992)] as 'a procedure for critical

Board in that case stated: "This disposition is not citable as

evaluation," it is noted that, as to the former, there are no "dictionary definitions" of the term "SIM." Instead, the record actually contains an excerpt from "Acronym Finder," available at <http://www.AcronymFinder.com>, which indicates that a "search for **sim** returned 100 definitions," including those listing such term as an acronym meaning "Simulation" and "Simulator/Simulation" as well as "Screen Image Multimedia," "Selected Item Management," "Sensor Input/Interface Module," and "Signal Interface Module" among others.

The Examining Attorney maintains, furthermore, that excerpts from various articles obtained through searches of the terminology "simulation test" in the "NEXIS" database "firmly establish that ... software programs are commonly used to perform 'simulation tests.'" Although erroneously asserting that "[i]n its own brief, the applicant provides that its software 'is used to actually test products that have completed the manufacturing process'" when, in fact, such statement by applicant is in reference to *registrant's* goods, the Examining Attorney is accurate in observing that applicant points out in its brief that the product simulation testing with which its goods are used "is conducted via a road simulator, 'that replicates the dynamic response ... of a mechanical assembly.'" The Examining Attorney thus insists that "[t]hrough its own words, the applicant establishes that the purpose of its software is to facilitate 'simulation tests.'"

precedent of the T.T.A.B."

With respect to applicant's arguments that the term "SIMTEST" is not merely descriptive because it is a coined term used exclusively by applicant and that such term has multiple meanings, the Examining Attorney correctly notes that:

[T]he fact that a term is not found in the dictionary is not controlling on the question of registrability. *In re Gould Paper Corp.*, 834 F.2d 1017, 5 USPQ2d 1110 (Fed. Cir. 1987); *In re Orleans Wines, Ltd.*, 196 USPQ 516 (TTAB 1977). The fact that an applicant may be the first and only user of a merely descriptive ... designation does not justify registration if the term is merely descriptive. *In re National Shooting Sports Foundation, Inc.*, 219 USQ 1018 (TTAB 1983). The examining attorney must consider descriptiveness in relation to the relevant goods or services. The fact that a term may have different meanings in another context is not controlling on the question of descriptiveness. *In re Bright-Crest, Ltd.*, 204 USPQ 591 (TTAB 1979). TMEP §1209.03(e).

Finally, as to applicant's contention that when the terms "sim" and "test" are joined to form the designation "SIMTEST," the combination is not readily recognizable as describing a particular aspect of applicant's goods and does not convey any immediate and unambiguous meaning, the Examining Attorney concedes that "a mark, which contains descriptive terms, may be registrable if the composite creates a unitary mark with a separate, nondescriptive meaning." Citing, inter alia, *In re Quik-Print Copy Shop, Inc.*, 616 F.2d 523, 205 USPQ 505 (CCPA 1980), the Examining Attorney argues, however, that "combining two descriptive terms is insufficient to accomplish that goal unless the combination is such as to create a new and different

commercial impression from that which is engendered by the separate components." According to the Examining Attorney:

In the instant application, the applicant has combined two descriptive terms to form its ... mark. However, the combination does not result in any incongruity. Rather, applicant has combined the descriptive terms for their descriptive meaning. This assertion is supported by the applicant's usage of the specific wording "simulation tests" in its identification of goods. The resultant mark, SIMTEST, describes goods used to facilitate "simulation tests" and[,] therefore, identifies a quality, characteristic, function, feature and purpose of the identified goods.

We agree with the Examining Attorney that, when considered in its entirety, the term "SIMTEST" is merely descriptive of applicant's "computer software, namely, software that provides control capabilities for laboratory simulation test equipment in the nature of road simulators." While the "Acronym Finder" listings made of record reflect other possible connotations for the term "SIM," it is the meaning thereof as "simulation" which would most immediately come to mind to customers for and users of applicant's computer software for providing control capabilities for laboratory simulation test equipment in the nature of road simulators. Specifically, while not mentioned by the Examining Attorney, the excerpts of record from applicant's website (<http://www.simulationtechniques.com>) indicate that its goods (and services) "are focused in the areas of Simulation Testing, NVH Refinement and Dynamic Analysis and Measurement Systems" and that its "Simulation Testing" products, in particular, include "Simulation Control Software." Such website, furthermore, refers to applicant's "SIMTEST Multiaxis

Simulation Control Software" and states, among other things, that "SIMTEST brings robust multiaxis simulation control capabilities to the PC" and "provides a process-oriented interface that makes creating simulator drive files a snap." Applicant's website additionally claims, with respect to its "SIMTEST" goods, that "[s]ince inventing global simulation (a.k.a. non-square matrix control) in 1990, we have continued to advance the state of the art for multiaxis simulation control."

That simulation tests or testing, including that utilized in connection with road simulators, is commonly conducted through use of computer software is evidenced by a number of excerpts which are of record from searches of the "NEXIS" database. Among the most pertinent thereof are the following (**emphasis added**):

"Computer **simulation tests**, such as this bending test ..., reduce the need for physical tests By simulating this bending test early in the product development cycle, the need to build a mold and make prototype parts is minimized to just a final check" -- ABI/INFORM, July 2001;

"A number of higher-level design products will generate source code that can then be compiled and linked into an application used for **simulation tests**." -- ASAP, October 30, 2000;

"Researchers ... unveiled a new earthquake **simulation test** they say is the most advanced in the country." -- San Francisco Chronicle, May 5, 2000;

"Real-world **simulation tests** are conducted 24-hours per day and include engine mechanical development; engine, transmission, and total powertrain durability testing; engine performance dynamometer testing;

catalyst aging tests; and diesel engine tests." -- ASAP, April 1, 2000;

"Conventional **simulation test** techniques require new road response data to be acquired for each new vehicle test. Effective road profile control ..., which is available within MTS Remote Parameter Control (RPC) software, reduces the need for prototype instrumentation

....
* **Simulation testing** -- Since effective road profiles are independent of most common vehicle modifications, they can be used repeatedly to develop road **simulation tests**. By equipping a road simulator with SWIFT sensing systems, effective road profiles can be calculated and used directly as the RPC test control parameters.

* Modeling and analysis -- Just as effective road profiles make laboratory simulation more accurate." -- ASAP, March 1, 2000;

"From sprinkler heads and cell phones to dog food cans and off-shore oil rigs, Bill Jones, director of the expert solutions group at MSC Software Corp., has run computer **simulation tests** on just about every type of product there is." -- Design News, February 21, 2000; and

"The same SWIFT wheel transducer that is used to collect data on the road can be mounted directly in the wheel adapters of the MTS model 329 road simulator and used to develop the **simulation test**, according to the company." -- ABI/INFORM, February 2000.

By way of further evidence, although not referred to in the Examining Attorney's brief, a copy of applicant's "SIMTEST Simulation Testing Software User's Guide," which is also of record, states under the section entitled "Overview" that "[t]his section of the SIMTEST User's Guide provides an overview of the simulation testing procedure and describes how SIMTEST is designed to provide widespread simulation capabilities."

Moreover, we take judicial notice that, for instance, The Random House College Dictionary (rev. ed. 1982) sets forth the term "sim" as a noun meaning "[i]nformal 1. Simulation. 2. Simulator." We additionally observe that the record contains a definition from The Random House Dictionary of the English Language (3rd ed. 1992) which lists the word "test" as a noun signifying "1. A procedure for critical evaluation; a means of determining the presence, quality or truth of something; a trial"

In view of all of the above, it is clear that to purchasers such as product development engineers, including those designing new parts for vehicles, the term "SIMTEST" conveys forthwith, without speculation or conjecture, that applicant's computer programs provide simulation test control capabilities for laboratory equipment in the nature of road simulators. Plainly, there is nothing in the combination of the term "sim" and the word "test" to form the term "SIMTEST" which is incongruous, ambiguous or otherwise "not readily recognizable" as contended by applicant. The constituent elements of the term "SIMTEST," instead, have a meaning in combination which is immediately apparent and identical to that of their separate connotations.

Admittedly, it is possible for individually descriptive words to be combined to form a valid, registrable mark which, as a whole, is not merely descriptive. However, as stated by the Board in, for example, *In re Medical Disposables Co.*, 25 USPQ2d 1801, 1804 (TTAB 1992), in order for such to be the case:

[T]he mere act of combining does not in itself render the resulting composite a registrable trademark. Rather, it must be shown that in combination the descriptiveness of the individual words has been diminished, [such] that the combination creates a term so incongruous or unusual as to possess no definitive meaning or significance other than that of an identifying mark for the goods. See *In re Calspan Technology Products, Inc.*, 197 USPQ 647 (TTAB 1977).

In this instance, we concur with the Examining Attorney that applicant has simply combined the descriptive terms "sim" and "test" and that the merely descriptive significance of the composite term "SIMTEST" is just as readily apparent to customers for applicant's products as if applicant were seeking to register the two-term designation "SIM TEST" as its mark. Nothing in the composite term "SIMTEST" is so incongruous or unusual as to possess no definitive meaning or significance other than that of an identifying mark for applicant's goods, nor does such term otherwise possess a new meaning different from its constituent terms. Moreover, nothing in such term, when used in connection with applicant's goods, requires the exercise of imagination, cogitation or mental processing or necessitates the gathering of further information in order for the merely descriptive significance thereof to be immediately apparent. Plainly, to customers for applicant's computer software, such term conveys forthwith that a purpose, function or use thereof is to provide simulation testing through the control capabilities it offers for laboratory simulation test equipment in the nature of road simulators. The term "SIMTEST" is accordingly merely descriptive of applicant's goods within the meaning of the statute. See,

e.g., *Surgicenters of America, Inc. v. Medical Dental Surgeries, Co.*, 202 USPQ 401, 406-09 (9th Cir. 1978) [term "SURGICENTER" held not registrable for services of providing facilities for doctors to perform operations on patients].

Turning to the remaining ground of refusal in this case, it is pointed out that the 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). 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 of the goods and the similarity of the marks.⁵

In the present case, applicant maintains that "[w]hile the marks are similar, no confusion is likely to occur when the marks are used in connection with their respective goods" because such goods "are not similar, flow in different channels of trade, and are sold to sophisticated purchasers." In particular, applicant asserts with respect to its "SIMTEST" computer software that:

This software provides control capabilities for laboratory test equipment in the nature of road simulators. The software is used in a product development environment to create an input signal for a servo-hydraulic test machine (road simulator) that replicates the dynamic response (example: acceleration,

⁵ 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."

strain, etc.) of a mechanical assembly
(example: automotive suspension).

By contrast, as to registrant's "CIMTEST" computer software,
applicant contends that:

This software is used in electronic manufacturing as a control system to ensure [that] the automotive test equipment properly performs its functions. The software is used in a manufacturing environment to assist the execution of pass-fail tests on electronic parts (electronic control units for engines and transmissions) as they come out of production. This software is used to ... test products that have completed the manufacturing process.

Applicant argues, in view thereof, that "while both goods are software and ... are used in connection with testing and the automotive market, the goods are still very different" because:

The goods in the cited registration are for use in electronic manufacturing as a control system to ensure that the automotive test equipment properly performs its function. The software is run to make sure that the test equipment that performs electronic tests on newly manufactured equipment is working correctly. Applicant's software is not used to run test equipment or to make sure that [that] equipment is running properly. Applicant's software is also not used to test any manufactured equipment. Applicant's software is used in the pre-production phase of designing products. Applicant's software performs hypothetical tests on products that do not yet exist in an effort to test possible new products. [Registrant's] software ... does nothing to refine vehicle design on pre-manufactured goods. While both goods are computer software and do relate [to] automotive testing, the two are completely different, perform completely different functions, and do not compete.

Furthermore, in light of such differences, applicant insists that the respective goods are sold in different channels

of trade to different purchasers. Specifically, applicant urges in this regard that:

Applicant's goods are used in the design and development phase to create input signals for dynamic testing of mechanical assemblies using road simulation equipment. The cited mark is used in the manufacturing phase as a customized test for performing electronic tests on electronic components. Applicant's product and the product in the cited registration will not travel in the same trade channels because the two products realistically never cross paths. The application and deployment environments are completely separate. The purchasers of Applicant's product are those purchasing products in the product development environment. This is a research and product development area that purchases dynamic analysis and simulation control products and services for purposes of testing and developing new products. The purchasers of the goods in the cited registration are very different. These purchasers are purchasing software that helps test actual equipment that has been manufactured and is being tested for quality, or some other performance measure. Since the testing software performs completely different functions and is marketed to different fields of manufacturing (product research and development and the post manufacturing area), no confusion is likely to occur

Finally, applicant argues that, even in the unlikely event that the same purchaser would be confronted with both marks, the purchaser's sophistication and high degree of care utilized in procuring the respective goods would preclude any likelihood of confusion. According to applicant:

Due to the expensive and complex nature of product development, the engineers and designers who purchase Applicant's goods are going to be sophisticated in nature and use a high degree of care when purchasing products that involve such development. Due to the expense and importance of product development, the purchase of Applicant's

goods is a careful transaction. The purchasers of the goods in the cited registration are also highly sophisticated due to the technical and expensive nature of customizing the cited goods to test the purchaser's specific manufactured product or feature of [such] product. In both cases, the products involve technical and expensive consequences, and will be treated with a higher degree of care.

The Examining Attorney, on the other hand, is of the view that "the applicant's goods and the registrant's goods are closely related." Among other things, the Examining Attorney contends that even if applicant's assertions concerning differences in the nature of the respective goods are correct, "the registrant's identification of goods does not limit its use to 'pre-manufactured [automotive] goods' and the applicant's identification of goods does not limit its use for 'possible new [automotive] products' only." However, while properly noting that it is well settled that the issue of likelihood of confusion between marks must be determined on the basis of the goods or services as they are identified in the application and cited registration, and that, in the absence of any express limitation therein, it is presumed that the cited registration encompasses all goods of the type described, that they move in all normal channels of trade and that they are available to all potential customers, the sole explanation offered by the Examining Attorney as to why there is a likelihood of confusion from contemporaneous use of the marks at issue is the assertion that the respective goods "are both computer software programs used to test automotive goods." In view thereof, and given the often stated principle that the fact that purchasers are sophisticated or

knowledgeable in a particular field does not necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or immune from source confusion, the Examining Attorney concludes that confusion is likely from contemporaneous use of the "highly similar" marks "SIMTEST" and "CIMTEST."

Contrary to the Examining Attorney's conclusion that "the record shows that the goods represented by the marks are closely related," there is nothing in the record which demonstrates a commonality of individual, as opposed to institutional, purchasers with respect to applicant's and registrant's computer software products.⁶ Specifically, while there appear to be overlapping customers, such as vehicle manufacturers as well as suppliers of electronic parts for vehicles, including original equipment and specialty after-market manufacturers, there is no showing that the same individuals would buy and/or use both applicant's and registrant's software.

⁶ As noted, for example, by our principal reviewing court in *Electronic Design & Sales Inc. v. Electronic Data Systems Corp.*, 954 F.2d 713, 21 USPQ2d 1388, 1391 (Fed. Cir. 1992), it is error to deny registration simply because applicant markets and sells its goods in one or more of the same fields, such as the automotive industry, as those utilized by registrant without also determining who are the relevant purchasers in instances of common customers. That is, the mere purchase of both applicant's and registrant's software by same institutions does not, of itself, establish similarity of trade channels or overlap of customers; instead, any likelihood of confusion must be shown to exist not in a purchasing institution but in a shared customer or purchaser. Thus, our principal reviewing court has cautioned in this regard that:

"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."

Id., quoting from *Witco Chemical Co. v. Whitfield Chemical Co.*, 418 F.2d 1403, 1405, 164 USPQ 43, 44-45 (CCPA 1969), *aff'g*, 153 USPQ 412 (TTAB 1967).

Applicant's goods, as identified, are limited to providing control capabilities for laboratory simulation test equipment in the nature of road simulators and, as such, would be sold to and/or utilized by product development engineers, including those who design new parts for vehicles. Registrant's goods, as identified, are by contrast restricted to the electronic manufacturing market and would be purchased and/or used by quality control personnel as a control system to ensure that automotive test equipment properly performs its functions. Stated somewhat differently, applicant's goods are used during the process of designing new vehicle parts by providing control capabilities for laboratory simulation test equipment such as road simulators, while registrant's goods are utilized in the actual manufacture or production of electronic parts for vehicles as an adjunct to the quality control thereof as determined by automotive test equipment. Thus, as a practical matter, the respective goods would not typically be bought and/or utilized by the same individuals, even if such products were to be sold to the same vehicle manufacturers or those which produce electronic parts for vehicles.

Moreover, as is obvious from the very nature of the goods at issue, applicant's and registrant's software would be purchased and used by highly trained and technically skilled individuals who would know their specific product design and testing needs. Consequently, customers and users of such software would be knowledgeable and sophisticated purchasers who would exercise a high degree of deliberation in their product

selections, thereby significantly decreasing any likelihood of confusion.

Finally, with respect to the marks themselves, it is plain that although they are phonetically identical, they are not visually the same inasmuch as registrant's "CIMTEST" mark begins with the letter "C" while applicant's "SIMTEST" mark starts with the letter "S." Such marks are thus distinguishable in terms of their overall appearances. As to the strength of the respective marks, that is, the scope of protection to which they are entitled, it is readily apparent that registrant's "CIMTEST" mark is highly suggestive of the control system its software provides with respect to simulator testing of automotive electronic parts, while applicant's "SIMTEST" mark, as previously explained, is merely descriptive of the simulation testing control capabilities its software provides for laboratory equipment in the nature of road simulators. The marks at issue, due to the respective suggestiveness and descriptiveness inherent therein, are accordingly weak marks meriting only a limited ambit of protection. In consequence thereof, applicant's "SIMTEST" mark and registrant's "CIMTEST" mark are considered to be sufficiently distinguishable to preclude a likelihood of confusion, especially in light of the additional differences in the purpose, function and uses of the goods at issue and the high degree of sophistication and technical expertise to be found among customers for and users of such goods.

Decision: The refusal under Section 2(e)(1) is affirmed, but the refusal under Section 2(d) is reversed.

Ser. No. 75/271,392