

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

Mailed: March 8, 2007

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re Meritek Electronics Corp.

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Serial No. 76587212

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George Young for Meritek Electronics Corp., pro se.

Alicia P. Collins, Trademark Examining Attorney, Law Office  
115 (Tomas V. Vlcek, Managing Attorney).

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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 in typed or standard character  
form on the Principal Register for the following goods and  
services, as amended:

Electronic components, namely, capacitors,  
resistors, capacitor networks, resistor networks,  
varistors, thermistors/sensors, temperature  
sensor/assemblies, polymer PTC resettable fuses,  
gas tube surge arrestors, and ceramic and film  
capacitors, tantalum capacitors, aluminum  
electrolytic capacitors, capacitors for  
electrical apparatus, interference  
suppression/safety capacitors, multilayer ceramic  
chip capacitors, solid tantalum chip capacitors,

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aluminum electrolytic capacitors, ceramic capacitors, and film capacitors,

in International Class 9;

Component procurement by purchasing electronic sensor components for client's project; computerized online ordering and retail store services featuring products in the field of electronic components that do not include computerized online ordering and retail store services featuring connectors and electrical cable assemblies,

in International Class 35; and

Custom manufacturing of electronic components, namely, capacitors, resistors, capacitor networks, resistor networks, varistors, thermistors/sensors, temperature sensor/assemblies, polymer PTC resettable fuses, gas tube surge arrestors, and ceramic and film capacitors, tantalum capacitors, aluminum electrolytic capacitors, capacitors for electrical apparatus, interference suppression/safety capacitors, multilayer ceramic chip capacitors, solid tantalum chip capacitors, aluminum electrolytic capacitors, ceramic capacitors, and film capacitors; custom manufacturing services in the field of electronic components that do not include the custom manufacturing of connectors and electrical cable assemblies,

in International Class 40.<sup>1</sup>

The trademark examining attorney refused registration under Section 2(d) of the Trademark Act on the ground that applicant's mark, as used on or in connection with its

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<sup>1</sup> Application Serial No. 76587212 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 on or in connection with all of the recited goods and services.

goods and 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,<sup>2</sup> as to be likely to cause confusion, mistake or deception.

When the refusal was made final, applicant appealed. Applicant and the examining attorney have filed briefs on the issue under appeal.<sup>3</sup>

For the reasons below, we affirm with regard to applicant's goods in International Class 9 and reverse with regard to applicant's services in International Classes 35 and 40.

Applicant argues that it manufactures computer components; that, on the other hand, registrant manufactures electrical connectors and cable assemblies; that, as a result "[t]he goods are not identical,

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

<sup>3</sup> The examining attorney also issued a final requirement that applicant submit an acceptable amendment to its recitation of services in Class 35 and Class 40. With its appeal brief, applicant submitted amendments to both classes of services so that the services read as indicated above. In her brief on appeal, the examining attorney accepted the proffered amendments and made them of record. As a result, the requirement that applicant amend its recitations of services is moot.

competitive, complementary or related in a way that would create confusion as to source" (brief, p. 3); and that "ordinary prudent purchasers simply will not assume that the source of Applicant's [goods] is the same" as those of registrant (*Id.*). Applicant further argues that its mark differs from that in the cited registration in appearance and commercial impression. Applicant argues in addition that the purchasers of registrant's goods may be skilled in the field of electronics; that purchasers of its own goods are "highly experienced, knowledgeable members of the electronic component industry, including engineers, computer scientists, and electronics technicians" (brief, p. 6); and that these sophisticated purchasers are capable of discriminating between its goods and services and those of registrant. Applicant argues moreover that its goods are sold to different consumers than those of registrant; and that the respective goods 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.

The examining attorney argues that applicant's mark is similar to the mark in the cited registration in sound, appearance and overall commercial impression. The examining attorney notes that applicant has set forth no

arguments regarding the relatedness of its services with those of registrant. The examining attorney further argues that third-party registrations of record demonstrate that applicant's goods and services are related to those of registrant; that further evidence of record demonstrates that applicant's goods are marketed in the same channels of trade to the same classes of purchasers as those of registrant; that due to the lack of restrictions in the services as recited, applicant's services are presumed to travel in the same channels of trade as those of registrant; and that there is no evidence that applicant's goods and services are purchased solely by sophisticated purchasers. The examining attorney argues in addition that the lack of actual confusion is not determinative of the question of likelihood of confusion. Finally, the examining attorney argues that any goods and services within registrant's normal field of expansion must be considered in our determination of likelihood of confusion.

In reply, applicant repeats certain arguments raised above and argues in addition that its services differ from the services identified in the cited registration; that the examining attorney's evidence does not support a finding of likelihood of confusion; and that its services are not within registrant's normal field of expansion.

Before turning to the substantive ground for refusal, we note that applicant has submitted with its main brief an exhibit consisting of printed copies of "screen shots" from registrant's Internet web site. Inasmuch as applicant previously made this exhibit of record with its request for reconsideration of the examining attorney's refusal to register, we will consider it in our determination herein. However, we further note that applicant submitted for the first time as part of its brief "screen shots" of the results of its search of the United States Patent and Trademark Office's Trademark Electronic Search System (TESS). We note in addition that while the examining attorney did not specifically object to this submission in her brief on the case, neither did she discuss the submitted materials. In view thereof, we find that this material is untimely, and it has not been considered. See Trademark Rule 2.142(d) (the record in the application should be complete prior to the filing of an appeal). See also *In re Styleclick.com, Inc.*, 57 USPQ2d2d 1445, 1446 n.2 (TTAB 2000) (material submitted in applicant's brief and not commented upon by examining attorney in her brief not considered). We hasten to add, however, that had we considered this material in our determination of the issue on appeal, the result would be the same.

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, 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 marks are nearly identical in appearance. As to sound, there is no evidence to suggest that applicant's substitution of the letter "K" at the end of 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.

Thus, despite the minor differences in spelling, the marks MERITEK and MERITEC are nearly identical in appearance, pronunciation and connotation, and convey nearly identical commercial impressions. Accordingly, this *du Pont* factor favors a finding of likelihood of confusion.

We turn now to our consideration of the identified goods and services, noting that it is not necessary that the goods or services at issue be similar or competitive, or even that they move in the same channels of trade, to support a holding of likelihood of confusion. It is sufficient instead that the respective goods and/or services are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods and services are such that they would or could be encountered by the same persons under circumstances that

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could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same producer. See *In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978).

In this case, registrant's goods and services are identified as "electrical connectors and electrical cable assemblies" and "electrical engineering design services." Applicant's goods and services include various electronic components as well as component procurement, computerized online ordering, retail store services and custom manufacturing services, all in the field of electronic components. We note that applicant has amended the recitation of its Class 35 and Class 40 services specifically to exclude "connectors and electrical cable assemblies." However, the mere exclusion of registrant's goods from the purview of applicant's computerized online ordering, retail store, and custom manufacturing services is insufficient by itself to compel a finding that applicant's goods and services are not related to those of registrant. That is to say, applicant's recitation of services indicates that it does not provide online ordering, retail stores or manufacturing in the field of electrical connectors and electrical cable assemblies. Nonetheless, we still must examine the record to determine

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whether applicant's electronic components and various services in the field thereof are related to registrant's electrical connectors and cable assemblies and electrical engineering design services.

The examining attorney has made of record a number of use-based third-party registrations to support her position that various entities have adopted a single mark for goods and services that are identified in both the challenged application and the cited registration. *See, for example:*

Registration No. 2892417 for, *inter alia*, mobile audio, video systems and components, namely, capacitors, electrical connectors, electrical cables, in Class 9;

Registration No. 2769217 for, *inter alia*, capacitors, electrical connectors, resistors, thermistors, in Class 9;

Registration No. 1649366 for, *inter alia*, electrical and electronic adaptors, cable assemblies, connectors, resistors, in Class 9;

Registration No. 2909192 for, *inter alia*, resistors, thermistors, electrical connectors, in Class 9;

Registration No. 2128443 for, *inter alia*, electric and electronic computer products and related accessories, namely, connectors and parts thereof, cable assemblies; computer structural components, namely, printed circuit boards, resistors and capacitors, in Class 9;

Registration No. 2619864 for, *inter alia*, house mark for a wide variety of electrical and electronic components and assemblies; wire and cable assemblies; data communications equipment;

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including - capacitors, resistors, thermistors,  
in Class 9;

Registration No. 1904220 for, *inter alia*,  
electric and electronic computer products and  
related accessories, namely, connectors and parts  
therefor, cable assemblies; computer structural  
components, namely, resistors and capacitors, in  
Class 9;

Registration No. 2658389 for, *inter alia*,  
electric/electronic/computer equipment products  
and related accessories, namely, connectors and  
parts thereof, cable assemblies, computer  
structural components, namely, resistors,  
capacitors, in Class 9;

Registration No. 2924955 for, *inter alia*,  
electronic components, namely, capacitors,  
resistors, resistor networks, electrical  
connectors, in Class 9;

Registration No. 3008130 for, *inter alia*, custom  
manufacturing of capital equipment, precision  
components, in Class 40; engineering design  
services for use in manufacturing, assembly, and  
test machinery, in Class 42;

(the following two registrations are owned by the  
same party)

Registration No. 2960097 for, *inter alia*, retail  
store services, on-line retail store services,  
all featuring capacitors, resistors, thermistors,  
electrical connectors, in Class 35;

Registration No. 3013591 for, *inter alia*, retail  
store services, on-line retail store services,  
all featuring capacitors, resistors, thermistors,  
electrical connectors, in Class 35;

(the following three registrations are owned by  
the same party)

Registration No. 2829454 for, *inter alia*,  
electronic components for use with printed  
circuit boards, namely, capacitors, resistors,

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thermistors, electrical connectors in Class 9; custom manufacturing of printed circuit boards and electronic components for use with printed circuit boards, namely, capacitors, resistors, thermistors, in Class 40;

Registration No. 2831497 for, *inter alia*, electronic components for use with printed circuit boards, namely, capacitors, resistors, thermistors, electrical connectors in Class 9; custom manufacturing of printed circuit boards and electronic components for use with printed circuit boards, namely, capacitors, resistors, thermistors, in Class 40; and

Registration No. 2881049 for, *inter alia*, electronic components for use with printed circuit boards, namely capacitors, resistors, thermistors, electrical connectors and parts therefore [sic], in Class 9; custom manufacturing services for printed circuit boards and electronic components for use with printed circuit boards, namely capacitors, resistors, connectors, thermistors, in Class 40.

The foregoing registrations, particularly Registration Nos. 2892417; 2769217; 1649366; 1904220; and 2658389, demonstrate the related nature of applicant's goods and those of registrant. Specifically, the third-party registrations made of record suggest that individuals and entities use the same marks to indicate the source of goods identified both in the subject applicant and the cited registration.

However, the evidence submitted by the examining attorney is insufficient to demonstrate that third parties use the same marks to indicate the source both of

applicant's recited services and the goods and/or services of registrant. 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. Further, we are not persuaded by the examining attorney's unsupported assertion 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). As such, based upon the record before us this *du Pont* factor favors a finding of likelihood of confusion as to applicant's goods, but not its services.

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 goods and services may be encountered. It is settled that in making our determination regarding the relatedness of the parties' goods and/or services, we must look to the goods and 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) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed.") 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.") As a result, we cannot view registrant's trade channels as being restricted based upon applicant's extrinsic evidence taken from registrant's Internet web site. Thus, both applicant's 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).

Another *du Pont* factor discussed by applicant and the examining attorney is that of the conditions of sale. Applicant asserts that purchasers of its goods and services

are experienced, knowledgeable, and capable of discriminating between its goods and services and those of registrant. As identified, applicant's component procurement and 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 the goods of either applicant or registrant 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). Moreover, in view of the third-party registrations which are evidence that both applicant's and registrant's goods are of a type which may emanate from a single source, prospective purchasers may mistakenly believe that these goods could emanate from the same source. In addition, even if some degree of care were exhibited in making the purchasing decision, the marks MERITEK and MERITEC are so similar that even careful purchasers are likely to assume that the marks identify goods emanating from a single source.

The final *du Pont* factor discussed by applicant and the examining attorney is 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, and as pointed out by the examining attorney, 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 similarities between applicant's mark and that of registrant, as well as evidence of a relation between applicant's goods and those of registrant, we find that a likelihood of confusion exists between MERITEK and MERITEC as applied to those goods. In view of the lack of sufficient evidence of a relation 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 affirmed as to the goods in International Class 9. The refusal of registration is reversed as to the services in International Classes 35 and 40. Accordingly, the involved application will be forwarded for registration in International Classes 35 and 40 in due course.