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THE TTAB

March 23, 2004  
Paper No. 12  
PTH

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Ritchie Engineering Company, Inc.

Serial No. 78110230

Edwin E. Voight II of Vidas, Arrett & Steinkraus, P.A. for  
Ritchie Engineering Company, Inc.

Amy E. Hella, Trademark Examining Attorney, Law Office 110  
(Chris Pedersen, Managing Attorney).

Before Hohein, Hairston and Bottorff, Administrative  
Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

Ritchie Engineering Company, Inc. has filed an  
application to register the mark ACCUPROBE (in typed form)  
on the Principal Register for "electronically powered  
detectors for detecting refrigeration gas leaks within air  
conditioning systems and refrigeration systems to

effectuate repairs to air conditioning and refrigeration systems previously placed into service.”<sup>1</sup>

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant’s mark, when applied to the identified goods, so resembles the mark shown below, which is registered for “microelectronic sensing probes as components [sic] parts of larger equipment,”<sup>2</sup> as to be likely to cause confusion, mistake or deception.



Applicant has appealed. Briefs have been filed, but no oral hearing was requested. We affirm the refusal to register.

Our likelihood of confusion determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the likelihood of confusion factors set forth in *In re E. I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In considering the evidence of record on these

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<sup>1</sup> Serial No. 78110203, filed on February 21, 2002, which is based on a bona fide intention to use the mark in commerce.

<sup>2</sup> Registration No. 1,375,570, issued December 17, 1985. Section 8 and 15 affidavits have been accepted and acknowledged, respectively.

factors, we keep in mind that "[t]he fundamental inquiry mandated by 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and the differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29. (CCPA 1976).

First, we turn to a determination of whether applicant's mark and the registered mark, when viewed in their entireties, are similar in terms of appearance, sound, connotation and commercial impression. The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods or services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

Applicant argues that the marks are significantly different because its mark is simply in typed form whereas the cited registered mark is a design mark consisting of a star or light beam symbol. Further, applicant contends that due to the design in the cited registered mark, this

mark connotes cutting edge technology whereas applicant's mark has no such connotation.

Notwithstanding applicant's contentions, we find that applicant's mark and registrant's mark are similar in appearance, differing only in the design element, which does not substantially distinguish the marks visually.

Also, we find that the marks are legally identical in terms of sound because the cited registered mark will be pronounced as "accuprobe."

In terms of connotation and commercial impression, we find that both applicant's and registrant's marks connote an "accurate probe." We are not persuaded by applicant's argument that because of the design element in the cited registered mark, such mark connotes cutting edge technology, and thus is readily distinguishable from applicant's mark.

In sum, we find that applicant's mark and the cited registered mark are highly similar in terms of overall commercial impression. Thus, confusion is likely to result from the contemporaneous use of the marks on identical or related goods.

Turning then to a consideration of the goods, applicant argues that its goods and the goods in the cited registration are extremely dissimilar in nature and travel

in different channels of trade. According to applicant, its goods are "used by blue collar workers to detect and repair refrigerant gas leaks," whereas registrant's goods are probes for "[use] in a clean room environment to detect manufacturing defects in printed electrical circuits."

(Brief, p. 4). Applicant maintains that its goods travel in "after-market" trade channels to service professionals in contrast to registrant's goods which travel in "before-market" trade channels to manufacturers. Further, applicant argues that probes and detectors are distinct instruments. Applicant points to the following definition of the word "probe" in Merriam-Webster's Collegiate Dictionary (10<sup>th</sup> ed): "various testing devices or substances as (1): a pointed metal tip for making electrical contact with a circuit being checked." In addition, applicant argues that its goods and registrant's goods are sold to sophisticated consumers who are unlikely to be confused.

We concur with the Examining Attorney, however, that the goods at issue are sufficiently related that their marketing under the highly similar marks in this case is likely to cause confusion. As the Examining Attorney correctly notes, it is not necessary that goods be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is sufficient that

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the goods or services are related in some manner, or that the circumstances surrounding their marketing are such, that they would be likely to be encountered by the same persons in situations that would give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same source or that there is an association or connection between the sources of the respective goods or services. In re Melville Corp., 18 USPQ2d 1385 (TTAB 1991); In re International Telephone & Telegraph Corp., 197 USPQ2d 910 (TTAB 1978).

Moreover, it is well established that the issue of likelihood of confusion must be determined on the basis of the goods as they are set forth in the involved application and the cited registration, and not in light of what such goods are shown or are asserted to actually be. Octocom Systems Inc. v. Houston Computer Services Inc., 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1815-16 (Fed. Cir. 1987). Thus, where a registrant's goods are broadly described as to their nature and type, it is presumed that in scope the registration encompasses not only all of the goods of the nature and type therein, but that the identified goods move

in all channels of trade which would be normal for those goods and that they would be purchased by all potential buyers. In re Elbaum, 211 USPQ 639, 640 (TTAB 1981).

Here, there is no evidence of record to support applicant's assertion that registrant's goods are in the nature of probes used in a clean room environment to detect manufacturing defects in printed electrical circuits. However, even if such evidence were of record, it could not be given consideration in our determination of the likelihood of confusion issue. As the Examining Attorney points out, the identification of registrant's goods (i.e., microelectronic sensing probes as component parts of larger equipment) is broad enough to encompass probes that are component parts of air conditioning and refrigeration equipment for detecting refrigeration gas leaks within these systems. Registrant's goods, therefore, must be considered closely related to applicant's goods, such that the marketing of the respective goods under the highly similar marks in this case, would be likely to cause confusion as to the source or sponsorship thereof.

As to applicant's contention that probes are different in nature from detectors, we judicially notice the following excerpts taken from The American Heritage

Dictionary of the English Language (3d ed. 1992) submitted with the Examining Attorney's brief:

*probe*: an exploratory action, expedition, or device, especially one designed to investigate and obtain information on a remote or unknown region: *electronic probes into the crust of the earth.*

*detector*: one that detects, especially a mechanical, electrical, or chemical device that automatically identifies and records or registers a stimulus, such as environmental change in pressure or temperature, an electrical signal, or radiation from a radioactive material.

Also, we judicially notice the excerpt submitted with the Examining Attorney's brief from The Original Roget's Thesaurus of English Words and Phrases (1994), wherein "probe" is listed as a synonym for "detector." It is clear from these excerpts that the words "probe" and "detector" are virtually identical in meaning.

Finally, we recognize that applicant's goods and those of registrant are not impulse items and would, instead, be marketed to and bought by knowledgeable persons who would exercise care in the selection of applicant's and registrant's products. Nonetheless, this does not necessarily mean that such persons would be entirely immune from confusion as to source or sponsorship. *Wincharger Corp. v. Rinco, Inc.*, 297 F.2d 261, 132 USPQ 289 (CCPA 1962).

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