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Subject: U.S. TRADEMARK APPLICATION NO. 85318060 - N/A - Request for Reconsideration Denied -
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**UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)
OFFICE ACTION (OFFICIAL LETTER) ABOUT APPLICANT'S TRADEMARK APPLICATION**

U.S. APPLICATION SERIAL NO. 85318060

MARK:



CORRESPONDENT ADDRESS:

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GENERAL TRADEMARK INFORMATION:

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

APPLICANT: Monster Cable Products, Inc.

CORRESPONDENT'S REFERENCE/DOCKET NO:

N/A

CORRESPONDENT E-MAIL ADDRESS:

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REQUEST FOR RECONSIDERATION DENIED

ISSUE/MAILING DATE: 6/19/2014

Objection to Applicant's Statement of Good Cause

Before addressing the merits of the applicant's request for remand, the Examining Attorney notes an objection to the applicant's stated "good cause" for this remand. The stated reason for the request for remand was "compelling new evidence." This new evidence is a declaration from the applicant's employee. This employee is identified as the inventor of a patent that was first made of record (as a published patent application) by the Examining Attorney in support of the first Office action dated 8/17/2011, and this employee's declaration relates to that patent and the related refusals first issued in that first Office action. These refusals were maintained in a subsequent non-Final Office action dated 2/23/2012, and were made final in an Office action dated 9/10/2012. The applicant has not indicated that there was any break in this individual's employment with the applicant or provided any other explanation as to why it took almost 3 years from when the patent was first made of record to obtain a statement from this employee-inventor. Specifically, the applicant has not explained why it could not provide this type of statement in response to any of the previous Office actions or in support of the applicant's previous request for remand, which was filed by the applicant's current attorneys.

The applicant has also made of record a licensing agreement signed only by the applicant in November, 2012, which is obviously not "new" evidence, and a CNN article from January 13, 2014, which predates the applicant's previous request for remand.

Denial of Request for Remand

The trademark examining attorney has carefully reviewed applicant's request for reconsideration and is denying the request for the reasons stated below. *See* 37 C.F.R. §2.64(b); TMEP §§715.03(a)(2)(B), (a)(2)(E), 715.04(a). The requirement and refusals made final in the Office action dated September 10, 2012 are maintained and continue to be final. *See* TMEP §§715.03(a)(2)(B), (a)(2)(E), 715.04(a).

In the present case, applicant's request has not resolved all the outstanding issues, nor does it raise a new issue or provide any new or compelling evidence with regard to the outstanding issue in the final Office action. In addition, applicant's analysis and arguments are not persuasive nor do they shed new light on the issues. Accordingly, the request is denied.

Mark Description Requirement

The applicant's request for reconsideration does not address the mark description requirement.

Section 23 Refusal – Functional Product Design

The applicant has described its mark as follows:

The mark consists of the curved outside contours of a headphone cable that give way to **sides of the cable jacket that are wider than they are thick**. The headphone cable is used to connect ear bud devices to a headphone splitter. The ear bud areas shown in dotted lines in the mark are not claimed as part of the mark. Additionally, no claim is made to the length of the cable or the splitting of the cable into two cables.

The inventor of the application confirms that “flat cables are one way of practicing our invention. . . . The cross-section shown in the drawings reveals a cable whose cross-sectional shape is oblong; two surfaces are flat, and those flat sides give way to the edges that are contoured/rounded.” The inventor has stated that “[t]he contoured edges were a design choice and were selected for their aesthetic and ornamental appeal. The contoured edges do not perform any function and are in fact incidental to the functions carried out by the cable.”

The applicant is referred to the following statements from the previous denial of reconsideration:

Throughout the patent, though not in the claims, the invention is referred to as a “flat” cable. Thus, the preferred embodiment of the invention, appears to be a flat cable like that shown in the applied-for mark.

The curved corners are also included in the patent drawing, and thus are part of the preferred embodiment of the patent.

Where the evidence shows that the overall design is functional, the inclusion of a few arbitrary or otherwise nonfunctional features in the design will not change the result. TMEP §1202.02(a)(v); see *In re Becton, Dickinson & Co.*, 675 F.3d at 1374, 102 USPQ2d at 1376; *Textron, Inc. v. U.S. Int'l Trade Comm'n*, 753 F.2d 1019, 1025, 224 USPQ 625, 628-29 (Fed. Cir. 1985); *In re Vico Prods. Mfg. Co.*, 229 USPQ 364, 368 (TTAB 1985). Thus, if the curved outer contours have no functional advantages, they are such a minor element of the overall cable design, that they are insufficient to overcome the functionality of the overall cable design.

Accordingly, the Final functionality refusal is maintained and continued for the reasons discussed in the previous Office actions and above.

Section 23 Refusal – Generic Product Design

In addition to the employee declaration, the applicant has attached some exhibits to its request for remand that are not explained. The Examining Attorney has been left to guess at the purpose of these exhibits and assumes that they relate to the generic product design refusal.

Exhibit A includes a license grant to Beats Electronics, LLC. This appears to be included because the applicant has previously relied on this use by this third party to claim that the mark was capable of acquiring distinctiveness. However, the finding that the mark was generic was based on uses by numerous parties other than Beats. The applicant has also made of record an article about Beats headphones (Exhibit B) and an article about Apple's acquisition of Beats Electronics (Exhibit C). The first article talks about the popularity, quality, and price point of Beats' headphones. However, the only trademark reference is to the "company's lower-case 'b' . . . ubiquitous on the ears of listeners across the country". There is no reference to the cable design. Additionally, the pictures of headphones in the article show and the detailed information about headphones in the article both refer to the ear-covering "can" style rather than the ear bud headphone style for which the applicant's cable is intended. The article about the Apple acquisition merely includes a vague reference to Beats' "slick design."

Therefore, the applicant has provided no evidence to overcome the previous examples of widespread use of cable designs similar to applicant's by parties other than Beats Electronics.

Accordingly, the Final generic refusal is maintained and continued for the reasons discussed in the previous Office actions and above

The Board will be notified to resume the appeal. *See* TMEP §715.04(a).

/Kim Teresa Moninghoff/

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