

Request for Reconsideration after Final Action

The table below presents the data as entered.

Input Field	Entered
SERIAL NUMBER	86295433
LAW OFFICE ASSIGNED	LAW OFFICE 104
MARK SECTION	
MARK	http://tmng-al.uspto.gov/resting2/api/img/86295433/large
LITERAL ELEMENT	PLAY MORE
STANDARD CHARACTERS	YES
USPTO-GENERATED IMAGE	YES
MARK STATEMENT	The mark consists of standard characters, without claim to any particular font style, size or color.
EVIDENCE SECTION	
	<p>RESPONSE TO OFFICE ACTION PLAY MORE I. INTRODUCTION In the March 30, 2015 Office Action, the Examiner continues the refusal to register. The Examiner states that "the services of the applicant and registrant are directly related as providing video games" and relies on the holding of In re United Service Distributors, Inc. 229 USPQ 237 (TTAB 1968). Applicant contends that the Examiner's reliance on In re United Service is misplaced; the case does not support Examiner's refusal to register. Applicant maintains that the services are marketed to distinctly different groups of consumers. II. THE HOLDING OF IN RE UNITED SERVICE DISTRIBUTORS, INC. DOES NOT SUPPORT EXAMINER'S REFUSAL TO REGISTER In re United Service addressed applicant's appeal from a refusal to register a design mark for distributor services in the field of health and beauty aids based on a similar design mark for moisturizing skin cream. In addressing the applicant's argument that the goods and services are marketed to different classes of consumers, the Board stated that "the relevant class of purchasers with which we are concerned is the retailer to whom applicant's distributorship services are directed." The Board found that a retailer, familiar with the applicant's moisturizing cream, when coming into contact</p>

with applicant's distributorship services may believe there to be some relationship between the two. To be clear, in this case the Board found the retailer to be the relevant consumer because the retailer may be familiar with the registrant's branded product and may also come into contact with applicant distribution services. This is not the case here. Here, Applicant is a distributor that distributes video games to retailers. Registrant is a retailer that provides its retail services to consumers. Registrant is not a product manufacturer that sells products to retailers. Here, retailers encounter Applicant's services and consumers encounter Registrant's services. The holding of *In re United Service* does not support the Examiner's refusal to register. III. THE RESPECTIVE SERVICES OF THE MARKS AT ISSUE ARE TARGETED TO DISTINCT CUSTOMER GROUPS, WHICH ELIMINATES ANY CHANCE OF CONFUSION. Relevant case law has repeatedly held that "if one mark user sells exclusively at retail and the other exclusively to commercial buyers, then there may be little likelihood of confusion since no one buyer ever buys both products." 3 McCarthy on Trademarks, Section 23:51, p. 24-118. See *Trade Publications, Inc. v. Big Bear of North Carolina, Inc.*, 191 U.S.P.Q. 477 (M.D.N.C. 1976) (plaintiff's FOOD WORLD trade journal "would be almost totally unknown" to consumers who shop at defendant's FOOD WORLD grocery store); *In re Shipp*, 4 U.S.P.Q.2d 1174 (T.T.A.B. 1987) (applicant's PURITAN for laundry and dry cleaning services rendered to consumers will not likely cause confusion with the cited trademark PURITAN for commercial dry cleaning filters sold only to dry cleaning professionals; it is unlikely that applicant's customers would ever encounter any of the commercial goods sold under the cited mark); *Local Trademarks, Inc. v. Handy Boys, Inc.*, 16 U.S.P.Q.2d 1156 (T.T.A.B. 1990) (applicant's LITTLE PLUMBER liquid drain opener sold to consumers will not likely cause confusion with opposer's LITTLE PLUMBER advertising agency services for professional plumbing contractors; because the goods and services are sold through different channels, there is no likelihood of confusion); *In re Albert Trostel & Sons Co.*, 29 U.S.P.Q.2d 1783 (T.T.A.B. 1993) (Applicant's PHOENIX for bulk leather sold to manufacturers of finished leather goods will not cause confusion with PHOENIX for leather luggage sold to consumers because of different channels and purchasers.) All of these cases recognize a fundamental distinction between goods/services sold wholesale to businesses, and services provided at retail to end consumers. In the present case, Applicant's distribution services are marketed to retailers while the Registered Mark correspond to services provided to retail customers. There is a clear distinction between retail consumers and retailers. As

the case cited previously demonstrate, Courts have repeatedly distinguished between such consumer groups, and found that no likelihood of confusion exists when the respective services/goods are sold to professional business as opposed to retail customers. Applicant's mark should not be treated any differently, and no likelihood of confusion can be found with the Registered Mark due to the clearly distinguishable groups of relevant consumers. **THE THIRD PARTY EVIDENCE DOES NOT SUPPORT EXAMINER'S POSITION** The examining attorney must provide evidence showing that the goods and services are related to support a finding of likelihood of confusion. See, e.g., *In re White Rock Distilleries Inc.*, 92 USPQ2d 1282, 1285 (TTAB 2009) (finding the Office had failed to establish that wine and vodka infused with caffeine are related goods because there was no evidence that vodka and wine emanate from a single source under a single mark or that such goods are complementary products that would be bought and used together). The Examiner contends that the third party registrations introduced as evidence support the Examiner's position. Applicant disagrees. Third-party registrations and Internet evidence may have some probative value to the extent such evidence suggests that goods or services are of a type that may emanate from a single source. In *re Princeton Tectonics, Inc.*, 95 USPQ2d 1509, 1511 (TTAB 2010) However, it is not enough to submit third party registrations and conclusively claim they lend support to the Examiner's position. The Examiner must show that such evidence actually supports the Examiner's contentions. In *Princeton Tectonics*, the TTAB addressed the validity of a trademark examiner's refusal to register the mark EPIC for "personal headlamps" on the grounds that it conflicted with the registered mark EPIC for "electrical lighting fixtures." Preliminarily, the TTAB noted: the mere fact that both types of goods at issue here emit and provide light is not a sufficient basis for us to conclude that the goods are related. The goods, as identified, are sufficiently different in their uses to require proof that they are related. Nor can we conclude by intuition that both types of goods would be sold through common trade channels In an attempt to show the relatedness of personal headlamps and electrical lighting fixtures, the trademark examiner introduced third party registrations and Internet evidence. However, the TTAB found the applicant had shown that the majority of the evidence introduced by the examiner lacked probative value. The TTAB noted that such evidence must be probative and the amount of evidence introduced sufficient to establish that the types of goods at issue are related. *Id.* The third-party registrations introduced by the examiner are of very little probative value to show that Applicant's

distribution services and Registrant's retail store services are related. Applicant has established that distribution services and retail store services are marketed to different groups of consumers. The Examiner's evidence fails to establish any degree of overlap in the groups of consumers. IV. DOUBTS MUST BE RESOLVED IN APPLICANT'S FAVOR For the reasons outlined above, Applicant has raised clear doubts on the issue of whether Applicant's mark is confusingly similar to the registered mark. The law is clear that such doubts "should be resolved in Applicant's behalf..." In re Aid Laboratories Inc., 221 USPQ 1215, 1216 (TTAB 1993) (PEST PRUF not merely descriptive for animal shampoo with insecticide); In re American Hospital Supply Corp., 219 USPQ 949 (TTAB 1983); In re Gourmet Bakers. Inc., 173 USPQ 565 (TTAB 1972). See also In re Morton-Norwich Products, Inc., 209 USPQ 791 (TTAB 1981); and In re Grand Metropolitan Foodservice Inc., 30 USPQ2d 1974, 1976 (TTAB 1994). Applicant therefore respectfully requests that the Examiner withdraw the Section 2(d) refusal of Applicant's application and allow the application to proceed through registration.

GOODS AND/OR SERVICES SECTION (current)

INTERNATIONAL CLASS

035

DESCRIPTION

distributorship in the field of video games

FILING BASIS

Section 1(b)

GOODS AND/OR SERVICES SECTION (proposed)

INTERNATIONAL CLASS

035

TRACKED TEXT DESCRIPTION

~~distributorship in the field of video games~~; [distributorships in the field of video games](#)

FINAL DESCRIPTION

distributorships in the field of video games

FILING BASIS

Section 1(b)

SIGNATURE SECTION

RESPONSE SIGNATURE

/smh/

SIGNATORY'S NAME

Scott Hervey

SIGNATORY'S POSITION

attorney of record, California bar member

SIGNATORY'S PHONE NUMBER

310-860-3304

DATE SIGNED

09/24/2015

AUTHORIZED SIGNATORY

YES

CONCURRENT APPEAL NOTICE FILED	NO
FILING INFORMATION SECTION	
SUBMIT DATE	Thu Sep 24 17:52:00 EDT 2015
TEAS STAMP	USPTO/RFR-216.14.2.18-201 50924175200234032-8629543 3-54080ed3be1c6865e20f93c f86b489b1e8c1cd4eb55435e8 fda3eb5aba442f0-N/A-N/A-2 0150924174203903647

PTO Form 1960 (Rev 9/2007)
OMB No. 0651-0050 (Exp. 07/31/2017)

Request for Reconsideration after Final Action To the Commissioner for Trademarks:

Application serial no. **86295433** PLAY MORE(Standard Characters, see <http://tmng-al.uspto.gov/resting2/api/img/86295433/large>) has been amended as follows:

EVIDENCE

Evidence in the nature of RESPONSE TO OFFICE ACTION PLAY MORE I. INTRODUCTION In the March 30, 2015 Office Action, the Examiner continues the refusal to register. The Examiner states that "the services of the applicant and registrant are directly related as providing video games" and relies on the holding of In re United Service Distributors, Inc. 229 USPQ 237 (TTAB 1968). Applicant contends that the Examiner's reliance on In re United Service is misplaced; the case does not support Examiner's refusal to register. Applicant maintains that the services are marketed to distinctly different groups of consumers.

II. THE HOLDING OF IN RE UNITED SERVICE DISTRIBUTORS, INC. DOES NOT SUPPORT EXAMINER'S REFUSAL TO REGISTER In re United Service addressed applicant's appeal from a refusal to register a design mark for distributor services in the field of health and beauty aids based on a similar design mark for moisturizing skin cream. In addressing the applicant's argument that the goods and services are marketed to different classes of consumers, the Board stated that "the relevant class of purchasers with which we are concerned is the retailer to whom applicant's distributorship services are directed." The Board found that a retailer, familiar with the applicant's moisturizing cream, when coming into contact with applicant's distributorship services may believe there to be some relationship between the two. To be clear, in this case the Board found the retailer to be the relevant consumer because the retailer may be familiar with the registrant's branded product and may also come into contact with applicant distribution services. This is not the case here. Here, Applicant is a distributor that distributes video games to retailers. Registrant is a retailer that provides its retail services to consumers. Registrant is not a product manufacture that sells products to retailers. Here, retailers encounter Applicant's services and consumers encounter Registrant's services. The holding of In re United Service is does not support the Examiner's refusal to register.

III. THE RESPECTIVE SERVICES OF THE MARKS AT ISSUE ARE TARGETED TO DISTINCT CUSTOMER GROUPS, WHICH ELIMINATES ANY CHANCE OF CONFUSION. Relevant case law has repeatedly held that "if one mark user sells exclusively at retail and the other exclusively to commercial buyers, then there may be little likelihood of confusion since no one buyer ever

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outlined above, Applicant has raised clear doubts on the issue of whether Applicant's mark is confusingly similar to the registered mark. The law is clear that such doubts "should be resolved in Applicant's behalf...." In re Aid Laboratories Inc., 221 USPQ 1215, 1216 (TTAB 1993) (PEST PRUF not merely descriptive for animal shampoo with insecticide); In re American Hospital Supply Corp., 219 USPQ 949 (TTAB 1983); In re Gourmet Bakers. Inc., 173 USPQ 565 (TTAB 1972). See also In re Morton-Norwich Products, Inc., 209 USPQ 791 (TTAB 1981); and In re Grand Metropolitan Foodservice Inc., 30 USPQ2d 1974, 1976 (TTAB 1994). Applicant therefore respectfully requests that the Examiner withdraw the Section 2(d) refusal of Applicant's application and allow the application to proceed through registration. has been attached.

CLASSIFICATION AND LISTING OF GOODS/SERVICES

Applicant proposes to amend the following class of goods/services in the application:

Current: Class 035 for distributorship in the field of video games

Original Filing Basis:

Filing Basis: Section 1(b), Intent to Use: *For a trademark or service mark application:* As of the application filing date, the applicant had a bona fide intention, and was entitled, to use the mark in commerce on or in connection with the identified goods/services in the application. ***For a collective trademark, collective service mark, or collective membership mark application:*** As of the application filing date, the applicant had a bona fide intention, and was entitled, to exercise legitimate control over the use of the mark in commerce by members on or in connection with the identified goods/services/collective membership organization. ***For a certification mark application:*** As of the application filing date, the applicant had a bona fide intention, and was entitled, to exercise legitimate control over the use of the mark in commerce by authorized users in connection with the identified goods/services, and the applicant will not engage in the production or marketing of the goods/services to which the mark is applied, except to advertise or promote recognition of the certification program or of the goods/services that meet the certification standards of the applicant.

Proposed:

Tracked Text Description: ~~distributorship in the field of video games~~; [distributorships in the field of video games](#)

Class 035 for distributorships in the field of video games

Filing Basis: Section 1(b), Intent to Use: *For a trademark or service mark application:* As of the application filing date, the applicant had a bona fide intention, and was entitled, to use the mark in commerce on or in connection with the identified goods/services in the application. ***For a collective trademark, collective service mark, or collective membership mark application:*** As of the application filing date, the applicant had a bona fide intention, and was entitled, to exercise legitimate control over the use of the mark in commerce by members on or in connection with the identified goods/services/collective membership organization. ***For a certification mark application:*** As of the application filing date, the applicant had a bona fide intention, and was entitled, to exercise legitimate control over the use of the mark in commerce by authorized users in connection with the identified goods/services, and the applicant will not engage in the production or marketing of the goods/services to which the mark is applied, except to advertise or promote recognition of the certification program or of the goods/services that meet the certification standards of the applicant.

SIGNATURE(S)

Request for Reconsideration Signature

Signature: /smh/ Date: 09/24/2015

Signatory's Name: Scott Hervey

Signatory's Position: attorney of record, California bar member

Signatory's Phone Number: 310-860-3304

The signatory has confirmed that he/she is an attorney who is a member in good standing of the bar of the highest court of a U.S. state, which includes the District of Columbia, Puerto Rico, and other federal territories and possessions; and he/she is currently the owner's/holder's attorney or an associate thereof; and to the best of his/her knowledge, if prior to his/her appointment another U.S. attorney or a Canadian attorney/agent not currently associated with his/her company/firm previously represented the owner/holder in this matter: (1) the owner/holder has filed or is concurrently filing a signed revocation of or substitute power of attorney with the USPTO; (2) the USPTO has granted the request of the prior representative to withdraw; (3) the owner/holder has filed a power of attorney appointing him/her in this matter; or (4) the owner's/holder's appointed U.S. attorney or Canadian attorney/agent has filed a power of attorney appointing him/her as an associate attorney in this matter.

The applicant is not filing a Notice of Appeal in conjunction with this Request for Reconsideration.

Serial Number: 86295433

Internet Transmission Date: Thu Sep 24 17:52:00 EDT 2015

TEAS Stamp: USPTO/RFR-216.14.2.18-201509241752002340

32-86295433-54080ed3be1c6865e20f93cf86b4

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