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Subject: U.S. TRADEMARK APPLICATION NO. 77820105 - ULTRA CASE - FHKI 3117 (8 - EXAMINER BRIEF

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UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

U.S. APPLICATION SERIAL NO. 77820105

MARK: ULTRA CASE



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GENERAL TRADEMARK INFORMATION:

<http://www.uspto.gov/trademarks/index.jsp>

TTAB INFORMATION:

<http://www.uspto.gov/trademarks/process/appeal/index.jsp>

APPLICANT: Ripples Group Limited

CORRESPONDENT'S REFERENCE/DOCKET NO:

FHKI 3117 (8)

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EXAMINING ATTORNEY'S APPEAL BRIEF

The applicant has appealed the Trademark Examining Attorney's final refusal to register the mark ULTRA CASE and design for "Cases and bags specially adapted for protecting, holding and carrying electronic devices, namely, mobile phones, cell phones, smart phones, portable telephones, media

players, analog voice recorders, digital audio recorders, digital voice recorders, video recorders, personal hand-held portable music players, digital audio players for playing voice recordings, MP3 players, MP4 players, digital audio players designed for playing files with .ogg filename extension, WMA players, digital audio players designed for playing files in 3GPP file format, CD players, MD players, audio recorders, digital video players for watching movies, video file players for watching movies, VCD players for watching movies, DVD players for watching movies, digital video recorders for recording movies, and digital cameras with movie recording functions; screen protectors and fitted plastic films known as skins for covering and providing a scratch proof barrier for protection for mobile phones, cell phones, smart phones, portable telephones, media players, analog voice recorders, digital audio recorders, digital voice recorders, video recorders, personal hand-held portable music players, digital audio players for playing voice recordings, MP3 players, MP4 players, digital players designed for playing files with .ogg filename extension, WMA players, digital players designed for playing files in 3GPP file format, CD players, MD players, audio recorders, digital video players for watching movies, video file players for watching movies, VCD players for watching movies, DVD players for watching movies, digital video recorders for recording movies, and digital cameras with movie recording functions; devices and accessories for mobile phones, cell phones, media players, media recorders, namely, hands-free devices for mobile phones, keyboards, batteries, battery chargers, in International Class 009” on the ground of likelihood of confusion under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d).

I. FACTS

The applicant has applied for registration on the Principal Register for the mark ULTRA CASE and design for the goods, as stated above, in International Class 009. Registration was refused under

Trademark Act Section 2(d), 15 U.S.C. Section 1052(d), based on likelihood of confusion with Registration No. 3199331 for the mark ULTRACASE for use on “Waterproof, all-environment carrying and transit cases for electronic and field instruments,” as to be likely, when used in connection with the identified goods, to cause confusion or to cause mistake or to deceive. A Final refusal under Section 2(d) of the Trademark Act was issued on June 30, 2010. The applicant filed a Request for Reconsideration on December 30, 2010 (which presented new evidence) and a subsequent Final refusal under Trademark Act Section 2(d) was issued on January 21, 2011. On March 8, 2012, the Trademark Trial and Appeal Board suspended the applicant’s appeal and remanded the application to the Examining Attorney to clarify the applicant’s identification of goods. The application was abandoned on November 8, 2012 and subsequently revived on January 15, 2013. A subsequent Final refusal maintaining both the likelihood of confusion refusal under Trademark Act Section 2(d) and the requirement to clarify the identification of goods was issued on September 4, 2013. The application was abandoned again on April 22, 2014 and subsequently revived again on September 5, 2014. An Examiner’s Amendment clarifying the applicant’s identification of goods was issued on September 25, 2014. However, the applicant’s August 4, 2014 Petition to Revive/Response to the subsequent Final refusal issued on September 4, 2013 did not resolve the issue of likelihood of confusion. Thus, this appeal follows the Examining Attorney’s Final refusal under Section 2(d) of the Trademark Act.

II. ARGUMENT

THE MARKS OF THE APPLICANT AND REGISTRANT ARE CONFUSINGLY SIMILAR IN SOUND AND APPEARANCE AND THE GOODS ARE CLOSELY RELATED SUCH THAT THERE EXISTS A LIKELIHOOD OF CONFUSION OR MISTAKE UNDER SECTION 2(D) OF THE TRADEMARK ACT.

Trademark Act Section 2(d) bars registration of an applied-for mark that so resembles a registered mark that it is likely a potential consumer would be confused, mistaken, or deceived as to the source of the goods and/or services of the applicant and registrant. See 15 U.S.C. §1052(d). A determination of likelihood of confusion under Section 2(d) is made on a case-by case basis and the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973) aid in this determination. *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 1349, 98 USPQ2d 1253, 1256 (Fed. Cir. 2011) (citing *On-Line Careline, Inc. v. Am. Online, Inc.*, 229 F.3d 1080, 1085, 56 USPQ2d 1471, 1474 (Fed. Cir. 2000)). Not all the *du Pont* factors, however, are necessarily relevant or of equal weight, and any one of the factors may control in a given case, depending upon the evidence of record. *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d at 1355, 98 USPQ2d at 1260; *In re Majestic Distilling Co.*, 315 F.3d 1311, 1315, 65 USPQ2d 1201, 1204 (Fed. Cir. 2003); see *In re E. I. du Pont de Nemours & Co.*, 476 F.2d at 1361-62, 177 USPQ at 567.

In this case, the following factors are the most relevant: similarity of the marks, similarity and nature of the goods and/or services, and similarity of the trade channels of the goods and/or services. See *In re Viterra Inc.*, 671 F.3d 1358, 1361-62, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593, 1595-96 (TTAB 1999).

A. THE MARKS ARE HIGHLY SIMILAR

In this case, the applicant seeks to register the mark ULTRA CASE and design. The registrant's mark is ULTRACASE. Although not identical, the marks are highly similar in appearance, sound and commercial impression.

In a likelihood of confusion determination, the marks are compared in their entireties for similarities in appearance, sound, connotation, and commercial impression. *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)). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014) (citing *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988); *In re 1st USA Realty Prof’ls, Inc.*, 84 USPQ2d 1581, 1586 (TTAB 2007)).

When comparing marks, the test is not whether the marks can be distinguished in a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods and/or services offered under the respective marks is likely to result. *Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 1053, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012); *In re Davia*, 110 USPQ2d 1810, 1813 (TTAB 2014). The proper focus is on the recollection of the average purchaser, who retains a general rather than specific impression of trademarks. *United Global Media Grp., Inc. v. Tseng*, 112 USPQ2d 1039, 1049, (TTAB 2014); *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012).

In this case, the marks are highly similar in appearance because both marks consist of the identical words ULTRA and CASE. Each mark has a similar format consisting of two words, the first word of each mark is ULTRA and the last is CASE. The fact that there is a space between these words in the applicant’s mark (whereas the registrant’s mark is a unitary combination of these words) is not sufficient to distinguish applicant’s mark. The space in between the words ULTRA and CASE in applicant’s mark does not negate or overcome the similarities in appearance. Despite this difference, the marks at issue still share a confusing overall similarity in appearance.

Furthermore, because the marks consist of the same wording ULTRA and CASE in the same format, the marks are identical in sound. The applicant states that when viewed in their entireties the applicant's mark and cited mark are not confusingly similar because they create different overall commercial impressions and are dissimilar in visual appearance and sound. The applicant states that its two-word mark contains a design element with an encircled letter "U" cut thru in the middle which makes it look like an umlaut "U", whereas the registered cited mark has no design elements. Applicant attached the cited registrant's specimen submitted with registrant's application to show the difference between applicant's mark and registrant's mark. Applicant's Appeal Brief at p. 4-5 and Exhibit A. The examining attorney respectfully disagrees. Although marks must be compared in their entireties, the word portion generally may be the dominant and most significant feature of a mark because consumers will request the goods and/or services using the wording. See *In re Viterra Inc.*, 671 F.3d 1358, 1362, 1366, 101 USPQ2d 1905, 1908, 1911 (Fed. Cir. 2012); *In re Davia*, 110 USPQ2d 1810, 1813 (TTAB 2014). For this reason, greater weight is often given to the word portion of marks when determining whether marks are confusingly similar. *Joel Gott Wines, LLC v. Rehoboth Von Gott, Inc.*, 107 USPQ2d 1424, 1431 (TTAB 2013) (citing *In re Dakin's Miniatures, Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999)). In this case, the design element and appearance of the letter "U" in applicant's mark does not distinguish the applicant's mark. The examining attorney has considered the applicant's mark in its entirety. However, when considered in its entirety, it is the wording ULTRA CASE (not the design element) that is the dominant and most significant feature of the applicant's mark because consumers will request the goods using the wording ULTRA CASE, even though the letter "U" in the mark is stylized and encircled.

Also, the registrant's specimen evidence submitted by applicant shows the registrant's mark ULTRACASE on a product label. This label shows the cited registrant's mark presented in only one manner. As a typed drawing, the registrant's mark may be displayed in any lettering style, in lower case or capital letters, including the lettering style presented in applicant's mark. Therefore, despite this

extrinsic evidence, a comparison of applicant's mark and registrant's mark as discussed above shows that the marks are confusingly similar in sound and appearance.

Applicant further states that the commercial impression of applicant's mark and registrant's mark is different. Applicant attached images of its mark on its goods and printouts taken from registrant's website to illustrate the differences in the commercial impressions of the mark. Applicant's Appeal Brief at p. 6-7 and Exhibit B and C. The examining attorney respectfully disagrees. Use of the applicant's mark and registrant's mark in the manner shown on the images and webpages attached by the applicant does not change the fact that the commercial impression of the marks is determined by the identification of goods, as stated in applicant's application and as stated in the cited registration. Registrant's mark is used in connection with "Waterproof, all-environment carrying and transit cases for electronic and field instruments." This broadly-worded identification can be interpreted to include cases for various types of electronic instruments, such as those electronic instruments identified in applicant's identification of goods. The commercial impression of the applicant's mark and registrant's mark is therefore similar because both marks suggest goods or cases that are beyond normal or ordinary or of high quality (the word "ultra" means going beyond what is usual or ordinary). See online dictionary definition of this word from Dictionary.com, Page 3 of Attachments of the Office Action dated June 30, 2010.

The applicant states that the marks must be compared in their entirety and not dissected into component parts to determine likelihood of confusion, and it is inappropriate to dissect the mark in the manner relied on by the examining attorney without giving appropriate weight to the design element of the mark. Applicant's Appeal Brief at p. 8-9. The examining attorney respectfully disagrees. Marks must be compared in their entirety and should not be dissected; however, a trademark examining attorney may weigh the individual components of a mark to determine its overall commercial

impression. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1322, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014) (quoting *In re Nat'l Data Corp.*, 753 F.2d 1056, 1058, 224 USPQ 749, 751 (Fed. Cir. 1985) (“[I]n articulating reasons for reaching a conclusion on the issue of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entirety.”)). In this case, the examining attorney has considered the applicant’s mark and registrant’s mark in their entirety. Upon such consideration, it is determined that more weight is to be given to the wording ULTRA CASE (and not the design element) of the applicant’s mark because consumers will call for the goods using this wording. The applicant’s addition of the design elements to its mark does not overcome the likelihood of confusion in this case. This is because the word portions ULTRA CASE and ULTRACASE of the marks at issue in are nearly identical in appearance, sound, connotation, and commercial impression; therefore, the addition of a design element does not obviate the similarity of the marks in this case. *See In re Shell Oil Co.*, 992 F.2d 1204, 1206, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993).

B. THE GOODS OF THE PARTIES ARE CLOSELY RELATED

The goods and/or services of the parties need not be identical or even competitive to find a likelihood of confusion. *See On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 1086, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d 1322, 1329, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000) (“[E]ven if the goods in question are different (from, and thus not related to, one another in kind, the same goods can be related in the mind of the consuming public as to the origin of the goods.”). The respective goods and/or services need only be “related in some manner and/or if the circumstances

surrounding their marketing [be] such that they could give rise to the mistaken belief that [the goods and/or services] emanate from the same source.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)); TMEP §1207.01(a)(i). The applicant has identified its goods as “Cases and bags specially adapted for protecting, holding and carrying electronic devices, namely, mobile phones, cell phones, smart phones, portable telephones, media players, analog voice recorders, digital audio recorders, digital voice recorders, video recorders, personal hand-held portable music players, digital audio players for playing voice recordings, MP3 players, MP4 players, digital audio players designed for playing files with .ogg filename extension, WMA players, digital audio players designed for playing files in 3GPP file format, CD players, MD players, audio recorders, digital video players for watching movies, video file players for watching movies, VCD players for watching movies, DVD players for watching movies, digital video recorders for recording movies, and digital cameras with movie recording functions; screen protectors and fitted plastic films known as skins for covering and providing a scratch proof barrier for protection for mobile phones, cell phones, smart phones, portable telephones, media players, analog voice recorders, digital audio recorders, digital voice recorders, video recorders, personal hand-held portable music players, digital audio players for playing voice recordings, MP3 players, MP4 players, digital players designed for playing files with .ogg filename extension, WMA players, digital players designed for playing files in 3GPP file format, CD players, MD players, audio recorders, digital video players for watching movies, video file players for watching movies, VCD players for watching movies, DVD players for watching movies, digital video recorders for recording movies, and digital cameras with movie recording functions. devices and accessories for mobile phones, cell phones, media players, media recorders, namely, hands-free devices for mobile phones, keyboards, batteries, battery chargers.” The registrant has registered its mark for “Waterproof, all-environment carrying and transit cases for electronic and field instruments.”

Applicant argues that its mark and the registrant's mark are used on different goods and therefore confusion among consumers is highly unlikely. The applicant's mark is used in connection primarily with cases for protecting electronic devices such as telephones, and skins for covering mobile phones. By contrast, registrant's goods are big sturdy carrying boxes for carrying various items and protecting them from dust and water. Applicant states the applicant's goods and registrant's goods travel in different channels of trade and are therefore offered to different groups of consumers and thus confusion is unlikely. Applicant's Appeal Brief at p. 10-11. Applicant also states that applicant offers its goods online on its website and since U.S. consumers can only purchase the applicant's goods online, not in stores, and the applicant's website looks different from the registrant's website, there cannot be a likelihood of confusion. The public is not buying the applicant's goods and registrant's goods in the same store. Applicant's Appeal Brief at p. 12.

The examining attorney respectfully disagrees. The applicant's characterization of the registrant's goods as "big sturdy carrying boxes for carrying various items and protecting them from dust and water" is based on the registrant's use of its mark on its specimen. See Exhibit C of Applicant's Appeal Brief. However, this evidence of use of the registrant's mark on some of its goods is unpersuasive in determining likelihood of confusion. With respect to applicant's and registrant's goods and/or services, the question of likelihood of confusion is determined based on the description of the goods and/or services stated in the application and registration at issue, not on extrinsic evidence of actual use. See *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1323, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (quoting *Octocom Sys. Inc. v. Hous. Computers Servs. Inc.*, 918 F.2d 937, 942, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990)). In this case, the likelihood of confusion analysis must be determined by the registrant's identification as stated in its registration, which is "Waterproof, all-environment carrying and transit cases for electronic and field instruments." Despite what is shown on the registrant's website, the identification of goods in the cited registration is broadly-worded. The

wording “carrying and transit cases for electronic and field instruments” can be interpreted to include cases for electronic instruments such as those identified in applicant’s identification of goods.

Also, absent restrictions in an application and/or registration, the identified goods and/or services are “presumed to travel in the same channels of trade to the same class of purchasers.” *In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (quoting *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1268, 62 USPQ2d 1001, 1005 (Fed. Cir. 2002)). Additionally, unrestricted and broad identifications are presumed to encompass all goods and/or services of the type described. See *In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006) (citing *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981)); *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992). In this case, the identification set forth in the application and registration has no restrictions as to nature, type, channels of trade, or classes of purchasers. Therefore, it is presumed that these goods travel in all normal channels of trade, and are available to the same class of purchasers. Further, as discussed above, the registration uses broad wording to describe the goods and this wording is presumed to encompass all goods of the type described, including those in applicant’s more narrow identification.

Also, the goods presumed to be encompassed by the registrant’s identification of goods (namely, carrying cases for electronic instruments) are related to the applicant’s other identified goods (namely, screen protectors and fitted plastic films known as skins for covering and protecting various electronic instruments). The examining attorney has made of record third party websites found on the Google Searchable Database showing that the relevant goods (namely, carrying cases for electronic instruments, and cases and skins and screen protectors used for protecting and covering electronic devices) are sold or provided through the same trade channels and used by the same classes of consumers in the same fields of use. See third-party webpage attachments to the Office Action dated

June 30, 2010, Pages 4-14. The following discusses the relevant goods as shown on some of this third-party webpage evidence:

- The website from Dell shows that it sells and provides “Cases & Skins” for MP3 players and multimedia players to consumers. See Attachment Page 5 from the June 30, 2010 Office Action.
- The website from Tradestead.com demonstrates that it sells “Ipod Cases and Skins” for digital audio players. See Attachment Page 6 from the June 30, 2010 Office Action.
- The webpage from Xmarks advertises that the website for Case-Mate is “the worlds leading manufacturer of premium quality cases, holsters, skins, covers, and accessories for Apple Iphone, Blackberry, Ipod, MacBook and other electronic devices.” The actual website webpages from Case-Mate show that it sells cases, skins and screen protectors for media players, digital audio players, smartphones, portable phones and cameras. See Attachment Pages 7-10 from the June 30, 2010 Office Action.
- The webpage advertising from AboutUs.org states that the entity Ghost-Armor.com “sells electronic device protectors, skin, cases, covers & armor” with an excerpt taken from the Ghost-Armor website that states “Ghost Armor the first and last line of defense in electronics protection!” See Attachment Page 12 from the June 30, 2010 Office Action.
- The website from DividedbyO shows that this retailer sells “skins & cases” and the tagline “hand made shells for portable electronic devices” appears below pictures of various portable electronic devices that are encased in skins and cases. See Attachment Page 11 from the June 30, 2010 Office Action.

Therefore, this evidence supports the conclusion that the applicant’s and registrant’s goods are considered related for likelihood of confusion purposes. See, e.g., *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1202-04 (TTAB 2009); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1268-69, 1271-72 (TTAB 2009). Evidence obtained from the Internet may be used to support a determination under Trademark Act Section 2(d) that goods and/or services are related. See, e.g., *In re G.B.I. Tile & Stone, Inc.*, 92 USPQ2d 1366, 1371 (TTAB 2009); *In re Paper Doll Promotions, Inc.*, 84 USPQ2d 1660, 1668 (TTAB 2007).

Applicant further argues that this Office has consistently allowed similarly situated marks

that incorporate the same common element of the marks to co-exist with each other on the Principal Register for goods no less similar to each other than those of the cited registration and the applicant's mark. Numerous marks incorporating the word ULTRA co-exist on the Principal Register for related goods in International Class 009 and this demonstrates that the Office has recognized the commercial reality that consumers frequently encounter multiple marks incorporating similar marks and therefore are unlikely to be confused by the co-existence of multiple marks featuring similar word elements when other distinguishing elements are present. Applicant's Appeal Brief at p. 11 and Exhibit D. The examining attorney respectfully disagrees. Third-party registrations are entitled to little weight on the question of likelihood of confusion because they are "not evidence that the registered marks are actually in use or that the public is familiar with them." *In re Midwest Gaming & Entm't LLC*, 106 USPQ2d 1163, 1167 n.5 (TTAB 2013) (citing *In re Mighty Leaf Tea*, 601 F.3d 1342, 1346, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010)). Moreover, the existence on the register of other seemingly similar marks does not provide a basis for registrability for the applied-for mark. *AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 1406, 177 USPQ 268, 269 (C.C.P.A. 1973); *In re Total Quality Group, Inc.*, 51 USPQ2d 1474, 1477 (TTAB 1999). Prior decisions and actions of other trademark examining attorneys in registering other marks have little evidentiary value and are not binding upon the USPTO or the Trademark Trial and Appeal Board. See *In re Midwest Gaming & Entm't LLC*, 106 USPQ2d 1163, 1165 n.3 (TTAB 2013) (citing *In re Nett Designs, Inc.*, 236 F.3d 1339, 1342, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001)). Each case is decided on its own facts, and each mark stands on its own merits. See *AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 1406, 177 USPQ 268, 269 (C.C.P.A. 1973); *In re Binion*, 93 USPQ2d 1531, 1536 (TTAB 2009).

Applicant claims that the examining attorney did not demonstrate any prima facie evidence of actual confusion and that both the applicant and registrant are using the marks in the U.S. marketplace and there is no confusion. Applicant attaches various evidence of use of the applicant's mark in

commerce, including copies of Trademark registrations and applications in other countries, copies of reseller agreements and invoices to U.S. clients, Paypal payment records, applicant's homepage evidence, Google ad-word campaign records, and copies of magazine advertisements and a product catalog. Applicant argues that there is no adverse impact on the registrant. Applicant's Appeal Brief at p. 13-14 and Exhibits to Applicant's Brief – Second Part. The examining attorney respectfully disagrees. The applicant's various evidence of use of its mark in commerce is unpersuasive because it does not change the fact that the marks are confusingly similar and that the applicant's goods and registrant's goods are confusingly related, for the reasons stated above. Current use of the applicant's mark in commerce alone is not a basis for registration by the USPTO. Also, the test under Trademark Act Section 2(d) is whether there is a likelihood of confusion. It is not necessary to show actual confusion to establish a likelihood of confusion. *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1165, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002) (citing *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 1571, 218 USPQ 390, 396 (Fed. Cir. 1983)). The Trademark Trial and Appeal Board stated as follows:

[A]pplicant's assertion that it is unaware of any actual confusion occurring as a result of the contemporaneous use of the marks of applicant and registrant is of little probative value in an ex parte proceeding such as this where we have no evidence pertaining to the nature and extent of the use by applicant and registrant (and thus cannot ascertain whether there has been ample opportunity for confusion to arise, if it were going to); and the registrant has no chance to be heard from (at least in the absence of a consent agreement, which applicant has not submitted in this case).

In re Kangaroos U.S.A., 223 USPQ 1025, 1026-27 (TTAB 1984).

C. SUMMARY

Since the marks of the applicant and registrant are highly similar, and the goods of the parties are closely related, there is a substantial likelihood that purchasers would confuse the sources of these goods.

III. CONCLUSION

For the foregoing reasons, the refusal to registration under Section 2(d) of the Trademark Act should be affirmed.

Respectfully submitted,

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