

Mailed: March 26, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Ellis Engineering

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Application No. 76656289

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Michael S. Munk for applicant.

Michael Webster, Examining Attorney, Law Office 102 (Karen M. Strzyz, Managing Attorney).

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**Before Drost, Zervas, and Mermelstein, Administrative Trademark Judges.**

**Opinion by Mermelstein, Administrative Trademark Judge:**

Ellis Engineering filed an application to register the mark MK-7 (in standard characters)<sup>1</sup> on the Principal Register for

Firearm scopes, namely, pistol and rifle scopes with variable and fixed power magnification, pistol and rifle scopes with illuminated reticle, pistol and rifle scopes with duplex reticle, and pistol and rifle scopes with mildot reticle; and spotting scopes.

in International Class 9 (as amended).

The examining attorney issued a final refusal to register under Trademark Act § 2(d), 15 U.S.C. § 1052(d), on the ground that applicant's mark so resembles the marks MK9

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<sup>1</sup> Filed March 8, 2006, based upon an allegation of a *bona fide* intention to use the mark in commerce.

and MK40, previously registered for "firearms,"<sup>2</sup> that it would, if used on or in connection with the identified goods, be likely to cause confusion, to cause mistake, or to deceive.

Applicant appealed. Both applicant and the examining attorney have filed briefs. We reverse.

**I. Applicable Law**

We base our determination under Section 2(d) on an analysis of all of the probative evidence of record bearing on the likelihood of confusion. See *In re E.I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973); see also *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper*

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<sup>2</sup> Registration No. 2674992 (MK9), issued January 14, 2003. Registration No. 2527467 (MK40), issued January 8, 2002. Both registrations are owned by Saeilo Enterprises, Inc. of Pearl River, New York.

Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); *In re Azteca Rest. Enter., Inc.*, 50 USPQ2d 1209 (TTAB 1999).

## **II. Record on Appeal**

The examining attorney submitted the following evidence in support of the refusal to register:

- Six registrations,<sup>3</sup> based on use in commerce, and covering firearms on the one hand and firearm scopes on the other;
- Pages from Registrant's website, including pictures of registrant's goods

Applicant submitted the following evidence in support of registration:

- TESS records for two cancelled registrations:<sup>4</sup>
- Internet Resources:
  - Several pages from the cited registrant's website, submitted to show the nature of the registrant's goods  
<http://kahrshop.com/partsindex.html>
  - A page from the GEMTECH website discussing GEMTECH's MK-9 and MK9K silencers  
<http://gem-tech.com/mk-9k.html>
  - A page from AWC Systems Technology, describing their MK9 submachine gun suppressor  
<http://www.awcsystech.com/mk9.html>
  - A page from the website of FN Manufacturing, Military Division, offering information on their MK46 MOD 1 - "an M249 variant developed to meet a US Special Operations requirement..."  
[www.fnmfg.com/products/m249fam/mk46mod1.htm](http://www.fnmfg.com/products/m249fam/mk46mod1.htm)

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<sup>3</sup> Ten registrations were submitted, although we find consideration of four of them improper for various reasons.

<sup>4</sup> Registration Nos. 1868189 and 2142315. Cancelled or expired registrations are of no evidentiary value, and the Board is not bound by the decisions of examining attorneys to register marks.

- o A page from the website of FN Manufacturing, Military Division, offering information on their MK48 Mod 1 (similar to the MK46 MOD1)  
<http://www.fnmfg.com/products/m249fam/mk48mod1.htm>
- o An article from GlobalSecurity.org about the MK19 40 mm Machine Gun, MOD 3: Automatic grenade Launcher/Machine Gun.  
<http://www.GlobalSecurity.org/military/systems-/ground/mk19.htm>
- o An article from Wikipedia on the MK19 Grenade Launcher  
[http://en.wikipedia.org/wiki/mk19\\_grrenade\\_launcher](http://en.wikipedia.org/wiki/mk19_grrenade_launcher)
- o An article from The Arms Site on the Heckler & Koch HK MK23 pistol  
<http://remtek.com/arms/hk/civ/mark23/mark23.htm>

### III. Discussion

#### A. The Similarity or Dissimilarity and Nature of the Goods

Applicant's goods are various types of "firearm scopes" and "spotting scopes," while the cited registrant's goods are identified as "firearms." It seems obvious that the purpose of a scope of this type is to enable more accurate aim of a firearm. These goods are closely related inasmuch as such scopes would all be used with or attached to firearms and in fact aid in the effective use of the firearm. These are goods which are intended to be used together.

The examining attorney has submitted several registrations covering both firearms and firearm scopes. Third-party registrations which individually cover a number

**Application No. 76656289**

of different items and which are based on use in commerce may serve to suggest that the listed goods are of a type that may emanate from a single source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1469 (TTAB 1988), *aff'd* (unpublished) No. 88-1444 (Fed. Cir. Nov. 14, 1988).

Applicant points out that that some of the scopes listed in the third-party registrations are registered in International Class 9 (as opposed to Class 15, with firearms), and that "[t]his provides some evidence of industry recognition of the difference between FIRARMS [sic] and FIREARM SCOPES." Br. at 2. Applicant is mistaken. "The Patent [and Trademark] Office classification of particular goods is immaterial in determining the likelihood of confusion or mistake or deception of purchasers as to source or origin of the goods." *In Re Knapp-Monarch Co.*, 296 F2d 230, 132 USPQ 6, 7 (CCPA 1961); Trademark Act § 30, 15 U.S.C. § 1112 ("The Director may establish a classification of goods ..., for convenience of Patent and Trademark Office administration, but not to limit or extend the applicant's or registrant's rights"); Trademark Rule 2.85(g). The fact that some scopes are classified in International Class 9, while firearms are in International Class 13, thus has no bearing on our analysis.

The evidence establishes that firearms and firearm scopes are closely related products. This factor thus supports the refusal to register.<sup>5</sup>

**B. The Similarity or Dissimilarity of the Marks and their Strength**

Applicant's mark is MK-7, while the marks in the cited registrations are MK9 and MK40. The marks share an obvious similarity in that they both begin with the letters "MK" followed by a number, or a hyphen and a number. In applicant's mark, the numeral "7" follows the letters MK, as opposed to "9" and "40" in the cited registrations. While this provides some level of distinction, it nonetheless seems more natural that prospective purchasers would focus on the letters, rather than the numerals, which come first. The marks are therefore somewhat similar in appearance, and the initial two letters would likely be pronounced the same.

We next consider the meaning of the marks. As applicant's internet evidence demonstrates, the letters "MK" are widely used in the firearms industry to refer to various weapons from a wide variety of sources, although it is not obvious from the evidence whether "MK" has a particular meaning. When the examining attorney requested that

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<sup>5</sup> We note the proposal in applicant's brief to delete the word "pistol" from its identification of goods. Such an amendment is untimely, but more importantly, would be futile because the cited registrations identify the goods as "firearms," not pistols. Whether or not the registrant is actually selling firearms other than pistols under its marks, we must consider the trademark to

applicant furnish information on the meaning of "MK," with respect to the goods at issue, applicant responded that the letters have no meaning, except as a part of trademarks used by many in the firearms industry.

In our view, both the applicant and the examining attorney have got it wrong. To demonstrate, we take judicial notice of the following dictionary definitions:<sup>6</sup>

**mark 2 b (9)** *usu cap* ... - used with a numeral to designate a particular model of a weapon, machine, or article of equipment ... - **abbr. Mk** [emphasis added]

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (unabridged) 1382 (1993).

**mark ... 12.** (usually initial capital letter) U.S. Military. a designation for an item of military equipment in production, used in combination with a numeral to indicate the order of adoption, and often abbreviated: a Mark-4 tank; an M-1 rifle.

DICTIONARY.COM UNABRIDGED (v 1.1), Based on the RANDOM HOUSE UNABRIDGED DICTIONARY (2006). <http://www.reference.com> (March 24, 2008).

**mark ... 4. i.** A particular mode, brand, size, or quality of a product, especially a weapon or machine.

THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, (4<sup>th</sup> ed. 2006) (online edition). <http://dictionary.reference.com/browse/mark> (March 24, 2008).

It appears to us that the term "MK" does indeed have a meaning with reference to the firearms industry; it

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cover all firearms, a category that is not limited to pistols.  
<sup>6</sup> The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or have regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

indicates that what follows is a particular model designation, brand, version, or size for a particular weapon. While the result might be a descriptive or generic designation, that is not inevitable. As in all cases, whether the entire mark thus formed is descriptive will depend on the facts of the case. We emphasize, however, that the issue of descriptiveness of the mark is not before us in this case.

While we must consider the marks in their entireties, it is entirely appropriate to accord greater importance to the more distinctive elements in the marks. As the Court of Appeals for the Federal Circuit observed, "in articulating reasons for reaching a conclusion on the issue 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 consideration of the marks in their entireties. Indeed, this type of analysis appears to be unavoidable." *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). Further, it has long been held that descriptive or generic matter has very little trademark significance, and is unlikely to make a strong impression on the potential customer. *See In re N.A.D. Inc.*, 57 USPQ2d 1872, 1873 (TTAB 2000) ("These descriptive, if not generic, words have little or no source-indicating significance.").

**Application No. 76656289**

Although the abbreviation "MK" is undeniably a prominent part of both the applicant's mark and that of the prior registrant, its descriptiveness plus the public's exposure to its widespread use by others in the relevant field makes it inappropriate to overemphasize this element of either applicant's mark or that of the cited registrant. We find that MK is at best a weak element of these marks and that those in the firearms industry and their customers are thus unlikely to look to those letters as a source-identifying feature. Rather, we believe that it is the other matter, or more precisely, the combination of "MK" with the other matter, by which purchasers will distinguish the source of goods so marked.

Here, applicant's mark comprises the letters "MK" and the numeral "7," while the cited registrations comprise the letters "MK" and the numerals "9" and "40." Although applicant and the examining attorney have opined on the strength of the various numerals involved, we find it unnecessary to delve into the subject. Given that "MK" means nothing more than "mark," we find that, considered as a whole, the differences between applicant's mark and those of the prior registrant are sufficient to distinguish them.<sup>7</sup>

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<sup>7</sup> There is no evidence in this record to suggest that "7" has any meaning in relation to applicant's goods or to the relevant industry.

**IV. Conclusion**

We have carefully considered all the evidence of record, and we conclude that applicant's firearm scopes and spotting scopes are related to the firearms identified in the cited registration, and that the marks bear some obvious similarity. Nonetheless, because the only similarity among the marks is a descriptive term that is widely used in the industry, we nonetheless believe that registration of applicant's mark will not give rise to a likelihood of confusion.

**Decision:** The refusal to register under Trademark Act § 2(d) is accordingly reversed.