


IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

<p><b>In re Application of:</b></p> <p><b>Source Next Generation Technology Limited</b></p> <p><b>Serial No.: 90288188</b></p> <p><b>Mark:</b> </p>	<p><b>Scott Bibb, Esq.</b> <b>Examining Attorney</b></p> <p><b>Law Office 109</b></p>
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**RESPONSE TO OFFICE ACTION**

Applicant Source Next Generation Technology Limited (“Applicant”) hereby responds to the Office Action dated May 10, 2023, and submits that the Section 2(d) refusal should be withdrawn because there is no likelihood of confusion between Applicant’s applied-for stylized PARTY ANIMALS mark (“Applicant’s Mark”), Ser. No. 90288188, (the “Subject Application”) and the registered marks the Examining Attorney cited in the Office Action

**I. Applicant Amended Goods and Services**

As an initial point, Applicant notes that with this response, Applicant is deleting the Class 21 and 41 goods and services recited in the Subject Application.

**II. A Likelihood of Confusion Does Not Exist Between Applicant’s Mark and the Registered Marks Cited by the Examining Attorney**

The Examining Attorney initially refused registration of Applicant’s Mark on the ground that registration of the Mark creates a likelihood of confusion with the following registered marks (the “Cited Marks”):

**THE PARTY ANIMALS LIVE and Design** (Reg. No. 3590518) for “Entertainment in the nature of live performances by children's entertainment group; Entertainment, namely, live music concerts; Entertainment services, namely, providing a web site featuring photographic, audio, video and prose presentations featuring children's entertainment group” in Class 41 owned by The Party Animals, LLC

**PARTY ANIMAL** (Reg. No. 5195724) for “Empty toothpick and food-filled toothpicks holders in various animal shapes” in Class 21 owned by Talisman Designs, LLC

For the reasons detailed below, Applicant respectfully submits that when all relevant considerations are factored in, a likelihood of confusion does not exist between Applicant’s Mark and Cited Marks. Applicant therefore respectfully requests that the Examiner withdraw the Section 2(d) refusal and allow the Subject Application to proceed to publication.

**a. Likelihood of Confusion Standard**

Section 2(d) of the Lanham Act prevents the registration of a mark if it is likely to cause confusion with a mark that is already registered. 15 U.S.C. § 1052(d). Whether there is a likelihood of confusion “must be analyzed on a case-by-case basis, considering all evidence actually relevant to that inquiry.” *See Juice Generation, Inc. v. GS Enterprises LLC*, 794 F.3d 1334, 1338 (Fed. Cir. 2015).

A multi-factor test is used by the U.S. Patent and Trademark Office and courts to assess whether a likelihood of confusion exists between marks. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 U.S.P.Q. 563 (C.C.P.A. 1973) (determining likelihood of confusion by thirteen factors: similarity of the marks, similarity and nature of the goods or services, similarity of established trade channels, whether purchasers are impulsive or sophisticated, fame of the prior mark, amount and nature of similar marks on similar goods, actual confusion, length of time of concurrent use without evidence of actual confusion, variety of goods on which mark is used, market interface between applicant and owner of prior mark, extent that applicant has a right to

exclude others from use of its mark, extent of potential confusion, and any other probative fact). Not all of the factors may be relevant in every case. *In re Majestic Distilling Co.*, 315 F.3d 1311, 1315, 65 U.S.P.Q.2d 1201, 1204 (Fed. Cir. 2003). Additionally, there is no reason why a single du Pont factor should not outweigh all the rest. *Kellogg Co. v. Pack 'Em Enters., Inc.*, 951 F.2d 330, 333, 21 U.S.P.Q.2d 1142, 1145 (Fed. Cir. 1991). In this instance, in view of (1) the differences between Applicant's mark and the Cited Mark in terms of overall appearance, sound and meaning; and (2) the coexistence of several registrations for BOLT-formative marks for similar or related goods in Class 9, Applicant's Mark is entitled to registration under an analysis of the du Pont factors. TMEP 1207.01. These points are discussed in greater detail below.

**a. The Respective Goods are Different**

The cumulative effect of differences in the essential characteristics of the goods and services involved is a fundamental inquiry mandated by Section 2(d) of the Trademark Act. *Interstate Brands Corp. v. Celestial Seasonings, Inc.*, 198 USPQ 151, 153 (CCPA 1978). Applicant submits that the candles it intends to offer under Applicant's Mark are so different from the cosmetic goods recited in the Cited Registration that no confusion is likely.

The Examining Attorney submits that registration of Applicant's Mark is likely to cause confusion with the Cited marks due to the relatedness of the goods and services recited in the Subject Application and the goods and services recited in the registrations for the Cited Marks. However, now that Applicant has deleted the Class 21 and 41 goods and services recited in the Subject Application, the remaining Class 9 and 25 goods recited in the Subject Application are significantly different from the goods and services recited in the registrations for the Cited Marks, and thus are not likely to cause confusion. Specifically, because the nature and scope of a party's

goods must be determined on the basis of the goods or services recited in the application and cited registration, the fact that there is no overlap in the recitation of goods in the Subject Application and the registration for the Cited Mark demonstrates the parties' goods are not related and confusion is unlikely. *See, e.g., B & B Hardware, Inc. v. Hargis Inds., Inc.*, 135 S. Ct. 1293, 1300 (2015) (recognizing that an "applicant's right to register must be made on the basis of the goods described in the application"); TMEP § 1207.01(a)(iii). Therefore, the parties' goods are different, and confusion is not likely.

**b. Applicant's Mark and the Cited Mark are Dissimilar in Appearance, Sound, Connotation, and Commercial Impression**

The comparison of marks must be of the overall commercial impression, not of a comparison of the separate elements. *Juice Generation, Inc. v. GS Enterprises LLC*, 794 F.3d 1334, 1340 (Fed. Cir. 2015) (Board erred when it provided "no analysis sufficient to demonstrate consideration of the mark as a whole.") The Board has held that a side-by-side comparison of the marks is not the proper inquiry, instead one should consider whether the commercial impressions of the marks are sufficiently similar "such that persons who encounter the marks would be likely to assume a connection between the parties." *In re Covalinski*, Serial No. 85/685,983, slip op., p. 5 (December 18, 2014, TTAB) (finding no likelihood of confusion between REDNECK RACEGIRL & Design and RACEGIRL; Section 2(d) refusal to register reversed). It is improper to dissect and consider piecemeal a mark, "rather, it must be considered as a whole in determining likelihood of confusion." *Juice Generation, Inc.*, 794 F.3d at 1340, quoting *Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 1007 (CCPA 1981).

The differences between the marks can be enough to obviate a likelihood of confusion. There are a number of cases where no likelihood of confusion was found even though one mark

incorporates the entire word element of the other mark and the goods are related or identical. For example, the Court of Appeals for the Federal Circuit reversed a Board decision upholding a Section 2(d) refusal to register the mark VARGA GIRL for calendars based on a prior registration for the mark VARGAS for calendars. *In re Hearst Corp.*, 892 F.2d 493 (Fed. Cir. 1992). The Court held that:

The appearance, sound, sight and commercial impression of VARGA GIRL derive significant contribution from the component “girl.” By stressing the portion “varga” and diminishing the portion “girl”, the Board inappropriately changed the mark. Although the weight given to the respective words is not entirely free of subjectivity, we believe that the Board erred in its diminution of the contribution of the word “girl”. When GIRL is given fair weight, along with VARGA, confusion with VARGAS becomes less likely. *Id.* at 494.

In another example, the Board held that the REDNECK RACEGIRL & Design mark for various apparel goods was not confusingly similar to word mark REDNECK for various apparel goods because the overall commercial impression of the marks “weighs heavily against a conclusion that confusion is likely. *Covalinski*, at p. 7. In that case, the Board found the difference in the marks to outweigh all the other *du Pont* factors. *Id.* at p. 8.

The same is true here with regard to Applicant’s stylized PARTY ANIMALS mark and the Cited Marks. When considered in their entirety, the marks are more dissimilar than similar. The distinct stylization of Applicant’s Mark clearly distinguishes the mark from the Cited Marks, one of which has no stylization and does not include an “s” on the end of the mark (Reg. No. 5195724) and the other which has its own distinct stylization and add the terms “the” and “live” (Reg. No. 3590518). Just like the addition of “GIRL” in the VARGA GIRL vs. VARGAS analysis and “REDNECK”

in the REDNECK RACEGIRL vs. REDNECK analysis, the clear differences between Applicant's Mark and the Cited Marks weighs in favor of a finding of no likelihood of confusion. This is especially true given clear differences the goods recited in the Subject Application and the goods and services recited in the registrations for the Cited Marks.

**c. Applicant Owns a Registration for Applicant's Mark Covering Similar Goods**

Applicant also notes that it owns the following registration for the PARTY ANIMALS mark covering goods that are similar and related to the Class 9 goods recited in the Subject Application ("Applicant's Registration"):

PARTY ANIMALS (Reg. No. 4475673) for "Computer game software; video game software; computer game programs; downloadable computer game programs; interactive game programs; interactive game software; computer and video game software for use on electronic devices, including handheld devices and wireless devices; all the aforesaid not for use in the field of gambling" in Class 9

The coexistence of Applicant's Registration and the registrations for the Cited Mark further demonstrates that registration of Applicant's Mark in the Subject Application is not likely to cause confusion with the Cited Marks.

**d. Burden of Proof**

The burden of proof is on the Examining Attorney to establish the likelihood of confusion. A refusal should be based on an understanding of the relevant industries, an analysis of the marketplace, and the likely reaction of prospective purchasers. Substantial evidence is now before the Examining Attorney to show that no likelihood of confusion is possible. To maintain this refusal in view of these submissions, significant contrary evidence would be necessary.

### **III. Conclusion**

For all of the foregoing reasons, Applicant respectfully submits that a likelihood of confusion does not exist between Applicant's Mark and the Cited Marks. Applicant therefore respectfully requests that the initial refusals be withdrawn, and the Examining Attorney allow the Subject Application to proceed to publication.