IN THE MATTER OF AN OPPOSITION
by Ferrisview Electronics Inc.
to application No. 559,188 for
the trade-mark ELECTRONIC SYMBOL
Design filed by Investronica, S.A.

On March 18, 1986, the applicant, Investronica, S.A., filed an application to register the design mark illustrated below based on proposed use in Canada for the following wares:

> manufacturing systems for the apparel industry, comprising computer hardware and computer software; computer assisted cloth cutting machines, computer assisted labelling machines, computer assisted pattern drawing and marking machines, computer assisted pattern design and grading machines, computer assisted pattern matching machines, and computer assisted hanging garment transport systems.

The application contains a color claim, namely that the dark portion of the mark is colored red and the light portion is colored white. The application was advertised for opposition purposes on September 3, 1986.

The opponent, Ferrisview Electronics Inc., filed a statement of opposition on October 3, 1986, a copy of which was forwarded to the applicant on October 29, 1986. The grounds of opposition are that the applicant is not the person entitled to registration, the applied for trade-mark is not distinctive and the application does not comply with Section 30(i) of the Trade-marks Act because the applied for trade-mark is confusing with the opponent's design mark illustrated below previously used in Canada and which is the subject of a previously filed application (No. 557,534) for the operation of a retail stereo, sound and electronic equipment store.

The applicant filed and served a counterstatement. As its evidence, the opponent filed the affidavit of Darren M. Ferris. The applicant did not file evidence. Only the applicant filed a written argument and no oral hearing was conducted.

All of the grounds of opposition turn on the single issue of confusion although the material dates respecting the various grounds differ. However, since the latest material time is the filing of the opposition and since the opponent's case is strongest at that time, a consideration of the issue of confusion as of that time will effectively decide the outcome of the opposition. The onus or legal burden is on the applicant to show no reasonable likelihood of confusion. Furthermore, in applying the test for confusion set forth in Section 6(2) of the Act, consideration is to be given to all of the surrounding circumstances including those specifically set forth in Section 6(5) of the Act.

The marks of both parties are inherently distinctive. The representation of a sine wave in the opponent's mark, however, is somewhat suggestive of the electronics-related services. Thus, the opponent's mark is inherently weaker than the applicant's mark.

The opponent has evidenced some use and advertising of its mark in association with the retail sale of electronic audio equipment. However, that use has been restricted to the Toronto area. Furthermore, the evidence consistently shows the opponent's mark being used in conjunction with the opponent's trade-mark FAIRVIEW ELECTRONICS. Thus, the opponent's design mark would have a lessened impact on consumers. I am therefore only able to ascribe a limited reputation for the opponent's mark in the Toronto area.

The applicant has filed no evidence. Thus, I must conclude that its mark had not become known at all in Canada as of the material time. The length of time the marks have been in use favors the opponent although this is not a particularly significant circumstance in the present case.

The wares and trades of the parties are different. The opponent operates retail outlets which sell audio equipment. The applicant's proposed wares are sophisticated systems to be used in a specific manufacturing environment. It is difficult to envision any connection between the trades of the parties.

The marks of the parties bear some degree of resemblance although it is not particularly pronounced. Both marks could be said to include a representation of a sine wave although the individual representations are somewhat different. Otherwise, the two marks are not similar.

In applying the test for confusion, I have considered that it is a matter of first impression and imperfect recollection. In view of my conclusions above, and particularly in view of the dissimilarities between the wares, services and trades of the parties and the relatively low degree of resemblance between the marks, I find that the marks of the parties are not confusing. All four grounds of opposition are therefore unsuccessful.

In view of the above, I reject the opponent's opposition.

DATED AT HULL, QUEBEC, THIS 31st DAY OF MAY 1990.

David J. Martin,
Member,
Trade Marks Opposition Board.