RESPONSE TO FIRST OFFICE ACTION

Applicant respectfully submits the following response to the Office Action dated December 15, 2020, for the mark FLIPPER (U.S. application serial no. 90/121,009) ("Applicant's Mark"). The Office Action raises an objection to registration of Applicant's Mark under Trademark Act Section 2(d) arising out of an existing registration for the mark FLIPPER (reg. no. 3,702,611) (the "Cited Registration").

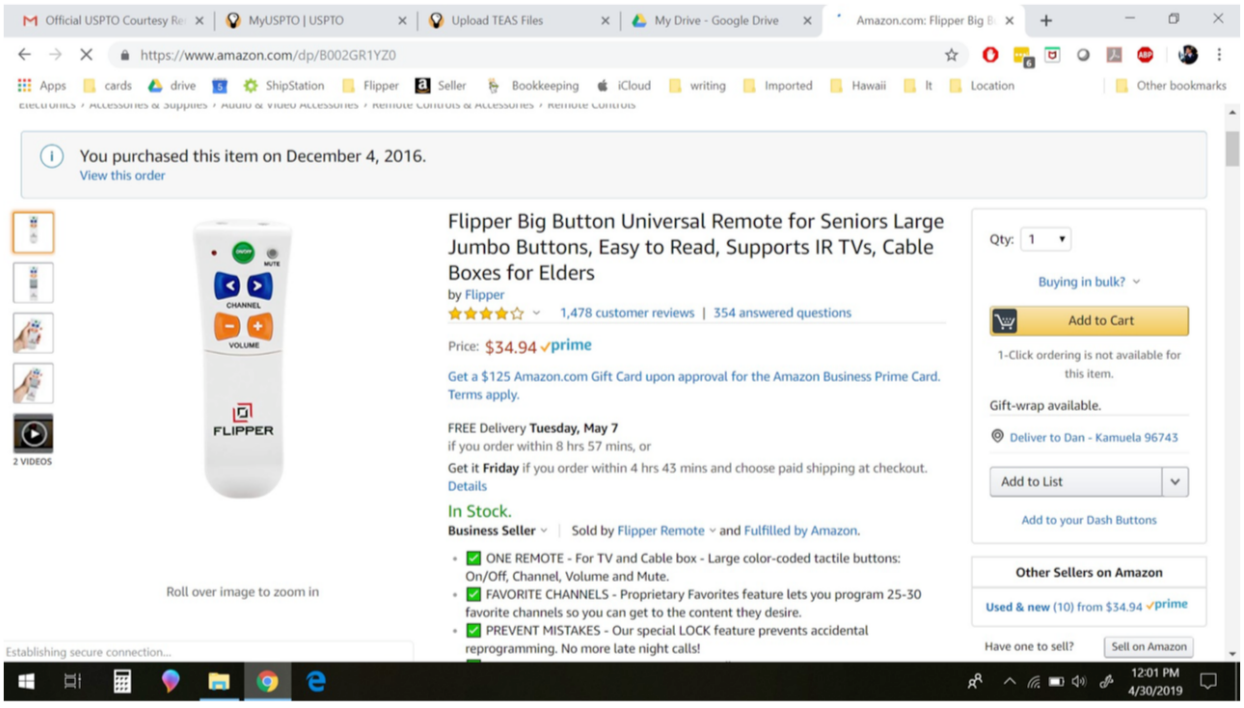
Applicant respectfully disagrees that a likelihood of confusions exists between Applicant's Mark and the mark shown in the Cited Registration. Applicant's belief is based primarily on two factors. First, the goods claimed in connection with Applicant's Mark are substantially different than those identified in the Cited Registration. Second, the target purchasers of Applicant's Goods are technologically sophisticated and quite different from the intended audience as identified in the Cited Registration, namely, "children and older individuals" in need of a "simplistic" remote control for television sets. Together, these factors suggest that consumers are not likely to be confused as to the source of sponsorship of the parties' respective goods.

Differences Between Goods

Applicant's application, as amended herein, claims the mark FLIPPER for use in connection with "Portable, customizable electronic device, namely, a handheld security testing device with onboard computer software development tools, open-source firmware, and an operating system reminiscent of a computer game, for use in interacting with and testing the security of other electronic devices by spoofing two-factor authentication, emitting and receiving infrared signals, storing access-control credentials, transmitting and receiving wireless signals, and scanning, analyzing and penetration-testing radio protocols, computer interfaces, USB ports,

and computer hardware; computer hardware for detecting and identifying access to computer networks and resources, performing vulnerability scans, and penetration testing," in International Class 9 ("Applicant's Goods"). The Cited Registration, on the other hand, identifies "universal remote controls for televisions, satellite receivers and cable set top boxes, all having a simplistic design for ease of use by children and older individuals," in International Class 9 ("Registrant's Goods"). The goods are distinguishable.

Applicant's Goods are sophisticated security-testing devices meant to be used with a wide variety of computer interfaces. Further, Applicant's device even allows users to customize the onboard software and hardware options. On the other hand, Registrant's Goods appear to consist of simplistic remote controls for televisions. The image below was submitted to the PTO on April 30, 2019 as a specimen for the Cited Registration:



In fact, since a remote control is used to "flip" or change television channels, the cited FLIPPER mark arguably is merely descriptive for remote controls, or even generic. Whatever its branding,

a television remote is not a sophisticated product and is never going to be confused with a customizable security testing device, especially when said remote has a "simplistic design for ease of use."

Differences in Marketing and Target Purchasers

In addition to being very different goods, Applicant's Goods and Registrant's Goods also are marketed to very different relevant consumers. For a likelihood of confusion to occur, Applicant's Goods and Registrant's Goods need to be marketed to the same relevant purchasers. *Electronic Design & Sales v. Electronic Data Systems*, 954 F.2d 713, 21 USPQ2d 1388, 1390 (Fed. Cir. 1992). Applicant's Goods are marketed to a specific group of sophisticated purchasers with significant information-technology security skills; Applicant's security devices are meant for technophiles. Registrant's Goods, conversely, are specifically designed for technophobes, namely, "children and older individuals" who need a simpler design than those used in standard remote controls. Even if the marks are identical, 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, confusion is not likely. *See e.g., Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1371, 101 USPQ2d 1713, 1723 (Fed. Cir. 2012); *Shen Mfg. Co. v. Ritz Hotel Ltd*., 393 F.3d 1238, 1244-45, 73 USPQ2d 1350, 1356 (Fed. Cir. 2004). A likelihood of confusion is precluded when there is no reasonable probability that the same customers will encounter opposing marks. *See In re Fesco, Inc.*, 219 U.S.P.Q. 437, 439 (TTAB 1983). The relevant consumers of goods for technophiles and for technophobes are sufficiently distinct to prevent any likelihood of confusion.

Under Section 2(d) of the Trademark Act, there must be a likelihood of confusion, not simply a possibility thereof. Here, Applicant's Goods and Registrant's Goods are highly

distinguishable and are marketed to opposite segments of the consuming public. The pronounced differences in the goods claimed in connection with these marks and the very different purchasers must be emphasized when determining a likelihood of confusion, and close consideration of these factors should lead to a removal of the confusion objection.