

S.N. 88/337,865

ARGUMENT IN RESPONSE TO OFFICE ACTION OF 2019-05-23

Applicant Refuul respectfully disagrees with the Office's position that Applicant's mark, as applied to Applicant's goods, is confusingly similar to that shown in US Reg. No. 5,071,113, SLIDE.

SIMILARITY OF THE MARKS

Applicant concedes that both marks have the identical spelling: SLIDE.

RELATEDNESS OF THE GOODS:

Reg. No. 5,071,113 recites these goods: Audio headphones; earbuds; earphones.

These are electrical products, generally small, which are utilized for entertainment or educational purposes, such as listening to music, audiobooks, or radio broadcasts. "Earbuds" are particularly small, since they are intended to sit in the ear canal, and must be dimensioned small enough to fit any of a range of sizes of ears of various consumers. Typically, earbuds and earphones have rounded exteriors, and would never be mistaken by a consumer for a charger, which is larger than earbuds and more rectangular, in most cases, than earbuds and earphones. One always buys a pair of earbuds, often in a transparent package, but one never buys a pair of chargers in a single package.

By contrast, Applicant's goods in classes 9 and 34 are directed to users of e-cigarettes, commonly known as "vapers" because the users inhale the vapor from e-cigarettes, rather than smoke. Applicant's charger products have no audio outputs, except possibly momentary beeps to indicate the beginning or end of a charging cycle. They have no entertainment or educational feature. Thus, the only thing that Applicant's goods and Registrant's goods have in common is that both contain electrical conductors. This single common feature is not enough to imply that channels of trade are the same.

CHANNELS OF TRADE

WHERE ARE PORTABLE AUDIO PRODUCTS SOLD, AND TO WHOM? Earbuds and other audio headphones are a species of "portable audio" products, and are typically sold to either (1) consumers of musical entertainment or (2) cellphone users who are no longer permitted to drive while using a phone.

Many purchases of purchases of earbuds or headphones are made consumers who are either (A) first-time buyers, typically under 21 years of age, (B) buyers of replacements for earbuds which have been lost, stolen or damaged, or (C) buyers purchasing them in conjunction with a new electronic device such as a smartphone, with which they are often sold as a package. Most such purchases are made (A) online, (B) at cellphone stores or (C) at big-box retailers such as Best Buy, Sears, Walmart, or Target. There are no age restrictions against such purchases.

WHERE ARE E-CIGARETTE CHARGERS SOLD, and TO WHOM?

It is well known that, in recent months, there have been many unexplained deaths associated with consumption of e-cigarettes and similar “vaping” products. The US Center for Disease Control (CDC) has undertaken an investigation, and the President has proposed a ban on sale of flavored vaping products to those under 21. Numerous states have actually enacted such a ban. As a result, the distribution of vaping products has tended to be restricted to specialized retailers who are equipped to check the ID cards of their customers. Since the customers for e-cigarette chargers are the customers for the now age-restricted “vaping” products, the e-cigarette chargers are also sold predominantly in those specialized retail outlets, rather than in big-box stores or general-purpose retail outlets. In short, the typical customer for an e-cigarette charger is an over-21 person, and is often someone trying to transition from tobacco smoking to an alternative nicotine delivery system (NDS).

CONCLUSION

Portable audio devices (including the earbuds and earphones of Reg. No. 5,071,113) are sold without age restriction, and typically in either general purpose retail environments or retail contexts relating specifically to entertainment or communication. By contrast, Applicant’s e-cigarette chargers tend to be sold to the over-21 demographic, in a specialized retailing context, namely those ID-checking retailers who handle the associated “vaping” substances. Contrary to the Office’s contention, the channels of trade for portable audio gear are not the same as the channels for e-cigarette chargers, nor are the respective classes of customers the same.

Listening devices have a different function and utility than smoking or vaping products, and consumers are unlikely to mistake audio earbuds and e-cigarette chargers for each other. Therefore, allowing Applicant to market e-cigarette chargers under its SLIDE mark is unlikely to cause any confusion among the consumers of Registrant’s SLIDE earbuds or headphones.

PRIOR-FILED APPLICATION FOR ZLIDE

The Office has called attention to the currently-suspended pending application to register ZLIDE for various tobacco and e-cigarette products in class 34. Applicant respectfully submits that ZLIDE and SLIDE are phonetically and typographically different from each other, and that the respective products differ sufficiently to render any potential confusion unlikely.

Applicant Refuul respectfully requests that the examining attorney reconsider and withdraw the 2(d) refusal, and approve Applicant's SLIDE mark for publication for opposition. If there are any remaining issues, the examining attorney is invited to contact counsel, in order to resolve the same.

Respectfully submitted,

Micah T. Drayton

Attorney for Applicant REFUUL