

Partial Section 2(d) Refusal to Register – Likelihood of Confusion with RN 3451924

Applicant respectfully disagrees with the Examining Attorney's partial Section 2(d) refusal to register based on RN 3451924 ARCOS for "spectrometers" in IC 9 as compared to SN 87091227 ARCUS for "Industrial robots other than for manufacturing semiconductors; Robotic arms for industrial purposes other than for manufacturing semiconductors; Springs being parts of machines; Ball-bearings for machines, namely, robots, shaft couplings as parts of machines, shaft bearings being parts of machines, Bearing inserts for machines; Plastic processing machines and apparatus; Machines and apparatus for manufacturing rubber goods; Industrial robots for use in assisting with the handling and supporting of workpieces other than for manufacturing semiconductors; Industrial Service Robot other than for manufacturing semiconductors; Industrial robot for collaborative purposes other than for manufacturing semiconductors; Industrial robots for disaster response other than for manufacturing semiconductors" in IC 7 and "Optical apparatus and instruments for sensors, namely, optical lenses, optical reflectors; optical apparatus and instruments for industrial robots, namely, optical inspection apparatus, cameras, laser scanners; Optical profilers for sensors, Optical profilers for industrial robots; Optical sensors, infrared sensors, namely, electronic sensors for detecting motion; Pressure sensors; Angle sensors, namely, a device to measure angles using industrial field; Thermal sensors for human detection, namely, heat sensors for detecting the presence of humans; Optical sensors for detecting the position of objects; Motion sensors, heat detectors, proximity sensors; Liquid level sheets; Alarm sensors, motion sensors for security purpose; Piezoelectric switches; Static electricity sensors; Electric current sensors; Ammeters; Electronic machines, namely, electronic sensors for measuring pressure, position, heat, not including Geiger counters, cyclotrons not for medical purposes, industrial X-ray machines and apparatus not for medical use, industrial betatrons not for medical use, magnetic object detectors, seismic exploration machines and apparatus, hydrophone machines and apparatus, echo sounders, ultrasonic flaw detectors, ultrasonic sensors, and electron microscopes; Conductive tape for electrical purposes; all of the foregoing for use in connection with industrial robots, assisting robots for agricultural purposes, robots for non-medical nursing care, robots for assisting physically disabled individuals and the elderly, robots for security and premises guarding and theft prevention purposes, robots for entertainment purposes, robots for disaster-relief purpose, robots for operating metalworking machines purpose, humanoid robots with artificial intelligence, robots with artificial intelligence, robots for assisting mining, robots for assisting construction, robots for assisting loading-

unloading for burden, robots for assisting lumbering, robot for assisting industrial fishing, robots for painting, robots for assisting woodworking, robots for teaching, robots enhancing physical abilities extend to lift, move and hold assisting human activities for industrial purpose, agricultural purposes, industrial fishing purposes, forestry purposes, medical purposes, nursing care purposes, security purposes, surgical purpose, security surveillance purpose, vacuum cleaners use, disaster relief purposes, entertainment purposes, hobby purposes, education and laboratory purposes, robotic exoskeleton apparatus worn by humans for the purpose of enhancing the strength and endurance of the person wearing the apparatus, robots for assisting forestry purposes, robots for medical purposes, robots for nursing care purposes, robots for security purposes, robots for surgical purpose, robots for security surveillance purpose, robots for vacuum cleaners use, robots for hobby purposes, robots for education and laboratory purposes; Robots for guarding purpose, namely, theft prevention purposes, security surveillance purposes and security guarding for facilities, and not for industrial, medical purposes or for use as a toy; Robots for personal entertainment use and not for industrial, medical purposes or for use as a toy; Robots for hobby use and not for industrial, medical purposes or for use as a toy; Piezoelectric switches; high frequency apparatus for welding; electronic door closing control systems, conductive tape for sensors, conductive tape for industrial robots” in IC 9 (as amended herein).

Initially, Applicant continues to rely on and reiterates the arguments presented in its response on February 16, 2017. In addition, the *In re E.I. du Pont de Nemours & Co.*, 177 USPQ 563 (CCPA 1973) factors for determining a likelihood of confusion mandate a finding in favor of Applicant and require the Examining Attorney to withdraw the refusal. The relevant factors here are the differences in the goods and the sophistication of purchasers.

1. Differences in the Goods

The Examiner’s partial refusal relates solely to the following list of goods cited in the Office Action dated August 16, 2016:

“Optical apparatus and instruments for sensors; optical apparatus and instruments for industrial robots; optical profilers for sensors; optical profilers for industrial robots; optical sensors, infrared sensors; pressure sensors; angle sensors; thermal sensors for human detection; position sensors; motion sensors, heat detectors, proximity sensors; liquid level sensors; motion sensitive sensors for pressure measuring sheets; alarm sensors, motion sensors for security purpose; static electric sensors; electric current sensors; ammeters; electronic machines not including Geiger counters, industrial x-ray machines and apparatus not for medical use, cyclotrons not for medical purposes; industrial betatrons not for medical use; magnetic prospecting machines, magnetic object detectors, seismic exploration machines

and apparatus, hydrophone machines and apparatus, echo sounders, ultrasonic flaw detectors, ultrasonic sensors, and electron microscopes” in International Class 9.

It should be noted that the cited registration identifies “spectrometers” in IC 9. As defined by www.dictionary.com, a spectrometer “is an optical device for measuring wavelengths, deviation of refracted rays and angles between faces of a prism, especially an instrument consisting of a slit through which light passes, a collimator, a prism that deviates the light, and a telescope through which the deviated light is viewed and examined; any instrument for producing a spectrum, especially one in which wavelength, energy, intensity, etc. can be measured.” (See Exhibit A). Examples of spectrometers are devices that separate particles, atoms, and molecules by their mass, momentum or energy. As indicated in promotional literature, the “ARCOS spectrometer excels in industrial and academic applications for the most advanced elemental analysis of metals, chemicals, petrochemicals and other materials. It is a new pinnacle of productivity and performance for inductivity coupled plasma optical emission spectrometers.” (See Exhibit B). The ARCOS machine is very large and costs more than \$130,000 to purchase. This is not a casual purchase. Furthermore, individuals in the market for such a machine carefully analyze and consider the manufacturer of such goods.

On the contrary, Applicant uses the ARCUS mark in connection with materials and sensors that are used with robotic hand technologies. The Applicant’s components are to be incorporated in robotic hands that are used for a variety of purposes, such as agricultural purposes, non-medical nursing care, for assisting physically disabled and elderly individuals, for security purposes, for entertainment purposes, for disaster-relief purposes, just to name a few. These components are entirely unrelated to those identified by the Registrant and target a very specific audience. Aside from the goods both being classified in IC 9, there are no other similarities. The purposes and physical manifestations of Applicant’s goods are so different from those in the cited registration that no connection between the two would be made by the respective sets of consumers for the goods – or the desired outcome produced by the respective goods – offered by each party. The proper inquiry should be whether the products appeal to the same market and whether purchasers would generally expect them to emanate from the same source. *ILC Industries, Inc. v. ILC, Inc.*, 175 USPQ 623, 626 (TTAB 1972). As stated above, the answer to that question in this case is no.

The crux of the matter here is that Applicant’s goods and the goods in the cited registration are unquestionably not competitive but rather operate in different universes. In *Hoover Co. v. Citicorp Venture Capital Ltd.*, 6 USPQ2d 1396 (DC SDNY 1987), the Court held that HOOVER for vacuum cleaners and other home appliances was not confusingly similar to HOOVER GROUP for ball bearings and other

components parts sold only to manufacturers. The Court recognized that the marks were strong, were used in different markets and were used on products that are marketed in different manners. Applicant contends that the same reasoning should be used in the present case. Where products are dissimilar and non-competing, the degree of similarity necessary to support a finding of confusing similarity is greater than with competing products. *Exquisite Form Industries, Inc. v. Exquisite Fabrics of London*, 183 USPQ 666 (DC SDNY 1974); *See also In re the Coca-Cola Co.*, SN 78449413 (October 29, 2006) holding that SPRITE QUENCH for beverages is not confusingly similar to QUENCH in various design forms for soft drinks. In the present case, the marks are not identical (ARCQS vs. ARCUS) and they are not used on similar or competing goods. Applicant's goods and those of the cited registrant are highly specialized and are not sold in the same channels of trade or to the same individuals. Both Applicant's goods and the Registrant's goods target very specific users and serve very different purposes. Accordingly, Applicant contends that the differences in the goods and their intended uses and audiences, along with the differences in the marks, are enough to find that there is no likelihood of confusion.

2. Sophistication of Purchasers

The Examining Attorney must recognize that purchasers of both Applicant's goods and those of the cited registrant are highly specialized and sophisticated, and the differences in the goods covered are quite significant. When those differences are sufficiently vast, the marks can co-exist on the Register because the respective consumer groups for each are so disparate that neither would be confused about the source of the goods identified by each mark.

The goods in question are highly specialized and are clearly, by their nature, targeted to and used by specific individuals with very defined needs; they also move through very specific and individual channels of trade. A casual consumer is not in the market for a spectrometer costing more than \$100,000. Similarly, a casual consumer is not in the market for components which are used in the make-up of a robotic hand. Neither of these marks are used on goods which are sold as typical purchases. Rather, purchasers of both of these goods will use care and consideration in selecting the product and being aware of the source of the goods. When goods are intended for a specialized customer group, the degree of care and sophistication of the intended users strongly mitigates against a finding of likelihood of confusion. In *In re Trackmobile Inc.*, the Board found that use of design marks containing the letters "TM" on mobile railcar movers and light railway motor tractors was not likely to cause confusion because the goods were sold to industry rather than the public at large and the goods were only "somewhat" related. *In re Trackmobile Inc.*, 15 USPQ2d 1152 (TTAB 1990). Applicant contends that its

mark is not identical to the cited registration, and the goods sold by both parties here are sold to industry and not at all related.

In addition, it has also been held that “[C]onfusion is less likely where goods are expensive and are purchased after careful consideration than where they are purchased casually.” *Magnaflux Corp. v. Sonoflux Corp.*, 109 USPQ 313 (CCPA 1956). The comments of esteemed commentator J. Thomas McCarthy on expensive goods and likelihood of confusion are particularly appropriate:

If the goods are expensive, the reasonably prudent buyer does not buy casually, but only after careful consideration. Thus, confusion is less likely than where the goods are cheap and bought casually.... Thus, the reasonably prudent buyer is assumed to take more care in purchasing “expensive” items which he buys infrequently, than in buying every day, relatively inexpensive items.” J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION, Vol. 4 §23:96 at 23-426 (2017).

When the goods are expensive as is the case here, it follows that potential purchasers exercise more care in their decision-making process and are less likely to be confused about the source of a product bearing a particular mark than instances where the goods are inexpensive. The Court of Appeals for the Second Circuit propounded this conclusion in *McGregor-Doniger, Inc. v. Drizzle Inc.*, 202 USPQ 81 (2d Cir. 1979), stating, “The greater the value of an article, the more careful the typical consumer can be expected to be; *the average purchaser of an automobile will no doubt devote more attention to examining different products and determining their manufacturer than will the average purchaser of a ball of twine.*” *Id.* at 92 (emp. added). The present situation is entirely on-point with this analysis. Purchasers of expensive, highly sophisticated and technical scientific products such as spectrometers will devote particular attention to determining the manufacturer. Similarly, purchasers of sophisticated, technical components used in the manufacture of robotic hands will also devote close attention to determining the manufacturer. As such, Applicant further contends that neither of these consumers will be confused by the marks and therefore, there is no likelihood of confusion between the marks.

CONCLUSION

Applicant has demonstrated that the differences in the goods and the sophistication of purchasers of these goods lead to a finding that there is no likelihood of confusion. For all of the reasons discussed at length here, along with those in Applicant’s earlier Office Action response, lead to a finding that the Examining Attorney must withdraw the partial Section 2(d) refusal to register, find that

Applicant's mark can coexist without any likelihood of confusion and approve the application for publication and eventual registration.