

**THIS DISPOSITION  
IS NOT CITABLE AS PRECEDENT  
OF THE T.T.A.B.**

Paper No. 18  
PTH

9/28/00

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re **Unitek Miyachi Corporation**

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Serial No. 75/**215,856**

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**Richard J. Ward, Jr. of Christie, Parker & Hale, LLP for  
Unitek Miyachi Corporation.**

**Angela M. Micheli, Trademark Examining Attorney, Law Office  
108 (David E. Shallant, Managing Attorney).**

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Before **Hairston, Chapman and Bottorff**, Administrative  
Trademark Judges.

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

Unitek Miyachi Corporation has appealed from the  
refusal of the Trademark Examining Attorney to register the  
mark PHASEMASTER for "welding control equipment, namely,  
programmable AC resistance welding controllers."<sup>1</sup>

Registration has been refused pursuant to Section 2(d)  
of the Trademark Act, 15 U.S.C. §1052(d), on the ground

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<sup>1</sup> Serial No. 75/251,856 filed December 19, 1996, alleging dates  
of first use of October 1980.

that applicant's mark, when applied to its goods, so resembles the registered mark PHASEMASTER for "rotating transformers",<sup>2</sup> as to be likely to cause confusion or mistake or deception.

Briefs have been filed. Because applicant withdrew its request for an oral hearing, no oral hearing was held. We affirm the refusal to register.

At the outset, we note that applicant's mark and the cited mark are identical. We focus our attention then, as have applicant and the Examining Attorney, on the respective goods.

It is essentially the Examining Attorney's position that applicant's programmable AC resistance welding controllers and registrant's rotating transformers are related goods. According to the Examining Attorney, such goods could be used together inasmuch as transformers are used to power welding equipment. In support of her position that the goods are related, the Examining Attorney made of record copies of two third-party registrations wherein companies have registered a single mark for welding controls, on the one hand, and welding transformers for welding machines, on the other hand. In addition, the Examining Attorney submitted three registrations owned by

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<sup>2</sup> Registration No. 965,031 issued July 31, 1973; renewed.

applicant for marks which cover various welding equipment, including weld transformers. Also, the Examining Attorney maintains that the product brochures for applicant's and registrant's goods, which were made of record by applicant, show that the goods may be used together. In particular, registrant's brochure states that its rotating transformers may be used "[I]n industry for welding ...." Applicant's brochure indicates that a welding transformer is one of the required accessories for operating its programmable AC resistance welding controllers.

Applicant, on the other hand, argues that the goods are dissimilar and that there is no overlap between customers and channels of trade. According to applicant, its programmable AC resistance welding controllers are sold primarily to manufacturers of precision electronic circuits, whereas registrant's rotating transformers are used in heavy duty applications in such industries as agriculture and construction. Applicant states, in this regard, that:

In this case, Applicant's customers are in the business of manufacturing sensitive electronic circuitry and have a "focused" or specific need for a programmable welding controller that will not burn-out the electronic circuitry during the welding or soldering process. Applicant's customers would never consider the purchase of a heavy

duty rotatable transformer, used primarily to convert single-phase electrical power to three-phase electrical power, for use with a programmable welding controller. The products simply are not compatible and are designed for different purposes that do not interrelate.

Finally, applicant maintains that there is no likelihood of confusion because there have been no instances of actual confusion for nearly twenty years.

In considering the goods of applicant and registrant, two propositions must be kept in mind. First, when the marks of the parties are the same or almost so, it is only necessary that there be a viable relationship between the goods in order to support a likelihood of confusion. In re Shell Oil, 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993).

Second, it must be remembered in proceedings such as this, the question of likelihood of confusion must be determined based upon an analysis of the goods recited in the applicant's application vis-à-vis the goods recited in the registrant's registration, rather than on what the evidence indicates such goods actually to be. See, e.g., Canadian Imperial Bank of Commerce N.A. v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). In particular, it is well settled that the issue of likelihood of confusion must be determined in light of the goods as respectively set forth in the involved application

and cited registration and, in the absence of any specific limitations therein, on the basis of all normal and usual channels of trade and methods of distribution of such goods. See, e.g., *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1993); and *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983).

Applicant's goods, as they are identified in the application, are programmable AC resistance welding controllers. In the absence of any limitations as to the areas of use of these goods, we must presume that they may be used, not only in the manufacture of electronic circuitry, but in all welding applications, including those which utilize rotating transformers. Whether applicant's actual goods are used in connection with registrant's actual goods is not the relevant consideration. What is relevant is that the goods as described in the application are used in connection with the goods as described in the registration. See *Canadian Imperial Bank, supra*. Under the circumstances, we find that the Examining Attorney has made a prima facie case that the goods are related and applicant has not rebutted this showing. There is no evidence that rotating transformers, per se, are not used with programmable AC resistance welding controllers. In point of fact, as we noted above, the product brochure of

applicant indicates that a welding transformer is a required accessory for its programmable AC resistance welding controllers.

In view of the foregoing, we find that there is a viable relationship between applicant's and registrant's goods. In finding that the goods are related, we have accorded little weight to the third-party registrations and the registrations owned by applicant. Two third-party registrations are insufficient in number to establish that there is an overlap between applicant's and registrant's goods. Also, because applicant's registrations are for marks which are different from the mark herein and do not also cover welding controllers, they are not probative as to the relatedness of applicant's and registrant's goods.

Further, applicant's assertion that it is unaware of any instances of actual confusion despite close to twenty years of concurrent use of the marks by applicant and registrant does not persuade us that no likelihood of confusion exists in this case. We cannot determine on this record that there has been any meaningful opportunity for actual confusion to have occurred in the marketplace, and accordingly we cannot conclude that the alleged absence of actual confusion is entitled to significant weight in our likelihood of confusion analysis in this case. See

Gillette Canada Inc. v. Ranir Corp., 23 USPQ2d 1768 (TTAB 1992).

Finally, to the extent that we have any doubt in this case, it must be resolved against applicant as the newcomer. In re Hyper Shoppes (Ohio), Inc., 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988).

In view of the foregoing, we conclude that customers familiar with registrant's rotating transformers sold under the mark PHASEMASTER would be likely to believe, upon encountering applicant's identical mark PHASEMASTER for programmable AC resistance welding controllers, that the goods originated with or were somehow associated with the same source.

**Decision:** The refusal to register under Section 2(d) of the Trademark Act is affirmed.

P. T. Hairston

B. A. Chapman

C. M. Bottorff  
Administrative Trademark Judges  
Trademark Trial and Appeal Board

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