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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	86040656
Applicant	Mr. Recipe, LLC
Applied for Mark	JAWS DEVOUR YOUR HUNGER
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Serial No.	86/040,656	Ex Parte Appeal
Mark:	JAWS DEVOUR YOUR HUNGER	
Applicant:	Mr. Recipe, LLC	
Examining Attorney:	Sara Nicole Benjamin Law Office 110	

Appeal Brief

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APPLICANT'S BRIEF ON APPEAL

This appeal is taken in response to the Final Office Action issued on July 1, 2014. The sole issue remaining on appeal is whether applicant's mark, "JAWS DEVOUR YOUR HUNGER" for use in connection with the Internet streaming of programming related to cooking, is confusingly similar within the meaning of Section 2(d) to a prior registration for "JAWS" for use in connection with video recordings featuring motion pictures.

PROSECUTION HISTORY

The "JAWS DEVOUR YOUR HUNGER" mark application was filed on August 16, 2013. The Examining Attorney initially refused registration on December 10, 2013, asserting numerous instances of potential confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d) (hereinafter "Section 2(d)"), and requiring changes to the identification of goods and services. Applicant filed a timely response to all issues on June 10, 2014, pursuant to which applicant's services are now identified as "[e]ntertainment, namely, streaming of audiovisual material via an Internet channel providing programming related to cooking." On July 1, 2014, the Examining Attorney issued a Final Office Action refusing registration solely on the basis of potential confusion under Section 2(d) arising from a registration for the mark "JAWS" in typed

characters for use on "video recordings in all formats featuring motion pictures" in Class 9. Applicant's notice of appeal was timely filed on January 2, 2015.

ARGUMENT

I. Legal Standard

Likelihood of confusion is analyzed under a multi-factor test, in which the weight and relevance of various factors necessarily depends on the circumstances of the particular case. *See In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357 at 1361-62, 177 USPQ 563 (CCPA 1973). The primary question, as described in the Trademark Act, is whether Mr. Recipe, LLC's mark "JAWS DEVOUR YOUR HUNGER" is "likely, when used on or in connection with the [services] of the applicant, to cause confusion, or to cause mistake or to deceive," in light of registrant's mark. For the reasons discussed *infra*, Applicant respectfully submits that the mark in this application presents no likelihood of confusion with the cited registration.

II. Applicant's Mark Is Not Confusingly Similar to Registrant's Mark

Of the potential factors to be analyzed, the Examining Attorney and Applicant have previously identified as relevant the following factors: (1) the similarity of the marks in their entirety; (2) the similarity of the goods and services in the applications; (3) the use of similar marks on similar goods; and (4) the fame of the prior mark. *See id.*; *see also* Office Action at 3-7; Response to Office Action at 1; Final Office Action at 6-9.

"The ultimate conclusion of similarity or dissimilarity of the marks must rest on consideration of the marks in their entirety." *Packard Press, Inc. v. Hewlett-Packard Co.*, 227 F.3d 1352 at 1358, 56 U.S.P.Q. 1351 (Fed. Cir. 2000). Where marks utilize even something as simple as a different number of syllables or a different last syllable, marks may be considered dissimilar. *See A&H Sportswear, Inc. v. Victoria's Secret Stores, Inc.*, 237 F.3d 198, 217 (3d

Cir. 2000). For example, in *A&H Sportswear, Inc.*, the court held that the mark "THE MIRACLE BRA" was not confusingly similar to the mark "MIRACLESUIT" in light of the fact that the marks contained a different number of syllables and a different final syllable. *Id.*; *see also M.D. On-Line, Inc. v. WebMD Corp.*, 2005 WL 2469668 (D.N.J. 2005) (marks were not confusingly similar where marks had different numbers of syllables and the last syllable was different). Applicant seeks registration for a four word phrase, comprising six syllables and concluding with "Hunger", or simply "-ger." Registrant's mark, in contrast, consists of a single word with a single syllable. Viewed in its entirety, the "JAWS DEVOUR YOUR HUNGER" mark evinces a clear connection between the mark and food which is lacking from registrant's "JAWS" mark and which distinguishes Applicant's mark. *See Shen Mfg. Co. Inc. v. Ritz Hotel, Ltd.*, 393 F.3d 1238 at 1242-43, 73 U.S.P.Q.2d 1350 (Fed. Cir. 2004) (concluding that the dissimilarity of impression provided by the marks "RITZ" and "PUTTING ON THE RITZ" precluded a finding of likelihood of confusion because the marks were dissimilar). As such, applicant's mark is dissimilar from registrant's mark.

Moreover, even if the marks are considered similar, the law is clear that this factor alone does not inherently establish a likelihood of confusion. *See Shen Mfg. Co. Inc. v. Ritz Hotel, Ltd.*, 393 F.3d 1238 at 1244, 73 U.S.P.Q.2d 1350 (Fed. Cir. 2004) (observing that applicant's "RITZ" mark was identical to registrant's "RITZ" mark and "focus[ing] our attention of the relatedness of the goods").

The goods and services provided under two marks must be "related in some manner" to establish a likelihood of confusion on that basis. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012). Applicant's services here consist of "[e]ntertainment, namely, streaming of audiovisual material via an Internet channel

providing programming related to cooking," whereas registrant's goods are "video recordings in all formats featuring motion pictures." Although Applicant concedes that it is not impossible for a motion picture to involve cooking, programming relating to cooking such as the application at issue here describes is generally understood to be separate and distinct from motion pictures, or movies. The case at issue here is thus similar to the *ex parte* appeal of *In re Coors Brewing Co.*, 343 F.3d 1340, 68 U.S.P.Q.2d 1059 (Fed. Cir. 2003), in which the Federal Circuit considered a scenario where overlap between a registrant's goods and applicant's services was realistically possible but in practice not overly common. In that case, the court overturned the Board's decision sustaining a finding of substantial similarity in allegedly related goods/services and held that in the absence of substantial overlap, i.e., where overlap is *de minimis*, there is no likelihood of confusion. *See id.* at 1063-64. Here, too, although it is possible to have a motion picture about cooking, programming about cooking typically is not presented in or associated with a motion picture. Consequently, applicant's services should not be considered related to registrant's goods and there is no likelihood of confusion.

Moreover, the record is clearly that consumers have dealt with multiple "JAW" marks for goods and services involving audio-visual material and have not had any difficulty discerning between them. For example, the initial Office Action in this matter included refusals based on potential confusion with the mark "JAW BRANDING", Ser. No. 77/528,716, for use with, *inter alia*, "audio recording and production; digital video, audio, and multimedia publishing services, webcasts in the field of marketing and branding; production of DVDS, videotapes and television programs featuring marketing and branding; production of video cassettes," etc.. Office Action at Attachment 2; *see also* Office Action at Attachment 59 (referencing allowed mark "OPERATION JAWS", Ser. No. 85/647,186, for use in connection with "[e]ntertainment and

educational services in the nature of television and multimedia programming . . . ."). The record contains no suggestion whatsoever that the presence of both these marks in the marketplace has caused any confusion. The addition of the "JAWS DEVOUR YOUR HUNGER" mark would merely add another player to the market of audio-visual material and would not be likely to cause confusion. The unique focus of each mark's audio-visual material (motion pictures, marketing and branding, cooking) make it possible for the marks to co-exist without confusion.

Finally, with regard to the alleged fame of the mark, the evidence demonstrates at best a "niche" level of fame insufficient to create a likelihood of confusion. "Courts have generally limited famous marks to those that receive multi-million dollar advertising budgets, generate hundreds of millions of dollars in sales annually, and are almost universally recognized by the general public . . . ." *ABC Rug & Carpet Cleaning Serv. v. ABC Rug Cleaners, Inc.*, 2010 WL 10091076, *21 (S.D.N.Y. Feb. 10, 2010). These truly famous marks are things like "Budweiser beer, Camel cigarettes, Barbie Dolls, and the like," where the brand name immediately calls to mind the object with which it is associated. *See Bd. of Repents. Univ. of Tx. Sys. v. KST Elec., Ltd.*, 550 F.Supp.2d 657, 679 (W.D.Tex. 2008). Perhaps unsurprisingly, evidence submitted by the Examining Attorney indicates none of these factors, but rather only that registrant's JAWS mark is well-known within the movie industry, or somewhat more specifically within the context of thriller movies. *See generally* Trademark Manual of Examining Procedure § 1207.01(d)(ix) (observing that fame "is usually treated as neutral in [ex parte] proceedings" and that "[b]ecause of the nature of the evidence required to establish the fame of a registered mark, the Board normally does not expect the examining attorney to submit evidence as to the fame of the cited mark"). The mere fact that someone has posted a blog entry claiming that "Jaws might just be the greatest film of all time" (*see* Final Office Action at Attachment 5) does not indicate that the

JAWS mark owned by registrant is famous outside of its particular niche. Indeed, rather than generic "video recordings," registrant's mark is famous only in connection with a particular major motion picture relating to sharks that was produced in 1975. *See* Final Office Action at Attachment 4 (indicating that the movie JAWS was made in 1975). The general public is unlikely to be confused as between applicant's mark for programming relating to cooking, which will be produced going forward, and registrant's 40-year-old thriller movie about a shark. The Examining Attorney cannot and has not established that the mark is famous for relevant purposes, and the Applicant's mark should therefore be permitted to proceed through the registration process.

CONCLUSION

The relevant factors strongly favor a finding that Applicant's "JAWS DEVOUR YOUR HUNGER" mark is not likely to cause confusion with the cited registration for "JAWS." Applicant therefore respectfully requests that the Board grant this Ex Parte Appeal and allow for the registration of the "JAWS DEVOUR YOUR HUNGER" mark.

Respectfully submitted,

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