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

Proceeding	86224470
Applicant	Anderson Brass Company
Applied for Mark	KANTLEAK
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TRADEMARK

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

In re Application of Anderson Brass Company	)	Trademark Attorney:	N. Gretchen Ulrich
Serial No.: 86/224,470	)	Trademark Law Office:	113
Filed: March 18, 2104	)	Customer ID No.:	22827
Mark: KANTLEAK	)		

**EX PARTE APPEAL BRIEF PURSUANT TO 37 C.F.R. SECTIONS 2.142(b) AND 2.126**

United States Patent and Trademark Office  
Trademark Trial and Appeal Board  
P. O. Box 1451  
Alexandria, VA 22313-1451

Dear Sirs:

Responsive to the January 20, 2015 Final Rejection, Appellant's Ex Parte Appeal Brief is submitted in the above-identified application, as follows. The subject Appeal Brief contains the following sections:

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I. INDEX OF CASES

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**II. STATEMENT OF THE ISSUE**

1. Whether the final refusal of Appellant's mark under Lanham Act Section 2(d) over U.S. Reg. No. 1,218,854 should be reversed.

**III. RECITATION OF THE FACTS**

The Appellant is Anderson Brass Company, a corporation of South Carolina having an address of 1629 Bobo Newsom Highway, Hartsville, SC, 29550. Appellant filed USSN 86/224,470 on March 18, 2014 seeking registration on the Principal Register, based on an actual use of the mark KANTLEAK beginning at least as early as December 31, 1931.

Appellant seeks registration of the above mark in International Class 006, for the following goods and services: "Manually operated industrial and instrumentation grade brass shutoff cock valves being parts of systems or machines."

The January 20, 2015 Final Office Action, presently on appeal, refuses registration on the basis of Lanham Act Section 2(d) because of an alleged likelihood of confusion with the mark in U.S. Registration 1,218,854 ("the '854 registration") for KANTLEKE, registered on December 7, 1982 in International Class 006. The goods and services of International Class 006 includes: "Flexible Metal Gas Hose Connector for Appliances." Appellant previously responded to the Final Office Action in part by amending the goods and services to clarify that the manually operated industrial and instrumentation grade brass valves were shutoff cock valves.

The mark of the '854 registration is a standard character mark.

Prior to such Final Office Action, the Examining Attorney issued an Office Action dated June 27, 2014 also refusing registration on the basis of Lanham Act Section 2(d) because of an alleged likelihood of confusion with the '854 registration. Appellant responded to the Office Action of June 27, 2014 in part by amending the goods and services of the present application to clarify that the manually operated industrial and instrumentation grade brass valves were parts of systems or machines.

#### IV. ARGUMENT

The Final Office Action of January 20, 2015 refused registration based on Trademark Act § 2(d) (15 U.S.C.A. §1052(d)) because of an alleged likelihood of confusion with U.S. Registration No. 1,218,854 (“the ‘854 registration”) for KANTLEKE (“Registrant’s mark”) for the following goods and services: Flexible Metal Gas Hose Connector for Appliances. (emphasis added).

Appellant will demonstrate that consumer confusion is unlikely because: (A) Appellant's goods and the goods associated with the '854 Mark are entirely distinct; (B) Appellant's goods are encountered differently in the marketplace than Registrant's goods; (C) the '854 Mark and Appellant's mark create different overall commercial impressions; (D) there has been a lack of confusion despite simultaneous use of many very similar marks; (E) the purchasers of Appellant's goods and the goods identified by the '854 Mark are sophisticated; and (F) the '854 Mark is entitled to a narrow scope of protection due at least in part to the co-existence of the many similar marks.

#### **(A) THE DIFFERENCES BETWEEN THE GOODS AND SERVICES MAKE IT HIGHLY UNLIKELY THAT CONFUSION WILL OCCUR**

Section 2(d) of the Trademark Act prevents registration of trademarks when there is a likelihood they will cause confusion. The burden of making a *prima facie* showing that the goods are related is on the Examiner. In re Princeton Tectronics, Inc., 95 U.S.P.Q.2d 1509, 2010 WL 2604976 (T.T.A.B. 2010); see also, In re Coty US LLC, 2012 WL 1267919 (T.T.A.B. 2012).

It is well settled that the issue of likelihood of confusion between marks must be determined on the basis of the goods or services as they are identified in the application and registration. Canadian Imperial Bank of Commerce v. Wells Fargo Bank, Nat. Ass'n, 811 F.2d 1490, 1 U.S.P.Q.2d (BNA) 1813 (Fed. Cir. 1987); Paula Payne Products Co. v. Johnson Pub. Co., Inc., 473 F.2d 901, 177 U.S.P.Q. (BNA) 76 (C.C.P.A. 1973). With this principle in mind, it is

clear that Appellant's goods and the goods identified for use in conjunction with the '854 Mark are distinctly different enough to preclude a finding of a likelihood of confusion.

The goods identified for use with the '854 Mark is simply a "flexible metal gas hose connector for appliances." Notably, this statement refers to a metal gas hose that is used to connect an appliance to, e.g., a gas source. This is made abundantly clear by the description of the Registrant's goods on Registrant's website, as well as by the Registrant's Specimen. (See <http://www.ablemetalhose.com/pages/kantleke.html>; printout previously attached as Exhibit A to Appellant's Response to the Final Office Action filed July 20, 2015). Specifically, with regard to Registrant's website, Registrant describes their goods, marketed and sold under the KANTLEKE mark, in the following manner:

Our continuous tube of flexible, electro-galvanized, rust-resistant steel, with a heavy rubber packing, provides gas-tight performance under normal operation conditions. But we go beyond this and over the entire tube with a rubber sheath, then braid it with high-strength green and black fabric. That's protection!  
In fact, the outer braid of green and black has become a symbol of genuine Kantleke® connector.

Id. (emphasis added). Accordingly, Registrant's goods are limited to metal gas hoses that are used to make a gas connection in appliances. By stark contrast, Appellant's goods are limited to "manually operated industrial and instrumentation grade brass shutoff cock valves being parts of systems or machines" (emphasis added). Appellant's goods are thus quite different in that they refer to a specific type of valve that may be used in industrial pneumatic and/or hydraulic machinery.

This understanding is further supported by the Specimen filed by Registrant in support of use of the '854 Mark. For example, the most recent Specimen, reproduced below for convenience, depicts the same flexible gas hose pictured on Registrant's website as being marketed and sold under the KANTLEKE mark.



(Specimen filed by Registrant as support for use in Declarations of Use under Section 8 and 9 on November 15, 2012.)

As is clear from Registrant's express limitations, Appellant's goods thus do not overlap with those identified for use with the '854 Mark. Accordingly, the goods provided by Appellant and those provided by the registrant of the '854 Mark are distinctly different and under no circumstances would persons familiar with the goods identified for use in conjunction with the '854 Mark expect Appellant's goods to emanate from the same source. It is therefore urged that the Examiner withdraw his refusal to register Appellant's trademark on the basis of a likelihood of confusion.

**(B) APPELLANT'S GOODS ENCOUNTERED DIFFERENTLY IN THE MARKETPLACE THAN REGISTRANT'S GOODS**

Appellant notes that the primary focus in measuring the relatedness of goods and services is the way the goods and services are encountered in the marketplace by typical consumers. In re The W.W. Henry Co., L.P., 82 U.S.P.Q.2d 1213 (T.T.A.B. 2007). If the goods and services in question are not marketed in such a way that they would be encountered by the

same persons in situations that would create the incorrect assumption that they originate from the same source, then, even if the marks are identical, confusion is unlikely. See, e.g., id. at 1215 (PATCH & GO for cement-based product used in repairing wall and floor surfaces not likely to cause confusion with PATCH 'N GO for chemical filler preparations used in cosmetic repair of polyolefin surfaces); Local trademarks Inc. v. the Handy Boys Inc., 16 U.S.P.Q.2d 1156 (T.T.A.B. 1990) (LITTLE PLUMBER for liquid drain opener not confusingly similar to LITTLE PLUMBER & Design for advertising services in plumbing field); TMEP § 1207.01(a)(i).

Appellant respectfully submits that in the present matter Appellant's goods are encountered by its consumers in the marketplace in an entirely different manner than the goods provided under the '854 Mark. More specifically, Appellant's goods include industrial and instrumentation grade brass shutoff cock valves. Accordingly, Appellant's goods are encountered by and marketed to industrial customers looking for high quality, brass valves having the capability to shutoff, e.g., a hydraulic or pneumatic flow within their industrial systems and machines. For example, Appellant's shutoff cock valves may be marketed to customers looking to utilize Appellant's valve in complicated manufacturing machines and related systems.

By contrast, Registrant's goods are flexible metal gas hoses used to make connections within an appliance. Accordingly, Registrant's goods are marketed to customers looking for a flexible hose for connecting their gas-enabled appliance to a gas source, e.g., consumers looking for a flexible hose to attach their residential gas range to a gas range supply. This is made evident from Registrant's website and Specimen. (See Exhibit A to Appellant's Response to the Final Office Action filed July 20, 2015). Additionally, the gas hoses being used as connectors provided under the '854 Mark do not have any moving components and do not serve any function other than as a hose used to make a connection between a gas source and an appliance.

Thus, the goods identified in the present application are encountered in the marketplace in a decidedly different manner than the goods provided under the '854 Mark. Due to this stark

contrast in the manner in which Appellant's goods and the goods provided under the '854 Mark are encountered in the marketplace, Appellant respectfully submits that it is highly unlikely that the similarity of the marks would lead to a reasonable likelihood of confusion.

**(C) THE RESPECTIVE MARKS CREATE DIFFERENT OVERALL COMMERCIAL IMPRESSION**

The overall commercial impression derived from viewing marks in their entireties is the paramount focus when determining whether likelihood of confusion exists. New England Fish Co. v. Herwin Co., 511 F.2d 562 (C.C.P.A. 1975).

A comparison of Appellant's mark with the '854 Mark establishes that although the marks are phonetically similar, the marks are distinct. The '854 Mark mis-spells the second component. Specifically, the second component of the '854 Mark is spelled "LEKE." By contrast, Appellant's mark correctly spells the second component, "LEAK." Given that the term "leak" has such a simple spelling, it is extremely obvious that it is intentionally misspelled in the '854 Mark. Additionally, the manner in which it is misspelled (i.e., removing the "A" and adding an additional "E" on the end) makes the misspelling much more prominent. When the middle letters of a word are jumbled, a consumer may generally be less likely to notice such misspelling. However, when the outside letters of a word are rearranged, the consumer may generally be more likely to notice such misspelling.

Accordingly, Appellant respectfully submits that although the marks are similar, they are distinct enough obviate any likelihood of confusion among consumers.

**(D) LACK OF CONFUSION DESPITE SIMULTANEOUS USE OF MANY VERY SIMILAR MARKS**

In addition, the mark of the present application and the '854 Mark have been used concurrently since their respective dates of first use (1931 for the present application, and 1950

for the '854 Registration). Appellant is unaware of any evidence of actual confusion between these marks.

Further, Appellant's previous registration for the same mark as in the present application, Registration No. 2156038, was active between its filing date in March of 1996 and its unintentional cancellation date of February 17, 2005. Notably, the '854 Mark, which the Final Office Action alleges Appellant's mark is likely to be confused with, was active during this entire time period (including registration) as well. A TSDR printout for Registration No. 2156038 was previously attached as Exhibit B to Appellant's Response to the Final Office Action filed July 20, 2015. Appellant is unaware of any evidence of actual confusion between Appellant's previous registration and the above identified registrations (all of which were active prior to Appellant's previous application being filed).

Accordingly, Appellant respectfully submits that it is therefore highly unlikely that registration of Appellant's mark would cause confusion.

#### **(E) PURCHASERS ARE SOPHISTICATED**

Confusion of Appellant's mark with the '854 Mark is even further reduced in this case because Appellant's prospective customers are sophisticated purchasers who do not make these types of purchasing decisions lightly, but rather employ a high amount of care and consideration in making their decisions. See Dynamics Research Corp. v. Langenau Mfg. Corp., 217 U.S.P.Q. 649 (Fed. Cir. 1983) (holding that consumers would not be confused by the identical mark for unrelated goods even where there existed a strong possibility that such purchasers could encounter both marks (in advertisements in a trade publication)); Electronic Design & Sales, Inc. v. Electronic Data Systems Corp., 954 F.2d 713, 21 U.S.P.Q.2d 1388, 1392 (Fed. Cir. 1992) (holding sophistication of the purchasers a factor in concluding no likelihood of confusion).

In this case, purchasers of Appellant's goods include sophisticated industrial personnel looking for manually operated, industrial and instrumentation grade brass shutoff cock valves to incorporate into their systems or machines. Purchasers of Appellant's goods seek a very specific good and great care is invariably taken in making decisions regarding which of Appellant's goods to purchase. It is highly unlikely, if not impossible, that a purchaser would look at Appellant's goods and be confused into believing that they are in any way related to the goods identified in the '854 Mark (i.e., flexible gas hoses used as connectors for appliances). Accordingly, while Appellant concedes that this alone is not dispositive in finding no likelihood of confusion, Appellant submits that the purchasers' sophistication in the present matter weighs heavily in favor of such a conclusion

**(F) REGISTRANTS' MARKS ARE WEAK AND SHOULD BE ACCORDED ONLY A NARROW SCOPE OF PROTECTION**

Registrant's mark is so commonly used that the public is accustomed to looking at other elements to distinguish one source from another. For example, in addition to the '854 Registration for KANTLEKE, Appellant would also like to direct attention to Registration Nos. 0525820 for KANT LEEK and 0802104 for KANT-LEAK. TSDR printouts for Registration Nos. 0525820 and 0802104 were previously attached as Exhibit C to Appellant's Response to the Final Office Action filed July 20, 2015. Each of these marks are phonetically identical. As such, Appellant submits that the cited Registrations are entitled to only a narrow scope of protection that should not be extended beyond the identical mark for identical goods.

**(G) CONCLUSION**

In view of the foregoing, it is believed that this application is now in condition for prompt publication. Favorable action is therefore requested.

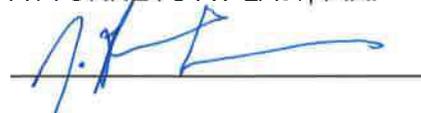
V. SUMMARY

In view of the foregoing, Appellant respectfully submits that there are no proper grounds for refusing registration of Appellant's application based on the applied '854 registration. For example, in consideration of the significant differences between the goods for the respective marks, as well as the prospective purchaser of such goods, there simply is no likelihood of confusion between Appellant's subject mark and the mark of the '854 registration. Accordingly, Appellant respectfully requests reversal of the stated grounds of refusal of the Appellant's subject application, and requests approval for publication of same.

Respectfully submitted,

DORITY & MANNING,  
ATTORNEYS AT LAW, P.A.

Date September 18, 2015



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