

Hearing:  
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May 18, 2000  
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Paper No.

10/18/00

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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Megastar, Inc.

v.

**Harris Corporation**  
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Cancellation No. 26,056  
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**John S. Torkelson** of Carrington, Coleman, Sloman &  
Blumenthal, L.L.P. for Megastar, Inc.

**L. Lawton Rogers, III and D. Joseph English** of Rogers &  
Killeen for **Harris Corporation**.  
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Before Hanak, Quinn and Chapman, Administrative Trademark  
Judges.

Opinion by Chapman, Administrative Trademark Judge:

Megastar, Inc. has filed a petition to cancel a  
registration issued to Harris Corporation for the mark  
MEGASTAR for "microwave radios, multiplexers, and parts  
therefor."<sup>1</sup>

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<sup>1</sup> Registration No. 1,973,923, issued May 14, 1996 from an  
intent-to-use application filed on August 11, 1993. The claimed  
date of first use is November 30, 1995.

**Cancellation No. 26056**

Petitioner asserts as grounds for cancellation that it has adopted and is using the mark MEGASTAR, INC. "for

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apparatus for satellite and telephone transmission, namely satellite teleports, earth station equipment, microwave equipment, high powered amplifiers, traveling wave tubes, wave guides, klystrons, satellite dish antennas, up and down converters, exciters, modems, T-1 equipment, synthesizers, switches, fiber optic cables, un-interruptible power supplies and test equipment in Class 9 and for satellite uplink transmission services and telephone communication services in Class 38"; that petitioner's pending application has been refused registration based on respondent's involved registration<sup>2</sup>; that petitioner first used its mark on the goods on or about December 22, 1986, and in connection with the services on or about March 1, 1988; and that respondent's mark, when used on its goods, so resembles petitioner's previously used mark, as to be likely to cause confusion, mistake, or deception.

In its answer respondent denies the salient allegations of the petition to cancel, and raises the affirmative defenses that petitioner is estopped by laches from asserting the allegations in the petition; and that petitioner has abandoned any rights it may have

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<sup>2</sup> Application Serial No. 75/069,180, filed March 8, 1996. The Examining Attorney handling petitioner's application has suspended action thereon.

had to the exclusive use and/or registration of the mark MEGASTAR for the involved goods and/or services.

The record consists of the pleadings; the file of respondent's registration; the testimony, with exhibits, of Nigel Iain Stuart Macrae, petitioner's president; the testimony, with exhibits, of Robert Stillerman, the director of marketing of the Microwave Communications Division of respondent corporation; and petitioner's notice of reliance on certain printed publications.

Both parties filed briefs on the case,<sup>3</sup> and both were represented at an oral hearing held before this Board.

Preliminarily, we determine respondent's motion to dismiss for failure to state a claim (included within its brief on the case)<sup>4</sup>, and respondent's two motions to strike evidence (included as exhibits A and B to its brief on the case).

Turning first to the motion to dismiss, respondent did not previously file at any time during the course of this proceeding any type of motion (e.g., motion to dismiss or motion for a more definite statement)

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<sup>3</sup> Petitioner's consented motion to extend its time to file a reply brief and opposition to respondent's motions to strike is granted.

<sup>4</sup> Respondent did not originally identify the specific rule under which it moved to dismiss for failure to state a claim, but in its reply brief in support of its motion, respondent referred in a footnote to Fed. R. Civ. P. 12(h)(2).

challenging petitioner's pleading. As stated in Wright & Miller, Federal Practice and Procedure: Civil 2d, §1392 (1990):

According to the plain language of Rule 12(h)(2), the three enumerated defenses are waived if they are not presented before the close of trial. Thus, for example, they may not be asserted for the first time on appeal. Nor can these defenses be asserted through any type of post-trial motion. (Footnotes omitted.)

Thus, Fed. R. Civ. P. 12(h)(2) only preserves the defense of failure to state a claim upon which relief can be granted through trial. Regardless of the untimeliness of respondent's motion to dismiss for failure to state a claim, under federal notice pleading, the allegations of a complaint should be construed liberally without requiring technical forms of pleading. See e.g., Fed. R. Civ. P. 1, 8(a), 8(e)(1) and 8(f). Even if the petition to cancel is inartfully drawn, the petition to cancel states a claim upon which relief can be granted. See *Otto Roth & Co. v. Universal Foods Corp.*, 640 F.2d 1317, 209 USPQ 40 (CCPA 1981); and *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982). Also, while respondent did state in its answer to paragraphs 3 and 4 of the petition to cancel that certain

parts thereof were "unintelligible," respondent also stated that it denied said allegations.

Respondent's motion to dismiss for failure to state a claim is denied.

Turning next to respondent's two motions to strike certain evidence, respondent seeks to strike "any evidence relating to petitioner's use of terms as trade names or in ways analogous to service/trade mark use" and "any evidence relating to petitioner's use of the terms 'MEGASTAR' or 'MEGASTAR, INC.' after August 11, 1993." First, we note that in both motions respondent referred only generally to striking "any evidence, documentary or testimonial" relating to the two matters raised by respondent. In its reply brief on the motions to strike, respondent listed specific exhibits which it contends should not be considered with respect to the motion to strike all evidence relating to petitioner's use after August 11, 1993. However, there is no such specificity with regard to the other motion to strike. Clearly the better practice would have been for respondent to specify precisely what portions of testimony and what exhibits or portions of any notice of reliance it sought to exclude in its original motions.

Respondent argues that all evidence relating to petitioner's trade name use and use analogous to trademark/service mark use should be stricken because such uses were not included in the original pleading; there has been no amendment to the pleadings to include such uses; there has been no trial, express or implied, of such issues; and to allow this evidence is prejudicial and unfair to respondent. Respondent's arguments are not persuasive. The original pleading clearly names petitioner as "Megastar, Inc.," and states that petitioner "has adopted and is using the mark 'MEGASTAR, INC.'" for a variety of goods and services. Even though petitioner did not specifically use the words "trade name," we find that the petition to cancel sufficiently informs respondent of the grounds for cancellation, inclusive of trade name rights. Clearly, petitioner was asserting the mark as a trade name as well as a mark for goods and services.<sup>5</sup> See *Innovation Data Processing Inc. v. Innovative Software Inc.*, 4 USPQ2d 1972, footnote 3 (TTAB 1987).

Respondent argues that all of petitioner's evidence of its use as a trademark, service mark, trade name,

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<sup>5</sup> Petitioner's witness (Macrae) testified as to trade name use and there was no objection by respondent. To whatever extent it

and/or use analogous to service mark/trademark use after respondent's filing date is irrelevant. This is incorrect. Petitioner may submit such evidence as it relates to standing, petitioner's continuous use of its mark, and/or to the strength of petitioner's mark. See *International Order of Job's Daughters v. Lindenburg and Company*, 727 F.2d 1087, 220 USPQ 1017, 1020 (Fed. Cir. 1984).

Both of respondent's motions to strike are denied.

A company called Morrisanna Incorporated was founded in 1983, and it was purchased by Nigel Iain Stuart Macrae in 1985. On December 15, 1986 the corporate name was changed to Megastar, Inc. Mr. Macrae created the name "MEGASTAR" based on "mega" meaning "many," and "star" which he associated with satellites. Petitioner has provided design and consulting services for satellite uplink communication systems since the late 1980s; satellite uplink transmission services since the late 1980s/early 1990s; and repair services for electronic satellite communications equipment since 1996. Since 1994 petitioner has continuously sold rebuilt used

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is necessary, the Board considers the pleadings amended to conform to the evidence pursuant to Fed. R. Civ. P. 15(b).

electronic equipment for satellite communications, including microwave radios, under the mark MEGASTAR, INC.<sup>6</sup>

Petitioner has advertised in Satellite Communications magazine every month since 1988.

Petitioner has also advertised in Via Satellite magazine; and in the early years it advertised in Broadcasting magazine. Petitioner's total annual sales (for goods and services) increased from the tens of thousands of dollars in 1987 to several hundred thousand dollars in the 1990s.

There is clear evidence of petitioner's use of MEGASTAR, INC. as both a trade name and as a service mark, such as advertisements in magazines from 1988-1998, invoices, marketing fliers and letterhead stationery. For example, petitioner's mark is used in the forms shown below:

and

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<sup>6</sup> Although petitioner argued in the brief on the case, that it used the mark MEGASTAR, INC. on goods since 1986, it is clear from the record, (and petitioner's attorney acknowledged at the oral hearing), that any valid trademark use by petitioner of this mark on goods did not occur until 1994, which is after respondent's filing date of August 11, 1993. (See the discussion of priority later in this decision.)

<sup>7</sup> Petitioner refers to this special form as its "neon" style of lettering.

Marketing flier

Advertisement

Invoice

Respondent, Harris Corporation, has four business sectors -- communications, semiconductor, electronics and office equipment; and the Microwave Communications Division (in which respondent's witness, Mr. Stillerman, works) is one of four divisions within the communications sector. Respondent adopted the mark MEGASTAR for use on microwave radios, multiplexers, and parts therefor based on an internal name for a project conducted by respondent at its Montreal, Canada facility. Respondent originally filed an intent-to-use application on August 13, 1993 for the mark MEGASTAR for "communications equipment," and in response to the Examining Attorney's request for a more definite identification of goods, respondent amended its identification of goods to "microwave radios, multiplexers, and parts therefor."

Respondent first promoted the sale of its microwave radios under the mark MEGASTAR in November 1994, and has sold them continuously from November 1995 to the present.

Specifically, respondent sells terrestrial (ground-based) point-to-point microwave links which transmit information from one fixed location (e.g., rooftop, tower) to another fixed location, that is, microwave radios.<sup>8</sup> It does not sell such equipment for use in connection with satellite communications.<sup>9</sup> He further explained that with large cellular systems, major traffic locations are interconnected through a backbone network, which are frequently microwave radio backbone systems; and that the linking of cellular backbones together is the type of product or system sold by respondent under the mark MEGASTAR.

The cost of one of respondent's systems ranges from several hundred thousand dollars for the installation of a small system to very large installations costing \$10 million, with a typical sale being around \$2 million.

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<sup>8</sup> Mr. Stillerman testified regarding satellite microwaves as follows: "I believe that the term there is -- these are not microwave radios but these are microwave frequencies. So they are using microwave frequencies or any -- microwave frequencies are defined generically as anything above two gigahertz...." (Dep., p. 65).

<sup>9</sup> We note for the record that respondent corporation does sell products in the field of communications satellites. However, the record is clear that these products are not sold under the mark MEGASTAR. (See respondent's Exhibit 43, Stillerman dep.) In fact, respondent, Harris Corporation, does not use the mark MEGASTAR for any other goods or services. (Stillerman dep., p. 84.)

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Respondent's sales of products sold under the mark MEGASTAR since 1996 have been "at least \$10 million" annually.

Respondent's customers for its product are "typically large, somewhat sophisticated telephone network communications network operators." (Stillerman dep., p. 14.) The customer base consists of three main segments - mobile market (cellular service providers), right-of-way market (e.g., electric utilities), and basic telephone service providers (long distance or local exchange providers).

Respondent promotes and advertises its products sold under the mark MEGASTAR through exhibiting at trade shows (e.g., CTIA -- Cellular Telecommunications Industry Association and UTC -- Utilities Telecommunications Council) and distributing brochures and delivering technical papers at seminars/conferences, and advertising in trade publications. It sells the involved goods either through its direct sales personnel who establish relationships with potential customers in response to formal requests for proposals, or through partnership with companies such as Lucent Technologies and/or AT&T. Respondent's customers frequently have planning, technology and procurement departments, and the customers

issue formal requests for proposals with exacting specifications.

In this case, petitioner essentially asserts a claim of common law trade name, trademark and service mark rights in the term MEGASTAR, INC. First, we find petitioner's unregistered term MEGASTAR, INC. to be inherently distinctive in the context of the goods and services involved herein. See *Towers v. Advent Software Inc.*, 913 F.2d 942, 16 USPQ2d 1039 (Fed. Cir. 1990); and *Otto Roth & Co. v. Universal Foods Corp.*, 640 F.2d 1317, 209 USPQ 40 (CCPA 1981). Second, we find that petitioner's use of the term MEGASTAR, INC. [e.g., in larger letters than the address, and/or in a stylized form (see the uses shown above)], constitutes valid use as a trade name, trademark, and service mark for petitioner's goods and services. See *In re Univar Corp.*, 20 USPQ2d 1865 (TTAB 1991).

Because petitioner is relying on common law rights in its mark, petitioner is restricted to rights in the mark for the goods and services on which petitioner has proven it uses the mark, and here that is limited to goods and services specifically for satellite communications.

The overall record herein establishes<sup>10</sup>, and respondent does not dispute (respondent's reply brief on its motions to strike, p. 2), petitioner's prior continuous use of MEGASTAR, INC. as a service mark for design and consulting services for satellite uplink communication systems and satellite uplink transmission services, all prior to respondent's constructive first use date of August 11, 1993.

However, petitioner, as acknowledged and clarified at the oral hearing, was the second party to use the mark MEGASTAR on goods. We recognize that prior to 1994 petitioner inserted its MEGASTAR, INC. labels on the inside of rebuilt goods manufactured by others which petitioner sold as used, but this was for purposes of internal control when a product was returned to petitioner. Petitioner's witness, Mr. Macrae, testified, for example, as follows (pp. 65-66):

Q. Under what circumstances did Megastar, Inc. place stickers such as Exhibit 33 on equipment it sold?

A. ... We've also, I think as I've testified previously, stuck labels inside of equipment, just to make sure that if we get it back, that we get back the equipment we shipped out.

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<sup>10</sup> See *West Florida Seafood Inc. v. Jet Restaurants Inc.*, 31 F.3d 1122, 31 USPQ2d 1660 (Fed. Cir. 1994).

This placement of the labels inside the equipment, not visible to the consumer, did not amount to trademark use or even use analogous to trademark use, and petitioner does not contend to the contrary. Thus, petitioner does not have priority with regard to any goods; but petitioner clearly has priority regarding trade name and service mark use for its satellite uplink transmission services and design and consulting services for satellite uplink communication systems.<sup>11</sup>

We turn then to the issue of likelihood of confusion.

Our determination of this issue is based on an analysis of all the probative facts in evidence that are relevant to the factors bearing on likelihood of confusion. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

Petitioner's common law mark and trade name MEGASTAR, INC. and respondent's registered mark MEGASTAR are essentially identical. Thus, this case boils down to whether petitioner's services and respondent's goods with which these marks are used are commercially related in

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<sup>11</sup> Inasmuch as this record establishes petitioner's prior use of MEGASTAR, INC. as a trade name and as a service mark, we need

such a way that the use of similar marks thereon is likely to cause confusion.

Petitioner is a dealer of satellite transmission and communication services<sup>12</sup> and respondent is a manufacturer of earth telecommunications equipment. Respondent's first use of its mark on its goods and petitioner's first use of its mark on its services (petitioner's rights being limited to its common law uses) do not appear to be in conflict.

Respondent's goods, as identified in the involved registration, are "microwave radios, multiplexers, and parts therefor." The meaning of the term "microwave radio" is a critical factual issue in this case.

Respondent argues as follows in that regard:

"The trade distinguishes between 'microwave radios' and 'satellite communication systems' although both

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not reach the question of whether petitioner's use constitutes use analogous to service mark use.

<sup>12</sup> Petitioner described its services in the brief as "design and consulting services for satellite uplink communication systems," "satellite uplink transmission services" and "repair services for electronic satellite communication equipment" (pp. 10-11). At the oral hearing, petitioner's attorney was asked which services petitioner offered as of 1993, and he responded uplink, clearinghouse, design and consulting and repair services. Finally, on page 31 of its brief, petitioner refers to its mark being used "in connection with its services in collecting and selling used and rebuilt microwave components for satellite systems and in designing microwave communications systems using those components."

involve the transmission and reception of electromagnetic energy as microwave frequencies. . . . Thus Harris has properly identified the goods for which MEGASTAR is registered by their common commercial name, i.e., 'microwave radios', and has, by the selection of the term 'microwave radios' excluded satellite communications from within the scope of the registration." (Brief, p. 4); and

"Thus Petitioner's trade as reflected in the identification of goods for which Petitioner sought registration has at all times been satellite communications equipment used to internationally transmit telephone traffic. Petitioner has failed to produce one iota of documentary evidence in support of the sale of any equipment for the terrestrial transmission of telephone signals. (Brief, p. 13).

Respondent's witness, Mr. Stillerman, was asked by petitioner's attorney, about an article titled "Microwave Radio: The Crucial Link in the Wireless Revolution" which petitioner's attorney had printed from respondent's website. (Stillerman dep., pp. 65-66, and Exhibit 38.) Mr. Stillerman had not seen the article before, but he testified as follows:

Q. One question on the statement that was made in there. It's on page four of five. The third paragraph from the bottom it says, 'Microwave is also used in radio and television transmissions. Satellite TV relies on microwave repeaters on the satellite to retransmit TV signals to a receiving station on earth. Microwave communications via satellite provide a

more reliable signal, longer land-based radio waves and a better picture.'

The question I had for you is if you agree with that statement or not?

A. Like I said, I am not aware of the use of microwave radios in -- I know that the use of the frequency bands between satellite and microwave transmission has been separated. It's separated by the FCC and regulatory agencies around the world. So there are similar technologies used, you know, similar frequency or radio frequency technologies which are used as parts of satellites.

I am not familiar at all with satellite repeaters. That is not my business area so I can't comment on that, you know.

Also on cross examination, and as previously noted herein (footnote 8, infra), Mr. Stillerman was asked whether "satellite TV relies on microwave repeaters on the satellite to retransmit TV signals to a receiving station on earth." He responded "I believe that the term there is -- these are not microwave radios but these are microwave frequencies. So they are using microwave frequencies or any -- microwave frequencies are defined generically as anything above two gigahertz..." (Dep., p. 65).

Petitioner submitted printed publications (standard English dictionary definitions of "microwave" and "radio," a portion of the McGraw-Hill Encyclopedia of Electronics and Computers under the heading "Microwave,"

and an article downloaded from respondent's website titled "Microwave Radio: The Crucial Link in the Wireless Revolution"<sup>13</sup>) to show the meanings of the words "microwave" and "radio" and to show that respondent's goods encompass both terrestrial and satellite applications. Also, both parties' witnesses testified regarding the respective goods and services, including matters such as the major components of a microwave radio, which include a transmitter, a receiver, a modulator and an amplifier; and that microwave radio systems would also include an antenna, and a waveguide (Macrae dep., p. 18, and Stillerman dep., pp. 58-63).

Because it is imperative that the Board more fully understand the specific nature of respondent's goods, identified as "microwave radios" (as well as "multiplexers"), the Board takes judicial notice of the following definitions from McGraw-Hill Illustrated Telecom Dictionary (2000):

(1) "microwave" is defined as **"In telecommunications, this is usually a reference to a terrestrial microwave link. The link is made by two radio transceivers equipped with parabolic dish antennas pointed directly at each other. (Fig. M.11). Radio can carry point-to-point transmissions at many bandwidths, including, DS1, DS@, Ds3,**

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<sup>13</sup> This article is also in the record as Exhibit 38 to the Stillerman deposition.

STS1 and OC1. Their range can vary, depending on the size of the antenna (dish), weather in the region, and the amount of power emitted. Including all of the previous factors, a link can range from 0 to 50 miles. **For a diagram of a microwave system, see *Terrestrial Microwave.*** (italics emphasis in original, bold emphasis added);

(2) **"terrestrial microwave"** is defined as **"Microwave radio has become a very economical way to bypass construction costs of broadband private-line services.** Many *CAPS* (*Competitive-Access Providers*) have access to microwave radio resources, such as licensing, equipment, and installation (Fig. T.12). **Digital microwave is also called an eyeball shot, 38 Gig, or just radio. ..."** (italics emphasis in original, bold emphasis added); and from

Newton's Telecom Dictionary: The Official Dictionary of Telecommunications (1998):

(1) "multiplexer" is defined as "Electronic equipment which allows two or more signals to pass over one communications circuit. That 'circuit' may be a phone line, a microwave circuit, a through-the-air TV signal. That circuit may be analog or digital. There are many multiplexing techniques to accommodate both."

The Board has carefully reviewed the record, and petitioner has not established by a preponderance of the

evidence<sup>14</sup> that the term "microwave radio" encompasses satellite applications. To the contrary, this record, including the telecommunications industry dictionary definitions, shows that respondent's "microwave radios," as identified, would be understood to be essentially solely for terrestrial transmission. That is, respondent's identification of goods, by definition, does not relate to satellite transmissions, whereas petitioner's goods and services all relate to satellite communications and transmissions. (See, e.g., Macrae dep., page 11 - line 4, page 110 - lines 4 - 5, petitioner's Exhibits 6, 16 and 17.)

We frankly concede that this is not a crystal clear case, with close questions and evidence that is somewhat vague. But the weight of the evidence, as explained above, shows to our satisfaction that the term "microwave radio" in respondent's identification of goods is a term of art that refers to a terrestrial based system such as respondent's and that, in the relevant trade and industry, it does not mean "satellite." Of course,

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<sup>14</sup> See *Cerveceria Centroamericana, S.A. v. Cerveceria India Inc.*, 892 F.2d 1021, 13 USPQ2d 1307 (Fed. Cir. 1989). We note that in *Recot, Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1897 (Fed. Cir. 2000), the Court held that it reviews factual findings of the Board pursuant to the "substantial evidence" standard under the Administrative Procedures Act, 5 U.S.C. §706(2)(E).

petitioner had the burden of proving that its services are related to the goods set forth in the registration. The record before us, however, falls short of establishing that petitioner's services are related to respondent's goods, as they are identified in the registration, such that confusion is likely. See *Electronic Data Systems Corp. v. EDSA Micro Corp.*, 23 USPQ2d 1460 (TTAB 1992).

We specifically address the appearance of the term "microwave radios" in petitioner's April 1991 catalog, which must be read in context with the remainder of the catalog, all of which relates to satellite services. Even if petitioner misused a term of art (e.g., "microwave radio" in its 1991 catalog), petitioner cannot bootstrap such use to save or expand its rights, when petitioner was really offering only satellite services at that time.

In light of our finding that respondent's identification of goods does not encompass "satellite" communications, we disagree with petitioner's argument, based on the case of *Octocom Systems, Inc. v. Houston Computers Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990), that the trade channels and sophistication of purchasers are irrelevant in this case.

Respondent contends that the parties' respective channels of trade are separate and distinct, and that the involved very expensive goods and services are sold to sophisticated purchasers.

Clearly, these goods and services are not sold to the general consuming public. The very high cost of these involved goods and services (respondent's goods costing hundreds of thousands or millions of dollars and petitioner's services costing thousands of dollars), and the sophistication of the purchasers of the involved goods and services lead to the obvious conclusion that purchasers would exercise great care and would distinguish the trade name, trademark and service mark of petitioner from the respondent's trademark.

We find that petitioner has not established with sufficient evidence that its satellite services (uplink, design and consulting, repair, clearinghouse) are offered in the same trade channels as respondent's goods identified as "microwave radios, and multiplexers" or that both are purchased by the same class of customers.

Even if there were sufficient evidence of record to establish sales through the same or similar trade channels to the same purchasers, which there is not, the Court of Appeals for the Federal Circuit stated in

**Cancellation No. 26056**

Electronic Design & Sales Inc. v. Electronic Data Systems Corp., 954 F.2d 713, 21 USPQ2d 1388, 1392 (Fed. Cir. 1992):

"...[w]here the purchasers are the same, their sophistication is important and often dispositive because '[s]ophisticated consumers may be expected to exercise greater care.' Pignons S.A. de Mecanique de Precision v. Polaroid Corp., 657 F.2d 482,, 489, 212 USPQ 246, 252 (1st Cir. 1981). '[T]here is always less likelihood of confusion where goods are expensive and purchased after careful consideration.' (Citation omitted)."

The record here shows that respondent's customers are typically large communications network operators and the individuals making the purchasing decisions are professional, technically trained people, with the cost of respondent's MEGASTAR microwave radio system typically being around \$2 million. Petitioner described its own domestic customers as "sophisticated" as compared to its international customers who frequently do not know "about satellites" (Macrae dep., pp. 69-70). In this case, the parties' goods and services involve technical terrestrial and satellite communications, are very expensive, and are purchased only after careful consideration by sophisticated purchasers. All of these factors weigh in respondent's favor.

Although petitioner argued that its mark is famous,

we do not find that approximately eleven years of use, sales of goods and services totaling about \$3.9 million<sup>15</sup> for the eleven year span from 1987-1997, and petitioner's own statement that "I think we're pretty well-known in the trade" (Macrae dep., p. 70) establish fame. There is not sufficient evidence that purchasers are aware of petitioner's name and mark.

Finally, the absence of any instances of actual confusion weighs in respondent's favor, especially in the circumstances of this case, where both parties have used essentially identical marks for their respective goods and services for several years, but the parties have not encountered any instances of actual confusion by consumers. And considering the technical nature and the high cost of the goods and services, instances of confusion as to source would most likely be reported by customers or potential customers. (In fact, in this case Mr. Macrae and Mr. Stillerman both testified that petitioner was not aware of respondent until the Examining Attorney cited respondent's registration against petitioner, and respondent was not aware of

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<sup>15</sup> Although petitioner's Exhibit 2 (a listing its annual sales figures) was submitted as "confidential," petitioner referred to

petitioner until the institution of this cancellation proceeding.)

In summary, despite the close similarity of the respective marks, in balancing the relevant du Pont factors (similarity or dissimilarity of the marks, similarity or dissimilarity and nature of the goods/services, similarity or dissimilarity of the channels of trade, conditions under which and buyers to whom sales are made (i.e., sophistication of purchasers, cost of goods/services), fame of the prior mark, the nature and extent of any actual confusion, and the length of time during and the conditions under which there has been concurrent use without evidence of actual confusion), we conclude that confusion is not likely.

Decision: The petition to cancel is denied.

E. W. Hanak

T. J. Quinn

B. A. Chapman

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the above total number in its reply brief, which was not submitted as "confidential."

**Cancellation No. 26056**

Administrative Trademark  
Judges, Trademark Trial and  
Appeal Board