IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

June 1, 2018
Tina Snapp
Trademark Examining Attorney
Law Office 110
United States Patent and Trademark Office

RE:	Serial No.:	87646992
	Mark:	**Cicada Wing**
	Applicant:	Shenzhen Royole Technologies, Co., Ltd.
	Office Action of:	December 16, 2017

APPLICANT'S RESPONSE TO OFFICE ACTION

The following is the response of Applicant, Shenzhen Royole Technologies, Co., Ltd. (Shenzhen Royole), by Counsel, to the Office Action sent via email on December 16, 2017 (12/16 OA), by Examining Attorney Tina Snapp.

Basis for Refusal

The Examining Attorney has refused registration on the grounds that the mark sought is confusingly similar to prior registration 5094082 for the mark Cicada.

Analysis

Likelihood of confusion between two marks is determined by the USPTO by a review of **all** of the relevant factors under the *DuPont* test as applied to the marks. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). A key consideration in an ex parte likelihood of confusion analysis are the similarity of the trade channels of the goods or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). The Examining Attorney assessed the likelihood of confusion principally as it pertains to Applicant's mark in light of this key consideration, noting specifically that the Applicant intended to use its mark with respect to "batteries, electric" and "photographic cameras." It is alleged that these intended uses overlap with the prior registration. With respect to perceived similarity, the addition of the word "wing" is significant enough to distinguish the applied-for mark by sight and sound. Cicadas are known for the loud noise that the insects make—not from their wings—but via special organs known as "tymbals" located on the first segment of their abdomen. http://songsofinsects.com/cicadas. Cicada wings are quite large relative to the body of the insect and wholly distinguishable therefrom. The addition of the word "wing" renders the applied for mark sufficiently distinguishable. *See Anheuser-Busch, Inc. v. L & L Wings, Inc.*, 962 F.2d 316, 318 (4th Cir. 1992)(holding wings on Anheuser label sufficiently distinguishable from t-shirt without such wings).

To demonstrate likelihood of confusion, the Examining Attorney must do more than show the theoretical possibility of confusion. *Int'l Ass'n of Machinists & Aero. Workers, AFL-CIO v. Winship Green Nursing Center*, 103 F.3d 196, 200 (1st Cir. 1996). Similarity is based on the designation's total effect. *Id.* at 203. In certain circumstances, even otherwise similar marks are not likely to be confused if they are used in conjunction with clearly-displayed names, logos or other source-identifying designations of the manufacturer. *Id.* at 204. To analyze similarity, one must assume the impression made by the marks in question on the average purchaser, who take in a general rather than a specific impression of trademarks. *United Global Media Grp., Inc. v. Tseng*, 112 USPQ2d 1039, 1049 (TTAB 2014); TMEP §

1207.01(b). Given that Applicant's letter mark partakes of both visual and oral indicia, both must be weighed in the context in which they occur. *In re Electrolyte Labs, Inc*., 929 F.2d 645, 647 (Fed. Cir. 1990). The Examiner has concluded that the marks in comparison "have the same commercial impression." Applicant respectfully traverses the Examining Attorney's conclusion given the dissimilarity in the marks.

More importantly, Shenzhen Royole has amended its description of goods to avoid any overlapping use with respect to "batteries, electric" and "photographic cameras," and submits that this Application is now in a position for allowance. According to TMEP § 1207.01(b)(v), "[e]ven marks that are identical in sound may create sufficiently different commercial impressions when applied to the respective parties' goods or services so that there is no likelihood of confusion." There is no per se rule that any certain goods are related. TMEP § 1207.01(a)(iv). Moreover, even where goods are found to be related, a likelihood of confusion still may not exist where the goods nevertheless have a "competitive distance between them. That is, they are different types of clothing, having different uses, and are normally sold in different sections of department stores." *In re Sears, Roebuck & Co*., 2 USPQ2d 1312, 1314 (TTAB 1987).

Applicant submits the Examining Attorney should reverse her conclusions on the likelihood of confusion and relatedness of goods and withdraw the statutory refusal in order to allow Applicant's mark to proceed to publication and registration.