

**THIS OPINION IS NOT A
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THE T.T.A.B.**

Mailed: March 13, 2007

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Meritek Electronics Corp.

Serial No. 76587046

George Young of Meritek Electronics Corp., pro se.

Maureen L. Dall, Trademark Examining Attorney, Law Office
117 (Loretta Beck, Managing Attorney).

Before Hairston, Drost and Cataldo,
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

An application was filed by Meritek Electronics Corp.
to register the mark MERITEK ELECTRONICS CORPORATION in
typed or standard character form on the Principal Register
for the following services, as amended:

Wholesale, namely, wholesale distributorships
featuring electronic components that are for sale
and related information on how to request
samples, sales literature and price quotations
therefor; import and export agency services in
the field of electronic components; component
procurement by purchasing electronic sensor
components for clients project [sic]; after-sales
services, namely, customer service in the field
of electronic components; providing an online

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website featuring products of others in the field of electronic components that are for sale and related information on how to request samples, sales literature and price quotations therefor,

in International Class 35; and

Custom manufacturing services in the field of electronic components,

in International Class 40.¹

The trademark examining attorney refused registration under Section 2(d) of the Trademark Act on the ground that applicant's mark, as used in connection with its services, so resembles the mark MERITEC, previously registered on the Principal Register in typed or standard character form for "electrical connectors and electrical cable assemblies" in International Class 9 and "electrical engineering design services," in International Class 42,² as to be likely to cause confusion, mistake or deception. In addition, the examining attorney required applicant to, *inter alia*, submit an acceptable amendment to its recitation of services.

¹ Application Serial No. 76587046 was filed April 15, 2004, based on applicant's assertion of March 1993 as a date of first use of the mark anywhere and in commerce in connection with both classes of services. In response to a requirement by the examining attorney, applicant disclaimed the exclusive right to use ELECTRONICS CORPORATION apart from the mark as shown.

² Registration No. 1717589 issued September 22, 1992. Section 8 affidavit accepted; Section 15 affidavit acknowledged. Renewed.

When the refusal and requirement were made final, applicant appealed. With its appeal brief, applicant submitted a proposed amendment to recite the above listed services in Class 35 and Class 40. Upon remand, the examining attorney accepted the amendment to the recitation of services, and maintained the Section 2(d) refusal to register. Applicant subsequently has filed a supplemental brief on the issue on appeal; the examining attorney has filed an appeal brief; and applicant has filed a reply brief.

Applicant argues that its services do not compete with and are not related to registrant's goods and services; that "ordinary prudent purchasers simply will not assume that the sources of [applicant's] services are related to Registrant's goods and services" (brief, p. 3); that both applicant's and registrant's businesses are highly specialized; and that, as a result, registrant is unlikely to expand its activities into those of applicant. Applicant further argues that its mark differs from that in the cited registration in sound, appearance, meaning and commercial impression. Applicant argues in addition that the purchasers of registrant's goods and services include knowledgeable and sophisticated purchasers; that purchasers of its own services are "highly experienced, knowledgeable

members of the electronic component industry, including engineers, computer scientists, and electronics technicians" (brief, p. 10); and that these sophisticated purchasers are capable of discriminating between its services and the goods and services of registrant. Applicant argues moreover that its services are purchased by different consumers than the goods and services of registrant; and that the parties' respective goods and/or services move in different channels of trade. Finally, applicant argues that the lack of actual confusion during 13 years of coexistence weighs against a finding of likelihood of confusion.

In addition, applicant submits with its supplemental appeal brief a further proposed amendment to its recitation of services in Class 35 and Class 40.

In light of arguments raised by applicant in its supplemental appeal brief, the examining attorney withdraws the refusal under Section 2(d) as to "component procurement by purchasing electronic sensor components for clients project" in Class 35. With regard to the remaining services in Class 35 and Class 40, the examining attorney states that "[t]he refusal under Section 2(d) rests heavily on the fact that the applicant has broadly identified its services as relating to or being in the field of

'electronic components'" (brief, unnumbered p. 9); and that because "the identification of services is very broad, it is presumed that the application encompasses distributorships, import and export agency services, customer services, and online website, and manufacturing services all related to electrical connectors and electrical cable assemblies, i.e., the type of goods listed in the registration" (brief, unnumbered p. 10). The examining attorney further argues that the disclaimed wording ELECTRONICS CORPORATION in applicant's mark is of little significance for purposes of creating a commercial impression; that, on the other hand, the term MERITEC in applicant's mark as well as the registered mark MERITEK are strong and arbitrary terms; that the dominant portion of applicant's mark, namely, MERITEK, is identical in sound and otherwise very similar to the mark in the cited registration; and that, as a result, the marks convey highly similar commercial impressions. The examining attorney argues moreover that due to the lack of restrictions in the parties' respective goods and services as recited, applicant's services are presumed to travel in the same channels of trade as the goods and services of registrant; and that sophisticated purchasers may still

experience confusion due to the similarities in the marks and the goods and/or services.

In addition, the examining attorney objects to applicant's further proposed amendment to the recitation of services included in its supplemental brief. The examining attorney also objects to evidence submitted by applicant with its supplemental appeal brief.

In reply, applicant repeats and amplifies certain arguments raised above. In addition, applicant repeats its request that we accept the further amendment to the recitation of services contained in its supplemental appeal brief.

Before turning to the substantive ground for refusal, we will address the above noted evidentiary and procedural matters. Applicant submitted with its supplemental brief exhibits consisting of printed copies of "screen shots" of various pages from registrant's Internet web site. A review of the record in this proceeding indicates that applicant has not previously made these Internet web pages of record.³ As noted above, the examining attorney objects to these exhibits as untimely. We agree with the examining

³ Applicant made of record similar, but not identical, pages from registrant's Internet web site as exhibits to its May 19, 2005 response to the examining attorney's first Office action.

attorney that these exhibits are untimely, and they have not been considered. See Trademark Rule 2.142(d) (the record in the application should be complete prior to the filing of an appeal).

We further note that applicant submitted with its reply brief exhibits consisting of "screen shots" from various third-party Internet web pages as well as copies of third-party applications and registrations taken from the United States Patent and Trademark Office's Trademark Electronic Search System (TESS). We also find that this material is untimely, and it has not been considered. See *Id.* We hasten to add, however, that these exhibits are of limited probative value, and had we considered them in our determination of the issue on appeal, the result would be the same.

Finally, we agree with the examining attorney that applicant's second proposed amendment to its recitation of services, submitted with its supplemental appeal brief, is untimely. In that regard, we note that applicant has made no showing of good cause for its second request to amend its recitation of services during further briefing of this appeal. See TBMP §1205.01 (2d ed. rev. 2004) and the authorities cited therein. Having previously submitted an acceptable amendment to its recitation of services in its

original appeal brief, applicant may not now, without a sufficient showing of good cause, file an additional amendment in its supplemental brief in a continuing attempt to obviate the refusal to register. Accordingly, the operative recitation of services remains as indicated above.⁴

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 USPQ 563, 567 (CCPA 1973). See also *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 27 (CCPA 1976). See also *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997).

We first consider the similarity of the marks. In this case applicant's mark, MERITEK ELECTRONICS

⁴ As noted above, this recitation was submitted by applicant in its original brief on appeal, and accepted with corrections of misspellings in the examining attorney's July 19, 2006 examiner's amendment.

CORPORATION, consists of the distinctive term MERITEK and the disclaimed wording ELECTRONICS CORPORATION. The term MERITEK in opposer's mark differs from the cited mark, MERITEC, by a single letter, namely, the substitution of the letter "K" at the end of applicant's mark for the letter "C" in the same position in that of registrant. As a result, the distinctive portion of applicant's mark is nearly identical in appearance to the mark in the cited registration. As to sound, there is no evidence to suggest that applicant's substitution of the letter "K" at the end of MERITEK in its mark for the letter "C" in that of registrant will result in a significant difference in pronunciation between the two. It is well settled that there is no correct pronunciation of a trademark. See *In re Belgrade Shoe*, 411 F.2d 1352, 162 USPQ 227 (CCPA 1969); and *Interlego AG v. Abrams/Gentile Entertainment Inc.*, 63 USPQ2d 1862 (TTAB 2002). See also *In re Microsoft Corp.*, 68 USPQ2d 1195 (TTAB 2003) (it is not possible to control how consumers will vocalize marks). The letter "C" at the end of registrant's MERITEC mark could reasonably be pronounced as a "hard C" and if so pronounced, would sound identical to MERTIEK when the marks are spoken.

As for the presence of ELECTRONICS CORPORATION in applicant's mark, this wording, which has been disclaimed,

is obviously descriptive of the recited services. It is a well-established principle that, in articulating reasons for reaching a conclusion on the issue of likelihood of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). In view of the descriptive nature of the wording ELECTRONICS CORPORATION, it has little, if any, source-indicating significance, and is entitled to less weight in the likelihood of confusion analysis.

Thus, despite the presence of the disclaimed wording in applicant's mark, when viewed in their entireties the marks MERITEK ELECTRONICS CORPORATION and MERITEC are more similar than dissimilar in appearance, pronunciation and connotation, and convey highly similar commercial impressions. Accordingly, this *du Pont* factor favors a finding of likelihood of confusion.

We next turn to the similarity or dissimilarity between applicant's services and the goods and services in the cited registration. We note at the outset that the examining attorney has presented neither arguments nor

evidence that applicant's services are similar or otherwise related to registrant's services. Nor do we find that, as recited, there is an obvious relation between applicant's services and registrant's "electrical engineering design services."

Turning then to registrant's goods, we note the examining attorney's assertion that because applicant's services are "broadly identified" (brief, unnumbered p. 9) to encompass electronic components, those services are presumed to include electrical connectors and electrical cable assemblies. In support of her contention, the examining attorney has submitted stories from the Lexis/Nexis computer database and copies of third-party registrations. However, a close examination of the Nexis stories reveals only the following two instances in which electronic components and registrant's goods are shown to be manufactured by a common source:

Florida RF Labs manufactures a range of high-powered resistors and electronic components, as well as coaxial cable assemblies, for spaceflight applications, company President Gerald Fenex said.

(The Stuart News/Port St. Lucie News (Stuart, FL) October 2, 1996); and

Other subsidiaries include General Connector Corp., a manufacturer of electrical connectors, resistors and other electronic components; and

Union Spring & Manufacturing Co., a manufacturer of coil steel springs.
(Business Wire, September 22, 1986).

Similarly, the third-party registrations submitted by the examining attorney yield a single registration in which the same mark is used to identify "connectors" and applicant's services:

Registration No. 2881049 for, *inter alia*, printed circuit boards; electronic components for use with printed circuit boards, namely...connectors, in Class 9; custom manufacturing services for printed circuit boards and electronic components for use with printed circuit boards, namely...connectors, in Class 40.

The remaining Nexis stories and third-party registrations suggest that registrant's electrical connectors and/or electrical cable assemblies are manufactured, distributed or used in connection with various other products.

However, while these Nexis stories and third-party registrations make reference to the goods identified in the cited registration, with the above noted exceptions they do not refer to the services recited in the challenged application. In short, with the exception of the printed article, newswire story, and third-party registration listed above, none of the evidence submitted by the examining attorney demonstrates or suggests that applicant's various services in the field of electronic components and registrant's goods emanate from a common

source. Thus, in the present case, there is insufficient evidence to support the examining attorney's conclusory statement that registrant's goods and applicant's services are related. Nor are applicant's services, as identified, so closely related to registrant's goods and services that we may find upon the face thereof that they are complementary or that a viable relationship exists between them.

Based on this record and the mere conclusory statement of the examining attorney, we see the likelihood of confusion claim asserted by the examining attorney as amounting to only a speculative, theoretical possibility. Language by our primary reviewing court is helpful in resolving the likelihood of confusion issue in this case:

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

Electronic Design & Sales Inc. v. Electronic Data Systems Corp., 954 F.2d 713, 21 USPQ2d 1388, 1391 (Fed. Cir. 1992), citing *Witco Chemical Co. v. Whitfield Chemical Co., Inc.*, 418 F.2d 1403, 1405, 164 USPQ 43, 44-45 (CCPA 1969), *aff'g* 153 USPQ 412 (TTAB 1967). Further, we are not persuaded that applicant's services are within the normal field of expansion for registrant's recited goods and

services. Simply put, there is nothing in the record to support a finding that purchasers are likely to believe that registrant will expand its goods and services to encompass the services recited in the application at issue. *Cf. In re General Motors Corp.*, 196 USPQ 574 (TTAB 1977). Accordingly, based upon the record before us this *du Pont* factor weights heavily against a finding of likelihood of confusion.

In reaching our decision on likelihood of confusion we have not relied upon applicant's arguments regarding trade channels, sophistication of purchasers, and the lack of actual confusion. With respect to trade channels, we are not persuaded by applicant's arguments that registrant's goods and services travel in channels of trade that are separate and distinct from those in which applicant's services may be encountered. It is settled that in making our determination regarding the relatedness of the parties' goods or services, we must look to the goods and/or services as identified in the involved application and cited registration. *See Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). *See also Paula Payne Products v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) ("Trademark cases involving the issue of likelihood of

confusion must be decided on the basis of the respective descriptions of goods.") Thus, both applicant's services and registrant's goods and services are presumed to move in all normal channels of trade and be available to all classes of potential consumers. See *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981).

With respect to sophistication of purchasers, applicant asserts that purchasers of its services are experienced, knowledgeable, and capable of discriminating between its services and the goods and services of registrant. In that regard, we note that, as identified, applicant's custom manufacturing services as well as registrant's electrical engineering design services appear to be the type of services that would be used or retained by sophisticated purchasers. However, there is no evidence of record that registrant's goods would be purchased only by highly sophisticated persons. Further, it is settled that even sophisticated purchasers are not necessarily knowledgeable in the field of trademarks or immune from source confusion. See *In re Decombe*, 9 USPQ2d 1812, 1814-1815 (TTAB 1988). In addition, even if some degree of care were exhibited in making the purchasing decision, the marks MERITEK ELECTRONICS CORPORATION and MERITEC are sufficiently similar so that even careful purchasers are

likely to assume that the marks identify goods or services emanating from a single source.

With respect to the lack of instances of actual confusion, applicant asserts that the absence of actual confusion for over 13 years suggests no likelihood of confusion. However, it is not necessary to show actual confusion in order to establish likelihood of confusion. See *Weiss Associates Inc. v. HRL Associates Inc.* 902 F.2d 1546, 223 USPQ 1025 (Fed. Cir. 1990). Particularly in an ex parte proceeding, applicant's assertion of the absence of actual confusion is of little probative value in our determination on the issue of likelihood of confusion. See *In re Kangaroos U.S.A.*, 223 USPQ 1025 (TTAB 1984). Moreover, on the record before us there is no evidence as to what extent there has been an opportunity for confusion to occur.

In view primarily of the dissimilarity between applicant's services and the goods and services recited in the cited registration, we find that the examining attorney has not met her burden of demonstrating that a likelihood of confusion exists between applicant's services and registrant's goods and services.

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Decision: The refusal of registration is reversed.
Accordingly, the involved application will be forwarded for
registration in due course.