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Subject: U.S. TRADEMARK APPLICATION NO. 85318060 - N/A - Request for Reconsideration Denied -
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Attachment Information:

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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:

David M. Kelly

KELLY IP LLP

SUITE 300

1330 CONNECTICUT AVE NW

WASHINGTON DC 20036

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:

docketing@kelly-ip.com

REQUEST FOR RECONSIDERATION DENIED

ISSUE/MAILING DATE: 7/8/2014

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 issues 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.

Previously Attached Evidence

In the request for reconsideration dated 2/6/2014, at 9, the applicant made the following statement "the images provided of headphone cables from the brands listed below lack sufficient detail and clarity for a skilled designer to determine whether those cables incorporate Applicant's design." The Examining Attorney construed this as an assertion that the images were accurate representations of the respective websites, but that the applicant did not consider the images as displayed on those websites to be sufficiently detailed to support the refusals.

The applicant has restated this argument in the current request for reconsideration, at 3, as follows: "even a skilled observer such as Professor Rake cannot tell what most of the third-party cables actually look like from the images that the Examiner relies upon in support of her genericness rejection." Again, this argument appears to be an assertion that the images as displayed on the respective websites not sufficiently detailed and that will be addressed below. However, the applicant now also states "there is no evidence that given the opportunity to see clear images or actual products. . . .," which appears to be an assertion that the website screen captures previously attached as evidence by the Examining Attorney are not clear representations of the images from the competitors' websites.

The Examining Attorney has thus reviewed the evidence using the Office's TSDR Case Viewer, and notes that because the Case Viewer does not include a zoom function for each page, much of the evidence appears illegible when viewed using the Case Viewer. The applicant is advised that the Download PDF button should be used to convert the Office action and evidence to a PDF file. The zoom function can then be adjusted as needed for each page of evidence. The Examining Attorney further notes, however, that even with a zoom as high as 400%, some pages attached to the Final Office action are still illegible.

In particular, these pages include printouts from the RadioShack and Best Buy on-line retail stores, which contained additional images of many of the brands of ear buds critiqued by the applicant. Accordingly, additional copies of these relevant pages are attached to this Office action. The applicant is also provided some additional printouts of ear buds marketed under the JVC brand, which include specific cable measurements that demonstrate the cables are wider than they are thick.

Section 23 Refusal – Functional Product Design

Patent

The applicant has provided argument that this refusal was based solely on the applicant's utility patent and has argued that the utility patent is insufficient to make a prima facie case of functionality. The applicant's arguments regarding the patent are essentially the same as those provided in its previous requests for reconsideration and the applicant is referred to the two previous denials of reconsideration that address this argument.

Additionally, the applicant cites a section the TMEP for the proposition that only the patent claims should be considered in determining functionality. However, the section of the TMEP referenced by the applicant states the following: "The examining attorney should consider both the numbered claims and the disclosures in the written description, drawings, and abstract of the patent. . . . The examining attorney should also consider other evidence described in a patent that is relevant to the functionality of the mark at issue." TMEP §1202.02(a)(v)(A). Therefore, the Examining Attorney properly considered the drawing and other matter in the patent in determining functionality.

The applicant has also claimed that the Examining Attorney has improperly dissected the design into individual features and analyzed the utility of each feature. This is incorrect. Rather, the Examining Attorney has considered the design as a whole, and compared it to the invention as described throughout the applicant's patent.

Advertising Regarding Utilitarian Advantages of Design

The applicant's statements that suggest that the refusal was based solely on its utility patent are an incorrect statement of the record and are contradicted by the applicant's own statements on pages 9

and 10 of the current request for reconsideration, which acknowledge that third-party examples of cables were included in the record. The applicant is referred back to the Final Office action, which provides a detailed summary of the applicant's own advertising and third-party advertising for similar goods that was relied on in support of this refusal.

The applicant is also referred to two additional examples of third-party uses of the applicant's design for earbud cables (flat cable and curved contours), attached to this Office action, marketed as having a tangle-free flat cable design.

Availability of Alternative Designs

The functionality refusal was based on three advantages set forth in the patent, and corroborated by advertising: (1) the resistance to being tangled, (2) the improved quality due to multiple conductors, and (3) the ability to accommodate additional functions, such as a microphone. The applicant has provided pictures of three cables with different designs from that at issue here, which the applicant asserts are alternative tangle-free designs, along with a web link to an additional design used by the applicant. A web link cannot be used to make the corresponding web page part of the record and the pictures do not include any identifying data such as the web link where the goods were found and when it was viewed. TMEP §710.01(b) Therefore, the Examining Attorney objects to the inclusion of this evidence.

The applicant has also not made any advertising relating to these goods part of the record. Further, even if they have the asserted tangle-free advantage, the applicant has not indicated that they also have the other quality advantages of the applicant's goods.

Alternative Designs/Cost to Manufacture

The applicant's first expert, Professor Rake, previously provided examples of drawings of alternative designs that the applicant asserts would provide the same functionality as the applicant's design and would cost no more than the applicant's design to manufacture. In denying the request for reconsideration, the Examining Attorney questioned the applicant's expert's qualifications to opine on the manufacturing costs of headphone cables since he has no documented expertise in this area, questioned whether the more complicated design could be effectively connected to a splitter, and pointed out that there was no evidence of use by competitors by any of the proffered equivalent

designs. The Examining Attorney found that due to the widespread use by third parties of the same design used by the applicant and the absence of third party use of the proposed alternates, “it appears that competitors would not find the alternative designs proposed by the applicant to be equivalent alternates to the applied-for design.”

The applicant has again confirmed that the applicant’s first expert, Professor Rake, has no personal expertise in the field of headphone cable design and that his closest expertise is in the field of USB drives. Since USB drives do not have any features that have a tendency to tangle and are not used for transmitting sound like ear bud cables, it is unclear how this expertise is “analogous” to the product design at issue here. However, the applicant has supplemented the record with an affidavit by one of the inventors of the patents, Jacky Hsiung, which includes statements confirming that the designs proposed by Professor Rake are feasible alternatives that are no more costly to manufacture. Since Mr. Hsiung has documented cable design experience, and as the applicant’s employee, presumably has access to the applicant’s trade secret manufacturing cost data to make informed cost calculations regarding the alternative designs, Mr. Hsiung’s opinions do appear entitled to more weight than Professor Rake’s. However, this still doesn’t explain why so many of the applicant’s competitors, such as SONY, SOUL, PHILIPS, PUREGEAR, and SKULLCANDY have chosen to market their ear buds with cables similar to the applicant’s rather than selecting one of the more distinctive, but according to the applicant, equally feasible alternative designs. This suggests that these competitors, as experts in the headphone industry, have some additional knowledge that has caused them to conclude that the flat cable design in the applied-for mark has some utilitarian advantage over the alternative designs proposed by the applicant.

Where the evidence indicates that the applicant’s configuration is the best or one of a few superior designs available, this evidence will strongly support a finding of functionality. TMEP §1202.02(a)(v)(C). Here, the widespread use of the design by the applicant’s competitors indicates that the applicant’s configuration is the best or one of a few superior designs available, and thus strongly supports a finding of functionality.

Section 23 Refusal – Generic Product Design

The applicant has argued that the evidence provided in support of this refusal does not provide details of the cables and that there is no evidence to show that third party use of the applicant’s mark is widespread or commercially significant. The applicant is again referred to the summary of third-party evidence in the Final Office action, which includes information from the third party’s websites regarding sales and marketing information. The Examining Attorney has again confirmed that the evidence

includes close-ups of many of the third-party examples along with descriptions of the cables in these examples as “flat.”

The applicant is also referred to two additional examples of third-party uses of the applicant’s design for earbud cables (flat cable and curved contours), attached to this Office action. This evidence is accompanied by information about the respective companies and marketing information (examples of where these goods may be purchased).

The applicant has provided argument that the applied-for mark is capable of acquiring distinctiveness based on use of the mark by license by Beats Electronics, which was recently acquired by Apple. The supporting evidence for this claim was addressed in the denial of reconsideration issued on June 19, 2014. As stated in that Office action, the article in exhibit B discusses Beats Electronics’ can-style headphones and lower case “b” trademark. There are no references in either Exhibit B or C to the cable design.

The applicant appears to argue that the mark is not generic because the contoured edge feature of the cables is not functional. Functionality and genericness are two different issues. Were the applicant to overcome the functionality refusal, that would have no impact on the issue as whether the product design in the mark is so commonly used by competitors that it is incapable of acquiring distinctiveness.

The applicant has also argued that the curved outer contour of its cable is a major aesthetic design element of the goods. “Consumers are aware of the reality that, . . . even the most unusual of product designs . . . is intended not to identify the source, but to render the product itself more useful or more appealing. . . . Consumers should not be deprived of the benefits of competition with regard to the utilitarian and esthetic purposes that product design ordinarily serves.” *Wal-Mart Stores Inc. v. Samara Brothers Inc.*, 54 USPQ2d 1065, 1069 (2000).

Mark Description

The applicant has proposed the following mark description:

The mark consists of a headphone cable having a cross-section in the form of an oblong, wherein the cable features contoured outer edges and is significantly wider than it is thick.

This wording is acceptable to replace the following wording suggested by the Examining Attorney:

The mark consists of a flat headphone cable that is wider than it is thick. The outer contours of the cable are curved in a manner that results in the cable having a cross-section in the form of an oblong.

However, the Final requirement is maintained and continued because the applicant has deleted wording from the mark description that was needed to clarify placement of the mark. The following mark description, which incorporates the applicant's suggested wording, would satisfy this requirement:

The mark consists of a headphone cable having a cross-section in the form of an oblong, wherein the cable features contoured outer edges and is significantly wider than it is 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.

Because the applicant has already filed a timely notice of appeal with the Board, the Board will be notified to resume the appeal. *See* TMEP §715.04(a).

/Kim Teresa Moninghoff/

Examining Attorney

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Home > EDM Universe >

EDM Universe In-Ear Headphones with Headset Functionality and Universal Volume Control (Unity/Green)

MSRP: \$49.99
Quantity:
Stock Status: In Stock
Product Code: EP-D1P-GN-MEE



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EDM Universe In-Ear Headphones

with Headset Functionality and Universal Volume Control

- Inspired by and designed for Electronic Dance Music
- Tuned for EDM with enhanced bass, spacious sound, and excellent dynamics
- In-line microphone, remote, and universal volume control for headset use
- Noise-isolating in-ear fit with angled nozzle for long term comfort
- Features [two-tone tactile-resistors](#) [flat cable](#) color-matched carrying case, and EDM wristband





MEElectronics RX12 In-Ear Headphones with Flat Cable

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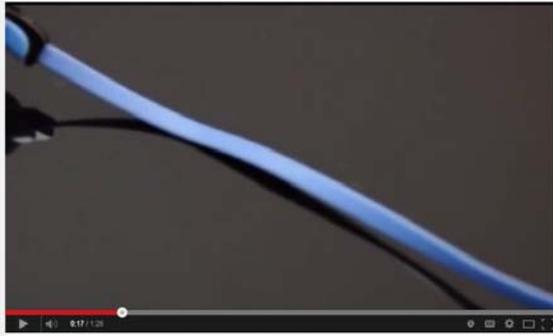
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First Ever Unboxing Of The MEElectronics RX17 In-Ear

WHERE TO BUY

AUTHORIZED RETAILERS AND DISTRIBUTORS OF MEELECTRONICS EARBUDS, HEADPHONES, AND WIRELESS PRODUCTS

MEElectronics earphone, headphone, and Bluetooth products are distributed across the world through a vast network of authorized retail channels and wholesale distributors. Below is a comprehensive list to find the global retailers and distributors MEElectronics works with.

Retailers / e-tailers				
The United States and Canada				
Canada				
South America				
Chile				
Peru				



ABOUT US

ABOUT MEELECTRONICS

Born out of a passion for music, MEElectronics has a goal of delivering Musical Enjoyment to Everyone. We started out in 2005, making MP3 players with a desire to bring our customers exceptional sound quality at affordable prices. However, the sound quality of any player is dependent on the earphones used, so we developed our own. In 2010, we shifted our focus to earphones that provide durability, style, and exceptional sound quality. Our current lineup of headphones and earphones has won acclaim from audio enthusiasts and reviewers worldwide, but that hasn't stopped us from continually refining our lineup and developing new products: we won't bring anything to market if it doesn't meet our high standards!

MEE isn't just about making great products, however - our earphones and headphones are also backed by industry-leading customer service. Feedback from our customers is always appreciated so please contact us with any questions, comments, or issues - we will take care of you before, during, and after your purchase. MEElectronics has grown at an amazing pace thanks to you, the customer, and the absolute greatest compliment we can receive is an online review and/or a referral to your family, friends, or colleagues. Try MEElectronics today and find out why we have so many loyal customers!

EVERYTHING YOU WANTED TO KNOW ABOUT MEELECTRONICS BUT WERE AFRAID TO ASK:

- Q. What do you do and why?**
A. MEElectronics manufactures earphones, earbuds, headphones, and audio accessories. We do it because we want to provide products that sound great and improve the music experience for our customers. Receiving positive feedback from our customers is what motivates us to continue making superior products!
- Q. How did you get your start?**
A. MEElectronics is a brand created by S2E Inc. S2E Inc. started selling memory on ebay in 2005 and quickly added other products including cases, iPods, Sandisk products, and TVs. After releasing several media players under the MEElectronics brand, we realized that the earphones made a huge difference to the sound quality and that ours sounded very good, especially when compared with most stock earbuds. Finally, in 2010, a concerted effort was made to bring great sounding, affordable earphones to the market and MEElectronics, as it is today, was born.
- Q. How did the name MEElectronics come about?**
A. The MEElectronics name was created because we were thinking, "If it were me, what would I want to buy and listen to?". When we developed our very first earphone lineup, we immediately knew that we would choose those over stock earbuds any day. We still feel that our products are designed for me - and hope you feel the same way!
- Q. How do you decide what products you bring out?**
A. We start by looking at a product category and seeing what the competition has to offer. Then, we design a product to offer better performance and accessories for the price. We use our prototypes ourselves in their every iteration. Once we feel we have a winning product, we bring it out!
- Q. Why is your customer service experience better than other companies?**
A. Customer service is a big part of the MEElectronics experience. We have a dedicated customer service team that is available to help you with any questions or issues you have. We are committed to providing the best customer service experience possible.