

ARGUMENT

In the Office Action dated June 21, 2019 (the “Office Action”) regarding Application Serial No. 88/022,602 for the mark SMARTMICRO (“Applicant’s Mark”), the Examining Attorney partially refused registration of the mark in Class 9 under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), asserting that Applicant’s Mark, with respect to “Electric or electronically controlled sensors, namely gas sensors for microwave ovens, that can be programmed to automatically interrupt and/or shut off power to the microwave when smoke is detected” in Class 9 creates a likelihood of confusion with Registration No. 4,865,013 for the mark SMARTMICRO for “Electric monitors and monitor modules for monitoring electric current and electrical signals” (the “Cited Mark”), owned by s.m.s. smart microwave sensors GmbH (the “Registrant”).

For the reasons below, Pioneering Technology Corporation (“Applicant”) respectfully submits that Applicant’s Mark is not likely to cause confusion with the Cited Mark. Applicant requests that the refusal be withdrawn and that the Application be approved for publication.

Applicant respectfully submits that Applicant’s Mark is not likely to cause confusion with the Cited Mark due to the differences between the goods that Applicant and Registrant offer, the differences in trade channels, the high degree of care exercised by the relevant consumers, and the differing commercial impressions associated with the marks.

I. There Is No Likelihood of Confusion Between Applicant’s Mark And the Cited Mark.

A. The Goods Offered Under The Marks Are Wholly Dissimilar.

In determining likelihood of confusion under Section 2(d), the similarity or dissimilarity and nature of the goods offered under the marks must be considered. *See In re E.I. Du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (C.C.P.A. 1973). Where the nature of the goods offered under two marks differs, there can be no likelihood of confusion between the marks. *See Clayton Mark & Co. v. Westinghouse Electric Corp.*, 356 F.2d 943, 953-54 (Cust. & Pat. App. 1966) (marks not confusingly similar where goods offered under marks were not similar); *see also Hutchinson v. Essence Comm’n’s, Inc.*, 769 F. Supp. 541, 552 (S.D.N.Y. 1991) (no likelihood of confusion between rap performer using stage name ESSENCE and ESSENCE magazine that provided some coverage of musicians and entertainers).

Applicant seeks to register Applicant’s Mark for “Electric or electronically controlled sensors, namely *gas sensors for microwave ovens*, that can be programmed to automatically interrupt and/or shut off power to the microwave when smoke is detected” in Class 9, in addition to “Microwave ovens and replacement parts thereof” in Class 11. The Cited Mark is registered for “Radar apparatus; radar instruments, namely, radar detectors, radar speedometers and radar counting devices; radar systems comprising radar sensors, radar displays, radar receivers, computer hardware and software for the management, display and analysis of radar data; radar antennas; plasma and electronic radar displays; radar transmitters; radar receivers with amplifiers; calibrated radar reflectors for traffic signals; electric radar connectors; electric monitoring apparatus, namely, electronic monitors and monitor modules for monitoring electric current and electrical signals; electronic traffic guidance apparatus, namely, traffic-light apparatus; traffic management equipment, namely, display monitors, computers, auto compasses and software to

manage traffic; instruments for detecting traffic, namely, radar detectors; traffic control apparatus, namely, actuated and pretimed traffic signal controllers; electric monitors and monitor modules for monitoring electric current and electrical signals; computer hardware for data processing; computer software, in particular for simulating reflections of radar radiation” in Class 9, in addition to “Scientific and technological services, namely, scientific research, analysis, testing, development, planning and consulting in the field of radar detection; scientific research and study in the field of radar detection” in Class 42.

Respectfully, the Examining Attorney errs in concluding that “applicant’s and registrant’s goods are legally identical” merely because “sensor” and “monitor” have similar meanings. The Cited Mark covers, in relevant part, “electric monitors and monitor modules **for monitoring electric current and electrical signals,**” while Applicant’s Mark covers, in relevant part, “**gas sensors** for microwave ovens, that can be programmed to automatically interrupt and/or shut off power to the microwave **when smoke is detected.**”

Applicant’s sensors detect smoke in microwave ovens, whereas Registrant’s goods monitor electric currents. Even without recourse to or review of any external evidence, this fundamental difference between the goods at issue is noteworthy in showing the dissimilarity of goods. This point is underscored by a review of Registrant’s product offering, which consists entirely of radar applications, and specifically “Automotive, Traffic, Airborne and Security Radar technology” applications. (See web printout of Registrant’s website home page, <http://www.smartmicro.de/>, attached as **Exhibit A.**)

The goods identification in the registration is best interpreted as simply a description of radar technology in layman’s terms: “Radar” is defined as “[a] system for detecting the presence, direction, distance, and speed of aircraft, ships, and other objects, by sending out pulses of high-frequency electromagnetic waves that are reflected off the object back to the source.” *Radar*, LEXICO POWERED BY OXFORD, <https://www.lexico.com/en/definition/radar> (last visited December 18, 2019).

Applicant, on the other hand, offers smoke sensors in connection with microwave ovens for cooking fire prevention. The fact that both Applicant and Registrant offer products with sensors does not render the marks confusingly similar.

Consumers encountering Applicant’s Mark in relation to smoke detectors for microwave ovens are unlikely to be confused as to any connection with the Registrant. *See M2 Software, Inc. v. M2 Communications, Inc.*, 450 F.3d 1378, 1384 (Fed. Cir. 2006) (no likelihood of confusion between nearly identical marks where the offered goods—CD-ROMs in both cases—were unrelated because they were produced for different fields and purposes). Applicant’s smoke detecting microwave ovens are wholly dissimilar from the traffic radar, automotive radar, and airborne radar devices sold by Registrant (see **Exhibit A**). Further, there is no evidence that consumers would assume smoke detecting sensors and electric current monitors are offered by the same company simply because both products detect some sort of stimulus. By that logic, a water flow sensor, a or even a fitness tracker, would be legal equivalents of an “electric current monitor,” which cannot be the case.

B. *The High Degree of Care Exercised by The Relevant Consumers And Differing Channels of Trade Prevent Any Likelihood of Confusion.*

Applicant's Mark is not likely to cause confusion with the Cited Mark because the conditions under which the goods and services are offered, including the differing channels of trade and the high degree of care of the relevant consumers, will avoid a likelihood of confusion. In a refusal based upon a likelihood of confusion, the main inquiry is whether the marks will confuse consumers into believing that the goods and services they identify come from the same source. It is also proper when determining whether there is a likelihood of confusion to consider the similarity or dissimilarity of established, likely-to-continue channels of trade. *In re E.I. Du Pont de Nemours & Co.*, 177 U.S.P.Q. at 567.

The respective trade channels differ completely. Based on the description of goods covered, it is safe to assume that Registrant offers its goods to industrial and commercial purchasers in the automotive and aircraft industries. This is reflected in Registrant's online materials, which describe its clientele as including "traffic system providers and system integrators," primarily via specialty retailers. (See, e.g., printouts from <http://www.smartmicro.de/traffic-radar/traffic-radar-overview/> enclosed as **Exhibit B** and <http://www.smartmicro.de/automotive-radar/where-to-buy/> enclosed as **Exhibit C**).

Applicant, on the other hand, offers fire-safe residential appliances, namely, microwaves, and distributes via traditional retail outlets. Applicant markets to commercial property owners and managers of multi-unit residential buildings, such as apartment buildings, public housing, military bases, colleges and universities, independent living seniors housing, and extended stay hotel-style suites. (See printout from Applicant's website at <https://www.pioneeringtech.com/products/> enclosed as **Exhibit D**.)

The parties' respective services "are not . . . marketed in such a way that they would be encountered by the same persons in situations that would create the incorrect assumption that they originate from the same source." TMEP § 1207.01(a)(i). *See also Welch Allyn Inc. v. Tyco Int'l Servs. A.G.*, 200 F. Supp. 2d 130, 141 (N.D.N.Y. 2002) (finding on consideration of a preliminary injunction that medical devices moved through different channels of trade where Plaintiff sold high-quality stethoscopes and Defendant sold disposable medical products in bulk).

Moreover, even in the unlikely event that a consumer would encounter both marks, both Applicant and the Registrant market their services to sophisticated consumers who exercise diligence in making their purchasing decisions. Circumstances suggesting care in purchasing may tend to minimize likelihood of confusion. TMEP 1207.01(d)(vii). Even where the channels of trade may overlap, the high level of sophistication of a shared consumer base "militates against a finding of likelihood of confusion." *Bose Corp. v. Custom Electronic Design & Installation Assoc.*, Cancellation No. 92042327, 2007 WL 1368976 at *9 (TTAB Apr. 30, 2007), citing *Continental Plastic Containers v. Owens Brockway Plastic Prods., Inc.*, 141 F.3d 1073, 1080-81 (Fed. Cir. 1998); *Hewlett-Packard Co. v. Human Performance Measurement, Inc.*, 23 U.S.P.Q.2d 1390 (T.T.A.B. 1991) (sophisticated buyers of medical instruments not likely to be confused between "HP" and "HPM"); *Oreck Corp. v. U.S. Floor Sys., Inc.*, 803 F.2d 166, 173-74 (5th Cir.1986) (business purchasers of expensive products not likely to confuse goods with similar marks).

Applicant's target consumers are property owners and managers for large, multi-residential properties who are purchasing Applicant's goods at high volume, and for the explicit purpose of increasing the fire safety of their properties. Registrant's presumed target consumers are also informed, industrial and commercial consumers including businesses in the automotive and aircraft industries, as well as municipalities. Neither set of consumers is likely to make rash, impulsive decisions in their respective purchases. Accordingly, Applicant's Mark and the Cited Mark do not travel in the same channels of trade and it is not likely that consumers will believe that Applicant's goods and Registrant's goods originate from the same source.

Further, even where the marks at issue are identical, or nearly identical, the T.T.A.B. has held that differences in connotation can outweigh visual and phonetic similarity. *Coach Serv's, Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1368 (Fed. Cir. 2012) (no likelihood of confusion for COACH marks where one mark carried the connotation of luxury traveling and the other that of an educator or tutor). When assessed in connection with the respective goods, Applicant's Mark and the Cited Mark offer distinct commercial impressions. Lastly, pursuant to the *DuPont* factors, the fact that Applicant has no intention of creating confusion with the Cited Mark, weighs in support of a finding of no likelihood of confusion.

CONCLUSION

Considering the differences in the nature of the goods offered under Applicant's Mark and the Cited Mark, the differences in trade channels, the high degree of care exercised by the relevant consumers, and the differing commercial impressions, Applicant respectfully submits that Applicant's Mark is not likely to be confused with the Cited Mark and that the present application is in condition for publication. However, the Examining Attorney is requested to contact the undersigned by telephone if a telephone conversation would expedite publication. Accordingly, Applicant respectfully requests that the mark be published in the Official Gazette pursuant to 15 U.S.C. § 1062(a).

EXHIBIT A



Traffic Radar - Intersections

smartmicro intersection management sensors reliably detect trucks, buses, passenger cars, motorbikes and bicycles at intersections.

[Read more »](#)



Traffic Radar

Automotive Radar

Airborne Radar

Company

News



Traffic Data Collection with smartmicro
smartmicro's Canadian partner MI-8 Innovation, Inc. has developed a mobile unit to allow traffic data collection on a temporary basis for both, real-time...

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Meet us



January 7th - 10th, 2020

Booth: 2410, Westgate Ballroom
Las Vegas, NV, USA

[Read more »](#)

Traffic Radar



The **most advanced** multi-lane traffic management Radar technology. **4D/UHD** ultra high definition. Sensors for end users and for OEM integration. Infrastructure sensors for **smart cities** and **car2X**. Setup Software and Accessories. Complete traffic solutions. Applications:

- Intersection Management
- Arterial Management
- Enforcement sensors

[Go to Traffic Radar Page »](#)

Automotive Radar



Radar sensors. Multi Radar sensor systems. Custom Radar system design, RF hardware, DSP hardware and signal processing software design services, prototype development and production of automotive sensors.

- Side/Rear Systems
- Front Systems
- Services & Solutions

[Go to Automotive Radar Page »](#)

Welcome to smartmicro

smartmicro designs and manufactures Radar sensors. For over 20 years we have been specialists in high performance Automotive, Traffic, Airborne and Security Radar technology.

smartmicro is a technology leader in Radar sensors.

The product portfolio includes off-the-shelf and customized Radar sensors and solutions, including data links, multi sensor data fusion, set-up and alignment accessories, data logging and application software.

Many thousand Radar sensors are manufactured per year in house in our brand new company facility.

Millions of automobiles carrying Radar sensors based on smartmicro technology are driving on the roads - and have been manufactured by automotive suppliers licensing smartmicro technology. [Read more about us »](#)



Quality and Certification

smartmicro is an ISO 9001 certified company.

Many automotive products are developed compliant to different ISO26262 levels.

[Show Certification »](#)



Geniale Mitarbeiter gesucht

Für die Entwicklung neuer Anwendungen für unsere Sensoren suchen wir mehrere neue Mitarbeiter.

[Zu den Stellenangeboten »](#)



EXHIBIT B




MEDIA GALLERY



QUESTIONS?

smartmicro Home > Traffic Radar > Traffic Radar Overview

smartmicro traffic Radars.
Engineered and made in Germany.



Section Menu >

Traffic Radar Overview	Intersection Management	Arterial Management
Enforcement Sensors	Smart Cities	Other Traffic Applications
Technology	Accessories	Setup Software
Downloads	Where to buy?	

smartmicro traffic sensors feature the most advanced multi-lane multi-object tracking Radar technology. **4D/UHD** ultra high definition. Products for intersection applications (**stop bar and advance detection**), arterial applications (**counting and classification**), enforcement applications (**speed and red light**) and for **smart cities** and **car2X**.

smartmicro is supplying **complete traffic solutions** for end users and sensors for **OEM integration** to numerous partners worldwide - tens of thousands of Radars being already deployed. With more than ten years of experience in the traffic industry, smartmicro is the perfect **partner for traffic system providers and system integrators**.

Meet smartmicro



at CES 2020 |
January 7th - 10th, 2020 |
Las Vegas, NV, USA >

smartmicro's YouTube channel

For all high-resolution videos of smartmicro's impressive radar technology, visit our [YouTube Channel](#) > and subscribe for future updates.



Applications

Intersection Management

- One single sensor for stop bar and advance detection.
- Mid-block detection.
- Counting and statistics.

Arterial Management

- Traffic counting, classification and statistical analysis.
- Ramp metering.
- Incident detection (detection of slowed or stopped vehicles).

- Collision warning for car-2-x communication.

[Go to Intersection Management »](#)

- Wrong way detection.

[Go to Arterial Management »](#)

Enforcement Sensors

- Speed enforcement (on roadside and at intersections).
- Red light enforcement.
- Mobile enforcement (speed and tailgating enforcement from a moving police car).

[Go to Enforcement sensors »](#)

Smart Cities

- Real-time object data transmission for smart cities and car2X
- Broadcast to connected vehicles.
- Detection of pedestrians, Bicycles (VRUs).

[Go to Smart Cities »](#)



Additional Information

[Traffic Radar Brochure »](#)

| [UMRR-OC Product Brochure »](#)

| [UMRR-11 Product Brochure »](#)

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EXHIBIT C



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Braunschweig , Germany

✉ info@smartmicro.de

☎ +49 (531) 390 23 - 0

🌐 www.smartmicro.de

EXHIBIT D

Preferred Distribution Partners:



COMMERCIAL PROPERTIES

Smart Cooking Fire Prevention

Pioneering Technology Corp. engineers and brings to market a range of cooking fire prevention products designed to help property owners and managers of multi-unit residential buildings reduce the risk and costs associated with cooking fires. Prevent the Fire. Control the Source. We have extensive experience working with a broad range of customers including:

- Multi-residential
- Public housing
- Institutional housing – including military bases, colleges and universities
- Healthcare – with an emphasis on independent living seniors housing
- Hospitality – extended stay hotel-style suites

[COST SAVINGS CALCULATOR >](#)



SMARTBurner™

\$199.73

SMARTBurner easily replaces electric coil burners and helps prevent cooking fires – the leading cause of household fires! It also delivers a fantastic return on investment through insurance savings, restoration and lost rent costs, energy savings, and maintenance savings. The patented and proven temperature limiting control (TLC) technology helps prevent burners from reaching the temperature at which most cooking oils auto-ignite. This technology has already been installed in more than 250,000 homes and buildings across North America without a single reported cooking fire being reported since. SMARTBurner meets the new UL 858 60A standard for cooking fire prevention on electric coil stoves, which becomes mandatory in April 2019.

[Specifications](#) [Commercial](#)

Two 6" burners + Two 8" burners



ADD TO CART

Order Today!



FIRE PREVENTION PROMOTION!

Now \$39.99

Safe T Sensor

\$39.99

Safe T Sensor, is product for preventing microwave fires and nuisance/false alarms. With a sleek, new look and updated technology, Safe T Sensor interrupts power to the microwave oven at the first sign of smoke. With the NFPA reporting more than 19 microwave cooking fires every day, microwave fire safety is important to every home or building.

[Specifications](#) [Commercial](#)

Grey



ADD TO CART



SMARTRange

\$199.99

SMARTRange monitors changes in the range's cooking temperature and signals a pre-alarm if a cooking fire risk is detected. If the user does not press the Heat Sensor cover during the pre-alarm, the range will automatically shut off. SMARTRange does not protect against all possible hazards, but it does significantly improve cooking safety and delivers a return on investment through insurance savings, restoration and lost rent costs.

[Specifications](#) [Commercial](#)

4-pronged control unit



ADD TO CART



SMARTElement™

\$199.73

*Price Includes 4 burners

SMARTElement with its patented temperature limiting control (TLC) technology controls the temperature of stovetops keeping it below the auto-ignition point of cooking oils and many common household materials. How does it do this? By shutting off the burner element when the temperature reaches about 350°C/662°F. When the element has cooled to below that threshold, the burner turns back on again. Think of it like a furnace for cooking. Just as your furnace turns on and off to regulate the temperature in your home, SMARTElement regulates the cooking temperature of your stovetop.

[Specifications](#) [Commercial](#)

Three 6" burners + One 8" burner



CONTACT US



"This technology does everything that it says it does and we are very pleased with the results."

Jim Winston, Quality Control Officer, Youngstown Metropolitan Housing Authority, Youngstown

"We would most definitely recommend this product to other housing authorities or apartment complexes."

Robert Bukowski, Director of Technical Operations, Buffalo Municipal Housing Authority, Buffalo

"This installation and safety initiative is proving to be a great benefit to protecting the people and property at RHA. We would definitely recommend this technology to all housing authorities to help protect residents and properties from the dangerous risks of cooking fires."

Sandra Whitney, Director of Housing Operations, Rochester Housing Authority

MORE TESTIMONIALS

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PROTECTING PEOPLE & PROPERTY

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