

**U.S. Application Serial No. 90367052**  
**Mark: MOONSHOT (& design)**  
**Reference/Docket No. LynHS\_ML025**

### **APPLICANT'S RESPONSE TO OFFICE ACTION**

Applicant has applied for the mark MoonShot (& design) for use in International Class 025 for: "Beanies; Hats; Stocking caps; Stocking hats."

On May 13, 2021, the Examiner in the present case issued an office action requiring the Applicant to respond to the following issue: 1) SECTION 2(d) LIKELIHOOD OF CONFUSION REFUSAL

Applicant's MoonShot mark (the "Mark") is not confusingly similar to M00NSHOT, Registration No. 6121735 (the "Cited Mark"), owned by M00NSHOT, LLC. Applicant's Mark is not confusingly similar to the Cited Mark because: 1) the Mark and the Cited Mark are not identical; 2) the Cited Mark is commercially weak and due a narrow scope of protection and the overall commercial impressions of the marks are dissimilar; 3) the products described are different and sold through different channels. On balance, the weight of the facts of record as of filing and as introduced herein weigh in favor of finding no likelihood of confusion. Applicant therefore respectfully requests the Examiner withdraw the refusal.

### **INTRODUCTION**

The primary issue in this case is whether consumers are likely to be confused between two brands sharing a common word "Moonshot" spelled in two different ways which is generally applied to very different market segments. The answer is somewhat obvious, no. Likelihood of Confusion is a question of law that must be based on facts. "Whether there is likelihood of confusion between a registered mark and a mark for which an application has been filed presents an issue of law based on underlying facts." *Jack Wolfskin v. New Millennium*, 797 F.3d 1363, 1371 (Fed. Cir. 2015). Therefore, any conclusion as to any factor must be based upon facts and employ a proper legal analysis to do so. A likelihood of confusion as between MoonShot and M00NSHOT under Lanham Act §2(d) could only be found by failing to apply the proper test, placing undue, heavy weight on how marks sound to the ignorance of much more determinative and important facts.

Applying the proper analysis and according all facts of record previously, and made of record herein, due weight, Applicant will demonstrate that: (1) the Mark and the Cited Mark are not identical that the difference between the marks should be accorded due weight; (2) the Cited Mark is weak in its use of MOONSHOT on graphic t-shirts, being diluted for use on such goods and the marks have dissimilar overall commercial impressions; and (3) the products described in the Cited Mark (Graphic T-shirts) and the Mark (Beanies; Hats; Stocking caps; Stocking hats) for hunting are different and sold through different channels. In light of the foregoing and the discussion that follows, there is no likelihood of confusion between the Cited Mark and Applicant's Mark, and Applicant therefore respectfully requests that the refusal be withdrawn, and Applicant's Mark approved for publication.

### **DISCUSSION**

#### **1. The Mark and the Cited Mark are not the Same.**

The Cited Mark uses the number zero (0) twice to represent the letter "O". As supported by the Declaration of David, the "00" are a tribute to Apple CEO John Scully, who speaks frequently about moonshot business thus implying the binary language of computers comprised of zeros and ones (e.g., 0, 1, 10, 11, etc.) and the intent to parody historical events and cultural events such as music, movies, television shows, and sports.

3. I am a graphic artist. I started m00nshot, LLC to sell my designs and market t-shirts that parody historical events and cultural events such as music, movies, television shows, and sports. See a printout from Applicant's online website attached hereto as Exhibit B.

4. The predominant customer base of m00nshot, LLC is males - making up about ninety percent of sales. I market my products via social media sites such as Facebook and Instagram as well as through ads on Google Shopping and target those ads by gender and age.

See Exhibits D and E: 1<sup>st</sup> and 2<sup>nd</sup> Declarations of David Snowden



See Exhibits F & G: Applicant's MoonShot Mark as used in Applicant's Catalog

**LIGHTWEIGHT BEANIES**

with Stretch Material

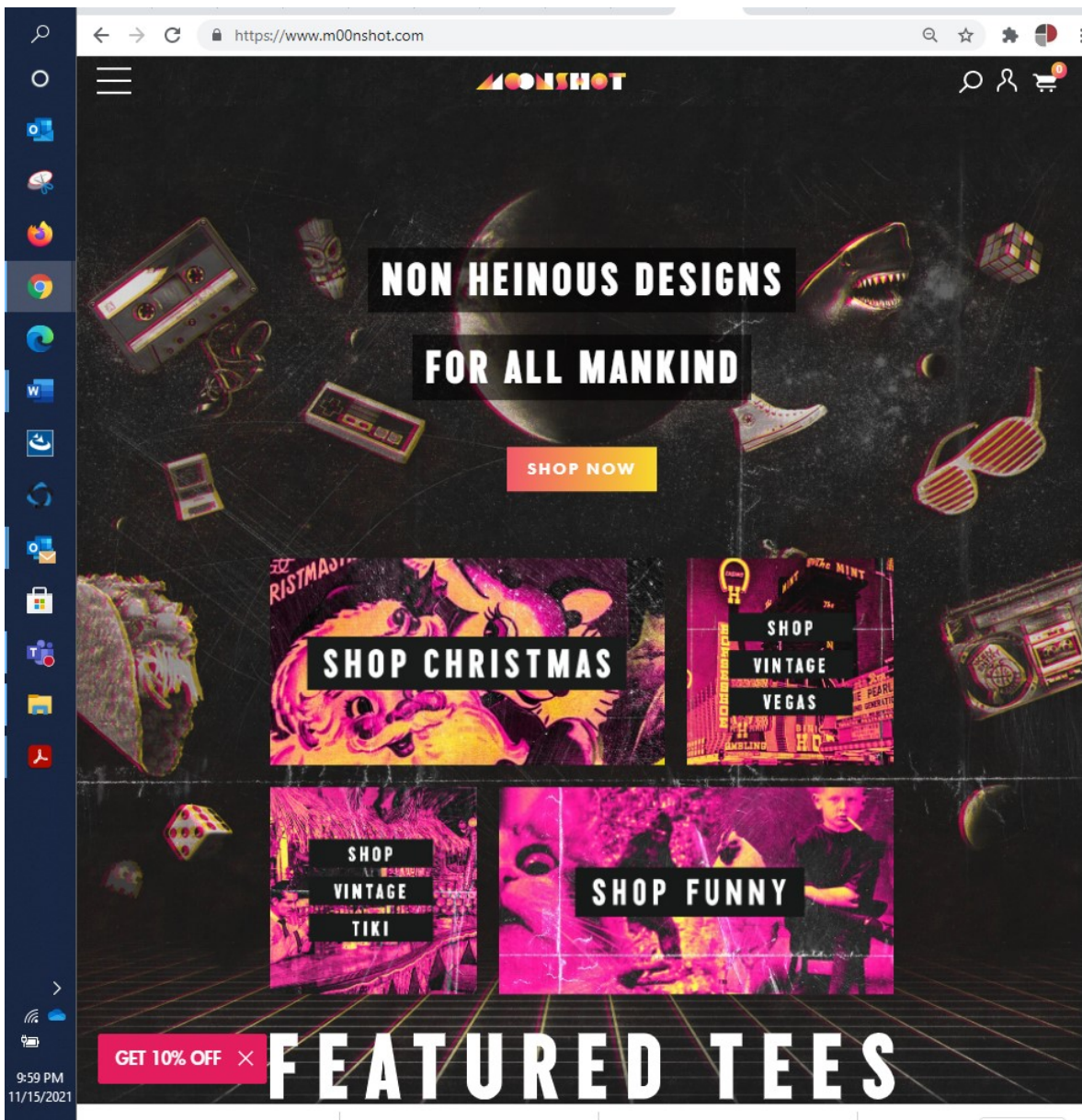
Lightweight, stretchy, double layered flexible material this hat is constructed of. None bulky and breathable.

**SOFT STRETCH** **BREATHABLE**

Oneshot Camo 166-32613 1 92768 32613 0 Case Pk: 6/72 Min. Order: 1	Moonshot Camo 166-32614 1 92768 32614 7 Case Pk: 6/72 Min. Order: 1
Black 166-32615 1 92768 32615 4 Case Pk: 6/72 Min. Order: 1	Orange 166-32616 1 92768 32616 1 Case Pk: 6/72 Min. Order: 1

A collection of images showing the beanies. There is a large orange beanie, a large camouflage beanie (Moonshot Camo), and two smaller camouflage beanies (Oneshot Camo and Moonshot Camo) hanging from hangers. The Moonshot Camo beanie has the "MOONSHOT" logo on it.

See Exhibits F & G: Applicant's MoonShot Mark as used in Applicant's Catalog



The Cited Mark M00NSHOT (See Exhibit E)

## 2. The Cited Mark is Weak and Entitled to a Narrow Scope of Protection.

The Cited Mark's use of "Moonshot" is weak, being one of a plethora of marks including MOONSHOT in primary part for use in connection with various goods as found in Exhibit C. Thus, the right to exclude other marks having "Moonshot" included therein are narrow. "Where a party chooses a trademark which is inherently weak, he will not enjoy the wide latitude of protection afforded the owners of strong trademarks." *Sure-Fit Products v. Saltzson Drapery Co.*, 254 F.2d 158 (C.C.P.A. 1958). Such a commonplace mark selection is no basis for consumers to be confused with Applicant's highly imaginatively suggestive mark, MoonShot. "The weaker a mark, the fewer are the junior uses that will trigger a likelihood of customer confusion." 2 McCarthy on Trademarks and Unfair Competition § 11:76 (4th ed.). M00NSHOT in the Cited Mark, due to its weakness as will be demonstrated below, deserves a narrow scope of protection.

The Cited Mark is weak due to M00NSHOT being crowded in use. Mark strength is a consideration "connected to 'the number and nature of similar marks in use on similar goods,' identified in *DuPont*, 476 F.2d at 1361, and is in any event probative of the likelihood of confusion." *Juice Generation v. GS Enters.*, 794 F.3d 1334, 1338 (Fed. Cir. 2015). If a crowded field of marks exists, a narrower scope of protection is afforded to the marks in

such crowded field, and the marks are commercially weaker. “[A] way a mark may be ‘weak’ is that there are many similar marks used by others, resulting in a ‘crowded’ trademark marketplace.” 2 McCarthy § 11:76. The effect of the crowded field is that it means consumers are more accustomed to seeing similar marks regularly and thus they have been conditioned to discern between them more readily—the terms used in such marks have been diluted. M00NSHOT is very similar to other third-party registrations in its use of MOONSHOT, the component at issue in this case.

Applicant has included significant evidence of a crowded field of marks to demonstrate the Cited Mark is weak, its strength therefore must be analyzed. “[T]he following, *when of record, must be considered*: ... (11) The extent to which applicant has a right to exclude others from use of its mark on its goods ... (13) Any other established fact probative of the effect of use.” *In re E.I. DuPont DeNemours & Co.*, 476 F.2d 1357 (C.C.P.A. 1973). The strength of the Cited Mark defines the scope of protection afforded, and therefore sets the frame through which to view the remaining factors. Absent a proper frame, the weight of other factors is thrown into a vacuum. Here, the crowded field adds clarity to the weakness of M00NSHOT in the Cited Mark.

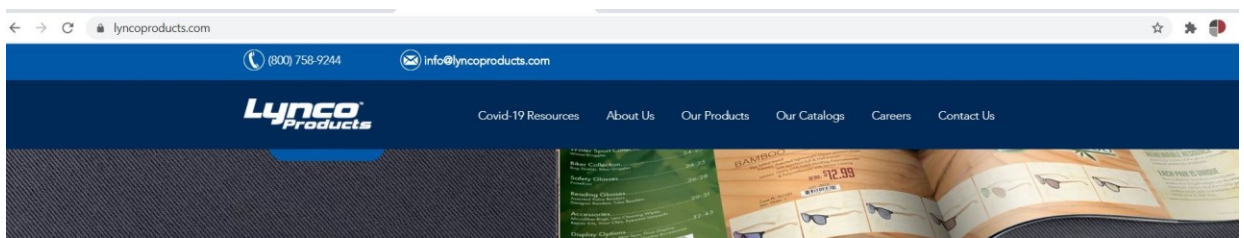
Evidence of third-party marks commonly adopting a particular term can show that the term is conceptually weak, or suggestive. *Juice Generation* at 1339. Here, the relevant portion, R, of the Cited Mark is conceptually weak, deserving a narrow scope of protection. “[A] relatively strong mark can leap vast product line differences at a single bound, while a relatively weak mark can barely hobble along to result in infringement when a direct competitor adopts a mark almost identical in appearance.” 2 McCarthy § 11:74. Applicant has included with this response Exhibits **A**, **B** and **C** listing numerous existing registrations based on use in commerce that prove the Cited Mark is weak. The crowded field of marks also shows that how weak Moonshot is in the commercial context in which it operates. Evidence of a crowded field of marks “can show that customers have been educated to distinguish between different marks on the basis of minute distinctions.” *Juice Generation* at 1339 (quoting 2 McCarthy at § 11:88). Importantly, “extensive evidence of third-party use and registrations is ‘powerful on its face,’ even where the specific extent and impact of the usage has not been established.” *Jack Wolfskin* at 1373-74 (quoting *Juice Generation* at 1339). This means that the Cited Mark is due a very narrow scope of protection. “[A] relatively strong mark can leap vast product line differences at a single bound, while a relatively weak mark can barely hobble along to result in infringement when a direct competitor adopts a mark almost identical in appearance.” 2 McCarthy § 11:74. The evidence above demonstrates that the Cited Mark deserves little protection over the term Moonshot.

### **3. Applicant’s Mark is Dissimilar in Overall Commercial Impression from the Cited Mark When Viewing the Marks in the Context of Consumer Understanding.**

“The ultimate conclusion of similarity or dissimilarity of the marks must rest on consideration of the marks in their entirety.” *Packard Press, Inc. v. Hewlett-Packard Co.*, 227 F.3d 1352, 1358 (Fed. Cir. 2000). “[T]he touchstone of this factor is consideration of the mark in total.” *Jack Wolfskin* at 1371. The marks in their entirety here are M00NSHOT, having no meaning, and MoonShot meaning or suggesting hunting in the dark to camouflage the hunter. The commercial impressions of these *complete* marks is very dissimilar. The comparison in this case comes down to a careful review of the facts, not merely assessing spelling and sound and ending the inquiry there. “The basic principle in determining confusion between marks is that marks must be compared in their entireties and must be considered in connection with the particular goods or services for which they are used. It follows from that principle that likelihood of confusion cannot be predicated on dissection of a mark, that is, on only part of a mark.” *In re Nat’l Data Corp.*, 753 F.2d 1056, 1058, 224 USPQ 749, 750-51 (Fed. Cir. 1985). Dissecting marks does not occur only by removal of wording in a mark, as would be necessary to find the impression of the Cited Mark to be centered only on the term MOONSHOT, dissection can also be done by ignoring evidence of the connotation and commercial impression, divorcing the mark from its context. “*All relevant facts* pertaining to appearance, sound, and connotation *must be considered before* similarity as to one or more of those factors may be sufficient to support a finding that the marks are similar or dissimilar.” *Packard Press* at 1357 (emphasis added). A mark’s commercial impression is the understanding of relevant consumers, and the context of use, which defines the meaning among relevant purchasers. It is the real-world context that determines the relevant impression for a likelihood of confusion analysis. *See Morton-Norwich Prods., Inc. v. S.C. Johnson & Son, Inc.*, 531 F.2d 561, 562-63 (C.C.P.A. 1976)

(reviewing evidence of actual use to determine the meaning and commercial impression of the marks at issue). This consumer understanding of meaning must be considered before similarity can be concluded, per *Packard Press*. This is a determination that cannot be made by conjecture, it is a conclusion that must be made on facts. *Jack Wolfskin* at 1371.

Finally, the Examiner must take into account the Applicant is a consumer products goods company that maintains global partnerships with vendors, factories and customers. Applicant offers competitive pricing, attractive quality product and a mix of goods. Applicant assists its retail customers with effective category management, driven by market awareness and industry knowledge. Applicant delivers products across the United States which includes 3,599 cities. (<https://www.lyncoproducts.com/p2020>) Applicant's products include impulse, convenience, automotive and general goods. Applicant's products are sold through multiple retail channels including travel center, convenience store, grocery & drug, full-service car wash, farm supply, hardware store, specialty retailer markets as well as mass retail. Representative customers across the multiple retail channels include: Alta Convenience (<http://altaconvenience.com/>); Advance Auto Parts (<https://corp.advanceautoparts.com/home/default.aspx>); Blains Farm & Fleet (<https://www.farmandfleet.com/>); AmBest (<https://am-best.com/>); Casey's General Stores (<https://www.caseys.com/>); Common Cents (<http://www.commoncentsstores.com/>); Farm King (<https://www.farmking.com/>); Flying J/Pilot Travel Centers (<https://pilotflyingj.com/>); Travel Center of America/Petro (<https://www.ta-petro.com/>); and Theisen's (<https://www.theisens.com/>). See also [www.lyncoproducts.com](http://www.lyncoproducts.com) as illustrated below as found in Exhibits F and G.



## CHANNELS SERVED

We service retailers big or small in Convenience & Travel, Car Washes, Grocery & Drug, Farm & Hardware and Mass Retail.



All of this becomes part of the consumer understanding of what a mark represents, and these facts cannot be ignored in comparing the Mark MoonShot with the Cited Mark M00NSHOT. Applying a complete review of *all* relevant facts on mark similarity, the marks *in total* are wholly distinct. The marks, in their entireties, are not similar.

## CONCLUSION

In consideration of the relevant factors in this case, confusion is unlikely to occur. The commercial impressions of the marks are very distinct and confusion is unlikely in this case. Applicant therefore respectfully requests that the Examiner withdraw the rejection and approve Applicant's Mark for publication.

Respectfully,

**Jay R. Hamilton**  
Managing Partner & Founder  
Hamilton IP Law, PC  
Attorney for Applicant

## **TABLE OF EXHIBITS**

**EXHIBIT A: DECLARATION OF ATTORNEY JAY R. HAMILTON**

**EXHIBIT B: TABLE OF GOOGLE SEARCH RESULTS FOR “MOONSHOT”**

**EXHIBIT C: TABLE TO TRADEMARKS INCLUDING “MOONSHOT”**

**EXHIBIT D: 1<sup>ST</sup> DECLARATION OF DAVID SNOWDEN SUBMITTED IN SUPPORT OF THE CITED MARK**

**EXHIBIT E: 2<sup>ND</sup> DECLARATION OF DAVID SNOWDEN SUBMITTED IN SUPPORT OF THE CITED MARK**

**EXHIBIT F: APPLICANT’S LISTING OF PRODUCTS USING THE MARK**

**EXHIBIT G: INFORMATION ABOUT APPLICANT AND CHANNEL SERVED**