

OFFICE ACTION RESPONSE
U.S. Serial No. 88131661 for QP (with design)

In the Office Action mailed January 9, 2019, the examiner rejected Application Serial No. 88131661 for the mark QP (with design), citing a likelihood of confusion with U.S. Registration No. 5225155. In addition, the examiner has objected to the current identification of goods. Each of these issues is discussed below.

I. Identification of Goods & Services

The examiner has alleged that the wording for several of the goods must be clarified because the identification of goods is indefinite as to the nature or specific types of goods.

As indicated in the form section of this response, applicant has adopted the identification of goods as proposed by the examiner for classes 12 and 28, and deleted class 25. Specifically, the applicant has made the following changes to the identification of goods and services, with deletions in **red strikethrough** text and additions in **blue underlined** text:

12: Children's car seats; Baby carriages; Small wagons for children; Child safety harnesses for vehicle seats; Prams; Electric cars; Tricycles, **not being toys**; Bicycles; **Motor Scooters; Mobility** Scooters; tires; Bicycle pumps; Motor cycles; Luggage racks for motor cars; Motorized luggage carts; electric cars for children

~~25: Clothing, namely, Sweaters, pullovers, Shirts, Suits, Trousers, waistcoats, vests, Dresses, Topcoats, Jackets as clothing, tee-shirts, Ponchos, Underwear, Pajamas, Children's clothing, namely, tops and pants, Windbreaker, Layettees as clothing, Babies' pants as clothing, Bathing trunks, Swimsuits, Raincoats, Gloves as clothing, Rain-cape, Mittens, Shawls, Scarfs; footwear; headgear, namely, Bathing caps, Berets, Caps as headwear, ear muffs; Stockings; Socks; Panty hose; Ankle socks~~

28: Games and playthings, namely, ride on toys, Building blocks as toys, Play balloons, Dominoes, Dolls, Scooters as toys, Stuffed toys, Toy models, Smart toys, namely, electronic learning toys and electric action toys, Toy **watches watch**, gymnastic and sporting articles, namely, Billiard balls, Billiard table cushions, Knee guards **for athletic use; as sports articles**, Elbow guards **for athletic use as sports articles**; decorations for Christmas trees; **toy tricycles for children; toy scooters; children's ride-on toy vehicles**

The clean version of these amendments is included within the form section of the response.

II. Section 2(d) – Likelihood of Confusion

The examiner has refused registration of the applied-for mark due to likelihood of confusion with U.S. Registration No. 5225155 for the mark Q P (with design) in connection with “headgear, namely hats, caps, and headbands” in class 25. Applicant respectfully disagrees with the examiner’s finding that this registration is likely to be confused with the applied-for mark.

For purposes of likelihood of confusion, the examiner must consider the marks in their entireties for similarities in appearance, sound, connotation, and commercial impression. *See In re Hearst Corp.*, 25 U.S.P.Q.2d 1238, 1239 (Fed. Cir. 1992) (“Marks tend to be perceived in their entireties, and all components thereof must be given appropriate weight.”); *see also Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1321, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 1371, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005)); TMEP §1207.01(b)-(b)(v).

A. The Applied-for Mark is Not Likely to be Confused with the Registered Mark

Traditionally, if a mark comprises both wording and a design, greater weight is often given to the wording, because it is the wording that purchasers would use to refer to or request the goods or services. *See In re Viterra Inc.*, 671 F.3d 1358, 1366 (Fed. Cir. 2012). However, the comparison of composite marks must be done on a case-by-case basis, without reliance on mechanical rules of construction. Indeed, the test for purposes of likelihood of confusion is whether the marks *in their entireties* are likely to cause confusion.

Here, in comparing the marks, the examiner relied almost entirely on the similarities between the literal portions of the applied-for mark and the registered mark and glossed over the importance of the distinctive graphical arrangement of the applied-for mark. When viewed in their entireties, the substantial difference between the two marks is readily apparent:



Courts have acknowledged that distinctive graphic elements may serve as the distinguishing feature between marks. For example, in *Massey Junior Coll., Inc. v. Fashion Inst. Of Tech.*, the court found that the design portion of the challenged mark created a different commercial impression than the prior mark, and that the design portion could not be ignored since the marks must be considered in their entireties. 181 USPQ 272, 276 (CCPA 1974). Further, in *In re White Rock Distilleries*, the court found that the prominent design feature in the registered mark served to distinguish the registered mark visually from the applicant’s mark. 92 U.S.P.Q.2d 1282, 1284 (TTAB 2009).

Here, applicant’s graphical arrangement readily distinguishes the applied-for mark from the registered mark because the marks utilize different cases of the relevant letters and each mark incorporates the letters into an overall design that is unique and obviates the possibility of

consumer confusion. Specifically, applicant's graphical arrangement utilizes capital versions of the letters Q and P, with the Q represented as a solid silhouette and the P aligned in the center of the Q in the negative. In contrast, the registered mark uses lowercase versions of the letters q and p against a circular background, with the letters arranged such that their spines are adjacent to each other and the upper loops face in opposite directions. Indeed, when the marks are compared in their entireties, the differences in the graphic representation of each mark results in significant differences in appearance, connotation and commercial impression.

Accordingly, applicant asserts that because consumers will readily distinguish the marks based on their design elements, there is no likelihood of confusion between the registered mark and the applied-for mark.

B. The Relevant Goods are Unrelated

The goods offered under the applied-for mark are unrelated to the goods offered under the registered mark. In evaluating the relatedness of goods, the issue is not whether the goods offered under the marks are likely to be confused but, rather, whether there is a likelihood of confusion as to the source or sponsorship of the goods because of the marks used thereon. *See In re Shell Oil Co.*, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993) ("The degree of 'relatedness' must be viewed in the context of all the factors, in determining whether the [goods] are sufficiently related that a reasonable consumer would be confused as to source or sponsorship.") If the goods in question are not related or marketed in such a way that they would be encountered by the same persons in situations that would create the incorrect assumption that they originate from the same source, then, even if the marks are identical, confusion is not likely. *See Coach Servs., Inc. v. Triumph Learning LLC*, 668 F3d 1356, 1371 (Fed. Cir. 2012).

Here, the examiner asserts that cited evidence shows the goods, namely "headgear" and "clothing, footwear, headgear, stockings, socks, panty hose," are of a kind that may emanate from a single source under a single mark. Because applicant has deleted the class 25 goods including "headgear" and "clothing, footwear, headgear, stockings, socks, panty hose," the examiner's argument regarding the similarity of the goods is now moot. Further, the similarity between the remaining goods in classes 12 and 28 and the registered goods fails to reach a level of relation that would create a mistaken belief in the consumer's mind that the goods emanate from the same source.

In light of the significant differences between the applied-for and registered mark, and because applicant's goods and registrant's goods are not related, there is no likelihood of confusion between the applied-for mark and the registered mark.

III. Conclusion

Because applicant has adopted the examiner's proposed clarification of the recited goods and because there is no likelihood of confusion between the registered mark and the applied-for mark, applicant submits that the application is in condition for allowance and respectfully requests that the examiner approve the application for publication.