

From: Leipzig, Marc J.

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Subject: U.S. TRADEMARK APPLICATION NO. 85892354 - DISTINCT - 006969-00788 - Request for Reconsideration Denied - Return to TTAB

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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.** 85892354

**MARK:** DISTINCT



**CORRESPONDENT ADDRESS:**

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**GENERAL TRADEMARK INFORMATION:**

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

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**APPLICANT:** Distinct, LLC

**CORRESPONDENT'S REFERENCE/DOCKET NO:**

006969-00788

**CORRESPONDENT E-MAIL ADDRESS:**

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**REQUEST FOR RECONSIDERATION DENIED**

**ISSUE/MAILING DATE:** 10/20/2016

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. §2.63(b)(3); TMEP §§715.03(a)(ii)(B), 715.04(a). The following requirement(s) and/or refusal(s) made final in the Office action dated March 28, 2016 are maintained and continue to be final: Section 2(d) refusal on the basis of Registration No. **1629906**. See TMEP §§715.03(a)(ii)(B), 715.04(a).

Upon consideration of applicant's Request for Reconsideration, the following refusal(s) are withdrawn: Section 2(d) refusal on the basis of Registration Nos. **3935604 and 3800251**. See TMEP §§715.03(a)(ii)(B), 715.04(a).

In the present case, applicant's request has not resolved all the outstanding issue(s), nor does it raise a new issue or provide any new or compelling evidence with regard to the outstanding issue(s) 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.

Regarding Registration No. 1629906, 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)).

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(s) has no restrictions as to nature, type, channels of trade, or classes of purchasers. Therefore, it is presumed that these goods and/or services travel in all normal channels of trade, and are available to the same class of purchasers. Further, the registration use(s) broad wording to describe the goods (namely, "computer software for personal computers and work stations **in the field of general business**") and this wording is presumed to encompass all goods of the type described, including those in applicant's more narrow identification.

Notwithstanding applicant's amended identification of goods, applicant's "software that allows users to create, upload, view, discover share data, information and media content, excluding the following subjects: loyalty marketing, customer relationship management, customer data analytics, promotional incentive schemes and consumer packaged goods data analytics" is presumed to have similar functions/applications as registrant's software, given the breadth of the identification of goods for the registered mark.

Accordingly, applicant's Request for Reconsideration is denied.

Appeal Status at Trademark Trial and Appeal Board

If applicant has already filed a timely notice of appeal with the Trademark Trial and Appeal Board, the Board will be notified to resume the appeal. See TMEP §715.04(a).

If no appeal has been filed and time remains in the six-month response period to the final Office action, applicant has the remainder of the response period to (1) comply with and/or overcome any outstanding final requirement(s) and/or refusal(s), and/or (2) file a notice of appeal to the Board. TMEP §715.03(a)(ii)(B); see 37 C.F.R. §2.63(b)(1)-(3). The filing of a request for reconsideration does not stay or extend the time for filing an appeal. 37 C.F.R. §2.63(b)(3); see TMEP §§715.03, 715.03(a)(ii)(B), (c).

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