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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Peng

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Serial No. 76662699

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Michael A. Painter of Isaacman, Kaufman & Painter, P.C.  
for Heidi Peng.

Benjamin T. Allen, Trademark Examining Attorney, Law Office  
114 (K. Margaret Le, Managing Attorney).

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Before Quinn, Walters and Walsh, Administrative Trademark  
Judges.

Opinion by Walsh, Administrative Trademark Judge:

Heidi Peng (Applicant) has applied to register the  
mark shown below for "battery chargers and voltage  
inverters" in International Class 9.<sup>1</sup>

The logo for MARXON features the word "MARXON" in a bold, black, serif font. The letter "O" is stylized with a decorative, swirling flourish that extends from the top and bottom of the letter.

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<sup>1</sup> Application Serial No. 76662699, filed July 7, 2006, claiming a  
bona fide intention to use the mark in commerce.

Serial No. 76662699

The Examining Attorney has finally refused registration under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), based on a likelihood of confusion with two registrations owned by different parties:

Registration No. 1859461 for the mark MARKON in typed form for "electric generators and alternators" in International Class 7; the registration issued on October 25, 1994; the registration has been renewed;

and

Registration No. 1139855 for the mark shown here for "capacitors and varistors" in International Class 9; the registration issued on September 23, 1980; the registration has been renewed.



Applicant has appealed the refusal. Applicant and the Examining Attorney have filed briefs. We affirm the refusal as to the MARKON registration, but reverse the refusal as to the MARCON and Design mark.

EVIDENTIARY OBJECTION

Before proceeding to the merits we must address the Examining Attorney's objection to evidence Applicant submitted for the first time with her appeal brief.

**Serial No. 76662699**

Specifically, Applicant submitted evidence related to the goods identified in the application and cited registrations from Wikipedia, an online encyclopedia. Applicant also asks that we take judicial notice of this evidence. The Examining Attorney has objected to this evidence as untimely. The Examining Attorney's objection is well taken. The record must be complete prior to appeal, subject to certain exceptions not relevant here. See 37 C.F.R. § 2.142(d). Applicant's submission here is manifestly late.

Furthermore, we will not take judicial notice of evidence from Wikipedia or other sources which are available only online. See *In re CyberFinancial.Net Inc.*, 65 USPQ2d 1789, 1791 n.3 (TTAB 2002). See also *In re IP Carrier Consulting Group*, 84 USPQ2d 1028 (TTAB 2007) (Wikipedia evidence only admissible when there is an opportunity to verify its accuracy). Accordingly, we have not considered the Wikipedia evidence. Nonetheless, we note that, if we had considered it, we would not decide the case differently.

LIKELIHOOD OF CONFUSION

Section 2(d) of the Trademark Act precludes registration of an applicant's mark "which so resembles a mark registered in the Patent and Trademark Office... as to

be likely, when used on or in connection with the goods of the applicant, to cause confusion..." 15 U.S.C. § 1052(d). The opinion in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1977) sets forth the factors to consider in determining likelihood of confusion. Here, as is often the case, the crucial factors are the similarity of the marks and the similarity of the goods of the applicant and registrant. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The 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."). Below we will consider each of the factors as to which Applicant or the Examining Attorney presented arguments or evidence.

#### The Goods

The goods of Applicant and the registrants need not be identical to find a likelihood of confusion under Trademark Act Section 2(d). They need only be related in such a way that the circumstances surrounding their marketing would result in relevant consumers mistakenly believing that the goods originate from or are associated with the same source. See *On-Line Careline Inc. v. America Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471 (Fed. Cir. 2000); *In re*

**Serial No. 76662699**

*International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978).

First we will consider whether Applicant's goods are related to the goods in the MARKON registration. Accordingly, we must determine whether Applicant's "battery chargers and voltage inverters" are related to the registrant's "electric generators and alternators."

Applicant emphasizes the technical and functional differences between its products and those in the cited registration. Applicant asserts that its products, battery chargers and voltage inverters, "... are electronic devices to either recharge the energy in a battery or convert a direct current source to an alternating current source." Applicant's Brief at 6. On the other hand Applicant asserts that electric generators and alternators "convert mechanical energy to alternating current electrical energy." *Id.* at 4. Applicant criticizes the Examining Attorney's use of definitions which Applicant believes to be too broad. Applicant states, "Where the goods, users and channels of trade employed to sell the respective goods are totally divergent, there is no relationship between the goods sufficient to refuse registration." *Id.* at 6. Applicant concludes, as follows: "Given the standard of what constitutes related goods, the record does not support

any logical association between or joinder between the goods defined in the application and the respective registrations." *Id.* In her argument Applicant does not address any of the evidence the Examining Attorney submitted to show that the goods are related, other than the dictionary definitions.

The Examining Attorney argues that Applicant's goods and the goods identified in the MARKON registration are related. To support this position the Examining Attorney provided dictionary definitions of the goods, copies of pages from Internet web sites showing that the respective goods are offered for sale by the same party, and third-party, use-based registrations showing registration of the same mark for both types of goods.

Although the dictionary entries are of limited probative value in determining whether the goods at issue here are related, for completeness we begin by noting the definitions the Examining Attorney provided from [encarta.msn.com](http://encarta.msn.com):

*Applicant's Goods*

**"battery charger"** - **"device for restoring power to batteries:** a device for restoring power to electrical batteries"; and

**"inverter"** - "2. device converting current; a device that changes direct current into alternating current and is commonly used on boats

to operate devices such as radios from batteries”;

*Goods in MARKON Registration*

“**generator**” - “1. **device for producing electricity**: a machine or device that is used to convert mechanical energy, such as that provided by the combustion of fuel or by wind or water, into electricity”; and

“**alternator**” - “generator of alternating current: a device that generates alternating current, especially in a car.”

The Examining Attorney also provided examples from the Internet of entities involved in producing and supplying electrical equipment which offer the types of goods identified in both the application and the cited registration. For example, the baldor.com web site offers both inverters and generators; the hardysolar.com web site offers inverters, generators and alternators; the windandsun.com web site offers both generators and inverters; the mastervolt.com web site offers battery chargers, inverters and generators; the expertelectric.com web site offers battery chargers, inverters and generators; and the goodallmfg.com web site offers battery chargers and generators. See Attachments to Final Office Action.

Finally the Examining Attorney has provided several third-party, use-based registrations showing that the same mark has been registered for both types of goods, for

**Serial No. 76662699**

example: Registration No. 721168 which includes both electric generators and electric battery chargers; No. 2214833 which includes electric generators, battery chargers and electrical inverters; No. 740864 which includes battery chargers, generators and inverters; No. 967400 which includes generators and battery chargers; and No. 1550740 which includes battery chargers and motor-driven electric generators for use in machines. *Id.*

These registrations provide some further evidence that the goods in the application and the goods in the cited registration are the types of goods which may emanate from the same source. *In re TSI Brands Inc.*, 67 USPQ2d 1657, 1659 (TTAB 2002); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993).

As we noted, Applicant has addressed neither the Internet evidence nor the third-party registration in her arguments. This evidence directly contradicts Applicant's assertion that, "... the record does not support any logical association between or joinder between the goods defined in the application and the respective registrations."

Applicant's Brief at 6. Based on the evidence of record, in particular, the Internet evidence and the third-party registrations, we conclude that the goods in the application and the goods in the cited MARKON registration

Serial No. 76662699

are related. We also note that the evidence indicates that, even though the respective goods may be technically and functionally different, the types of equipment in question are generally placed in the same category for sale as commercially related products.

Next we consider whether the goods in the application are related to the goods in the cited MARCON and Design registration. Accordingly, we must determine whether Applicant's "battery chargers and voltage inverters" are related to the registrant's "capacitors and varistors." On this question, we have before us the same essential arguments and evidence from both Applicant and the Examining Attorney as we had regarding the cited MARKON registration. Again, for the sake of completeness we note the relevant encarta.msn.com definitions for the goods in the MARCON and Design registration:

*Goods in MARCON and Design Registration*

**"capacitor"** - **"electrical storage component:** an electrical component used to store a charge temporarily, consisting of two conducting surfaces separated by a nonconductor **dielectric**";

**"varistor"** - **"variable resistor:** a two-element semiconductor with nonlinear resistance in which the resistance drops as the applied voltage increases. Varistors are often used as a safety device to short-circuit transient high voltages in electronic circuits."

**Serial No. 76662699**

In the case of the cited MARCON and Design registration, in the Internet evidence, we find no evidence that battery chargers and inverters are sold with capacitors and varistors. In fact, the evidence suggests that the products are fundamentally different. That is, while Applicant's goods are finished products, the goods in the cited MARCON and Design registration are components of finished electronic products. See, e.g., Attachment to Final Office Action from [highenergycorp.com](http://highenergycorp.com). Likewise, among the third-party registrations we find very few examples of registrations which include both types of goods.

Therefore, although Applicant's mark and the cited MARCON and Design mark may indeed be similar, the lack of evidence to establish that the relevant goods are related compels a determination on this record that there is no likelihood of confusion. Accordingly, in the absence of sufficient evidence to establish that these goods are related, we conclude that these goods are not related. Consequently, we find that the Office has not established a likelihood of confusion based on Rregistration No. 1139855 for the MARCON and Design mark.

The Marks

We now proceed to compare Applicant's mark with the cited MARKON mark. In comparing the marks we must consider the appearance, sound, connotation and commercial impression of the marks at issue. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005).

Also, "... it is well established that the test to be applied in determining likelihood of confusion is not whether marks are distinguishable on the basis of a side-by-side comparison but rather whether they so resemble one another as to be likely to cause confusion, and this necessarily requires us to consider the fallibility of memory over a period of time. That is to say, the emphasis must be on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks." *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975) (internal citations omitted).

Applicant argues that the marks differ. Specifically, Applicant argues that the Examining Attorney failed to consider the marks in their entirety and failed to recognize differences in appearance and sound between the marks. Applicant states further, "The letter 'X' and the

**Serial No. 76662699**

design feature are both integral parts of Applicant's mark. The refusal to register the subject mark fails to consider the commercial impression of all the portions of Applicant's mark." Applicant's Brief at 9.

On the other hand, the Examining Attorney argues that the marks are similar when viewed in their entireties. Specifically, the Examining Attorney argues that the literal element is the dominant element in Applicant's mark and that the literal elements in Applicant's mark, MARXON, and the cited mark, MARKON, are similar. The Examining Attorney argues further that the design element in Applicant's mark is minimal and insufficient to distinguish the marks.

We concur with the Examining Attorney and conclude that the marks, when viewed in their entireties, are similar.

First, we conclude that here, as is most often the case, the literal elements of the marks are dominant. See *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534-35 (Fed. Cir. 1997). In this case, the design element in Applicant's mark, which Applicant did not even describe in her application, is relatively minor; it is integrated with and subordinate to the literal element in Applicant's mark. Furthermore, the literal element is the

**Serial No. 76662699**

only element in the cited registered mark. Finally, in this case the common axiom regarding marks with both literal and design elements applies, that is, literal elements are more significant because purchasers use the literal elements in requesting the goods. See *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983).

Although there are specific differences between the marks in appearance, the differences are far less significant than the similarities. Again, the design element in Applicant's mark is minor. Furthermore, the cited mark is in typed form, and therefore, the cited registration covers the registered mark in all reasonable manners of display, including displays similar to the display of Applicant's mark. The difference in the literal elements, the "X" in Applicant's mark versus the "K" the cited registered mark, is subtle and not significant. Accordingly, we conclude that the marks are similar in appearance.

We also conclude that the marks are similar in sound. Here too, while it is arguable that the marks may be pronounced differently due to the slight difference in spelling, the difference in pronunciation would be subtle and not significant. Furthermore, as the Examining Attorney points out, there is no "correct" pronunciation of

**Serial No. 76662699**

a trademark. *Centraz Industries Inc. v. Spartan Chemical Co.*, 77 USPQ2d 1698, 1701 (TTAB 2006); *Kabushiki Kaisha Hattori Tokeiten v. Scuotto*, 228 USPQ 461, 462 (TTAB 1985). Accordingly, we conclude that the marks are similar in sound.

Neither Applicant nor the Examining Attorney had presented specific arguments with regard to the connotation of either mark. The literal elements of both marks consist of what appear to be coined terms. To the extent that the marks may possess "connotations" the connotations of the marks are likely to be similar due to the similarity in appearance and sound. Accordingly we conclude that the marks are similar in connotation.

The same analysis essentially applies with regard to the commercial impressions of the marks. While Applicant argues that the overall commercial impression of her mark differs from that of the cited registered mark, based on the design element and the difference in spelling, we do not agree. For the reasons we discussed above, we conclude that the differences between the marks are not significant, and therefore, the commercial impressions of the marks do not differ significantly.

Therefore, we conclude that Applicant's MARXON and Design mark and the cited MARKON mark are similar in

Serial No. 76662699

appearance, sound, connotation and commercial impression, and similar overall.

Other Arguments

Throughout Applicant has argued that the coexistence of the two prior registrations cited here indicates that there would not be a likelihood of confusion between Applicant's mark and either of the cited marks. In this regard, we note that we are sustaining the Section 2(d) refusal here based on only one of the two cited registrations, the MARKON registration. More importantly, we must decide each case on the record before us; decisions on prior applications do not dictate a particular decision here. *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564 (Fed. Cir. 2001).

CONCLUSION

Finally, based on all evidence of record in this case related to the *du Pont* factors, we conclude that there is a likelihood of confusion between Applicant's MARXON and Design mark when used in connection with "battery chargers and voltage inverters" and the cited MARKON mark when used in connection with "electric generators and alternators." We conclude so because the marks are similar and the identified goods are related.

**Serial No. 76662699**

**Decision:** We affirm the refusal to register the mark under Trademark Act Section 2(d) based on Registration No. 1859461. However, we reverse the refusal to register the mark under Trademark Act Section 2(d) based on Registration No. 1139855. Registration is refused.