

TTAB



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

(Our Docket No. 32557US02)

TRADEMARK

In the Application of:	)	<u>CERTIFICATE OF MAILING</u>
	)	EXPRESS MAIL NO. EL 849003928 US
Engineered Controls International, Inc.	)	I hereby certify that this correspondence
	)	is being deposited with the United States
Serial No. 76/056,615	)	Postal Service via Express Mail in an
	)	envelope addressed to:
Filed: May 25, 2000	)	Assistant Commissioner for Trademarks
	)	Arlington, VA, 22202-3513
For: MULTIPORT	)	on:
	)	July 25, 2002
Examining Attorney: Johanna B. Robinson)	
Law Office 104	)	By: <u>Ronald A. DiCerro</u>
	)	Ronald A. DiCerro

NOTICE OF APPEAL UNDER 37 CFR § 2.141

BOX TTAB FEE
Assistant Commissioner For Trademarks
2900 Crystal Drive
Arlington, VA 22202-3513

U.S. Patent & TMO/TM Mail Rcpt. Dt. #57



07-25-2002

Applicant hereby appeals to the Trademark Trial and Appeal Board from the Final Rejection of the Examiner dated January 25, 2002. The appeal fee of \$100.00 is attached hereto.

Please charge any additional fees or credit overpayment to the deposit account of McAndrews, Held & Malloy, Ltd., Account No. 13-0017.

Respectfully submitted,
McANDREWS, HELD & MALLOY, LTD.

Dated: July 25, 2002

By: Ronald A. DiCerro
Ronald A. DiCerro

07/31/2002 JHARLEY 00000221 130017 76056615

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RESPONSE

Asst. Commissioner for Trademarks
2900 Crystal Drive
Arlington, VA 22202-3513

U.S. Patent & TMO/TM Mail Rcpt. Dt. #57



07-25-2002

Dear Madam:

This is a response to the Office Action mailed January 25, 2002.

The application stands refused under Trademark Act Section 2(d), 15 U.S.C. § 1052(d) and is further subject to the requirement of responding to an informality. Specifically, Applicant must indicate whether MULTIPOINT has any significance in the relevant trade, any geographical significance, or any meaning in a foreign language.

I. SIGNIFICANCE OF THE MARK

Applicant asserts that the word MULTIPOINT does not have any significance in the relevant trade other than as the trademark used on or in connection with the Applicant's goods. Furthermore, the word MULTIPOINT does not have any geographical significance or any meaning in a foreign language.

II. LIKELIHOOD OF CONFUSION

Registration of Applicant's trademark application stands refused on the grounds that the Applicant's mark, MULTIPORT, so resembles the mark MULTIPORT of U.S. Registration No. 1,204,374 as to be likely, when used on the identified goods, to cause confusion, to cause mistake, or to deceive. More specifically, it is speculated that consumers would be confused by the Applicant and Registrant's marks on the basis that the marks are identical, release valves and gauges are included in a number of trademark registrations, and release valves and gauges are sold by the same retailers.

Applicant submits there is no likelihood of confusion between the Applicant's mark and Registrant's mark for the following reasons:

- (1) Applicant does not provide release valves under the mark MULTIPORT;
- (2) Applicant's and Registrant's goods are different;
- (3) The relevant purchasers are careful, discriminating, and sophisticated;
- (4) The Applicant and Registrant's trade channels are different; and
- (5) There has been no actual confusion in over forty years of concurrent use.

Consequently, the Applicant respectfully demurs to the refusal and requests reexamination and reconsideration of the application in view of these remarks.

A. Applicant's Mark

The Applicant, Engineered Controls International, Inc., is requesting the registration of the trademark MULTIPORT in International Class 7 for manifolds for safety relief valves used with containers for pressurized fluids. *See Response dated August 1, 2001* (amending the identification of goods); *see also, Office Action 2* (recognizing the amendment as acceptable and made of record).

B. Registrant's Mark

The examiner has cited the trademark MULTIPORT, registration number 1,204,374. The mark is registered in International Class 9 to Babcock and Wilcox Company for "liquid level gauges and replacement parts therefore." *See Registration Number 1,204,374.*

C. Applicant's Goods

Applicant provides manifolds for safety relief valves used with containers for pressurized fluids. Applicant does not provide pressure relief valves under the mark MULTIPORT. In contrast to the evidence establishing third party trademark registrations showing that relief valves and liquid level gauges are included in the same registrations, Applicant has been unable to find a single third party trademark registration showing that manifolds for safety relief valves and liquid level gauges are included in the same registrations. See Attachment A, search results.

D. Applicant's And Registrant's Goods Are Different

Both the Applicant and the Registrant are engaged in selling industrial storage tank equipment. However, "this type of classification is so broad as to be meaningless...." *Mejia and Assocs. v. IBM Corp.*, 920 F. Supp. 540, 548 (S.D.N.Y. 1996). "Within the broad outlines of a product class, the differences between the particular products in question is often sufficient to render them dissimilar for the purposes of trademark analysis." *Q Division Records, LLC v. Q Records*, 2000 U.S. Dist. LEXIS 1773 (Mass. Dist. Ct. February 11, 2000) (citing *Lang v. Retirement Living Publ'g Co.*, 949 F.2d 576, 582 (2nd Cir. 1991) (magazine catering to older adults and magazine concerning enhancing one's charisma were not similar products despite the fact that both were magazines); *Pignons S.A. de Mecanique de Precision v. Polaroid Corp.*, 657 F.2d 482, 487-88 (1st Cir.1981) (low-end instant camera and more expensive traditional camera were not similar products for purposes of trademark analysis)).

It is well settled 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. See, e.g., *CBS Inc. v. Morrow*, 708 F.2d 1579 (Fed.Cir.1983); *Squirtco v. Tomy Corp.*, 697 F.2d 1038 (Fed.Cir.1983); *Paula Payne Products Co. v. Johnson Publishing Co., Inc.*, 473 F.2d 901 (CCPA 1973). In the present application, Applicant's manifolds and the Registrant's level gauges are very different goods.

Applicant's mark, MULTIPORT, is used on and in connection with Applicant's manifold device. See Attachment B. This manifold is a specialty product designed to be used with pressure relief valves on pressurized storage containers. The manifold is specially engineered to facilitate the safe servicing or replacement of one or more of the relief valves while the container is maintained under pressure. Applicant does not provide liquid level gauges under the mark

MULTIPOINT. Nor can the Applicant's manifold be used as or in combination with a liquid level gauge.

Quite to the contrary, the Registrant's mark MULTIPOINT is used for liquid level gauges. *See Registration Number 1,204,374*. Liquid level gauges convey the quantity of fluid present in a tank. Typically these gauges convey the liquid level through the use of a visual float chamber, *see, e.g.*, Attachment C, or through a mechanical means. *See, e.g.*, Attachment D. Registrant does not provide manifolds for use with pressure relief valves under the mark MULTIPOINT. Nor can Registrant's liquid level gauge be use as a manifold in place of the Applicant's good.

While the category of goods – industrial storage tank equipment – touched under the marks is the same, the Applicant's and the Registrant's goods are significantly different. The two products serve distinctly different functions and they are prominently different in design. Therefore, there is no likelihood of confusion.

D. Sophistication of the Relevant Purchasers

The sophistication of the relevant purchasers also weighs heavily in reducing the likelihood of confusion. The sophistication factor "recognizes that the likelihood of confusion between the products at issue depends in part on the sophistication of the relevant purchasers." *Arrow Fastener Co., Inc. v. Stanley Works*, 59 F.3d 384, 399 (2d Cir. 1995). A finding of sophistication is based on the general impression of the ordinary consumer, buying under normal market conditions, and giving the attention such purchasers usually give in purchasing the product at issue. *W.W.W. Pharm. Co. v. Gillette Co.*, 984 F.2d 567, 572 (2d Cir.1993). A finding that the consumers are sophisticated usually militates against a finding of a likelihood of confusion. *Bristol-Myers Squibb Co. v. McNeil-P.P.C., Inc.*, 973 F.2d 1033, 1046-47 (2d Cir. 1992); *Pignons*, 657 F.2d at 489 ("[s]ophisticated consumers may be expected to exercise greater care.").

Courts have found an increased degree of care and reduced likelihood of confusion where the purchaser has a reasonably focused need or specific purpose or plan involving the product. *Haydon Switch & Instrument v. Rexnord, Inc.*, 4 U.S.P.Q.2d 1510, 1517 (D.Conn. 1987) (specific products for specific industrial purposes); *Munters Corp. v. Matsui America Inc.*, 730 F.Supp. 790, 799, 14 U.S.P.Q.2d 1993, 2000 (N.D. Ill. 1989) ("planning"). The court in *Haydon* stated that when a purchaser "enter[s] the marketplace in search of specific products for specific

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