

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

In the Matter of Application Serial No. 76/295,515
Published in the Official Gazette on June 18, 2002

UNIVERSAL CITY STUDIOS, INC.,

Opposer,

v.

VALEN BROST,

Applicant.

Opposition No. 153,683

CERTIFICATE OF MAILING

I hereby certify that on March 25, 2003, this paper is being deposited with the U.S. Postal Service by "Express Mail Post Office to Addressee" service with Express Mail Label No. EL123675661US for delivery to the Commissioner for Trademarks, Box TTAB NO FEE, 2900 Crystal Drive, Arlington, VA 22202-3513.

Eleanor Elko
Eleanor Elko

**OPPOSER'S NOTICE OF MOTION AND MOTION FOR PARTIAL
SUMMARY JUDGMENT STRIKING APPLICANT'S AFFIRMATIVE
DEFENSES OF LACHES, ESTOPPEL, AND ACQUIESCENCE**

TO APPLICANT AND HIS COUNSEL OF RECORD:

PLEASE TAKE NOTICE that pursuant to Rule 56 of the Federal Rules of Civil Procedure, opposer Universal City Studios, Inc. ("Universal")¹ hereby moves the Trademark Trial and Appeal Board for an order granting Universal partial summary judgment striking the three affirmative defenses pleaded in the answer of applicant Valen Brost ("Applicant") on the ground that there is no genuine issue of material fact regarding any of Applicant's affirmative defenses, and that Universal is entitled to judgment as a matter of law on all of them.

¹ Universal has simultaneously filed a motion under Rule 25(c) of the Federal Rules of Civil Procedure to substitute Universal City Studios LLLP, successor-in-interest by conversion and change of name to the original named opposer, Universal City Studios, Inc., as the party plaintiff in this action.

This motion will be based upon this Notice, the accompanying declarations of Christopher C. Larkin and Anne B. Nielsen, the pleadings in this action, the attached brief in support of the motion, and such other arguments and evidence as may be presented to the Board on this motion.

Dated: March 25, 2003

Respectfully submitted,

SEYFARTH SHAW

By: 

Christopher C. Larkin
Joan Kupersmith Larkin
Attorneys for Opposer
UNIVERSAL CITY STUDIOS, INC.

2029 Century Park East, Suite 3300
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Telephone: (310) 277-7200
Facsimile: (310) 201-5219

**OPPOSER'S BRIEF IN SUPPORT OF ITS MOTION
FOR PARTIAL SUMMARY JUDGMENT**

INTRODUCTION AND BACKGROUND

In the opposed application, Applicant seeks registration of the mark "UNIVERSAL TOYS" for goods identified as "toy rockets," based upon alleged first use of the mark in commerce on July 31, 2001. Universal has opposed the application under § 2(d) of the Lanham Act on the basis of its long prior use of various "UNIVERSAL" marks in connection with motion pictures, and a wide variety of entertainment-related goods and services, including toys, and the existence of a likelihood of confusion.

Applicant's answer, served on January 17, 2003,² asserts three affirmative defenses: (1) "Opposer's claims are barred by laches based on another incontestable mark 'Universal Games' of which the instant mark is derivative;" (2) "Opposer is estopped from raising the claims made in its opposition;" and (3) "Opposer has impliedly acquiesced to Applicant's use of the published mark." These defenses are all insufficient as a matter of law and partial summary judgment striking them should be granted.

ARGUMENT

**UNIVERSAL IS ENTITLED TO SUMMARY JUDGMENT
ON APPLICANT'S AFFIRMATIVE DEFENSES**

"Summary judgment is appropriate where the movant has established that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Nat'l Cable Television Ass'n Inc. v. American Cinema Editors Inc.*, 937 F.2d 1572, 19 USPQ2d 1424, 1427 (Fed. Cir. 1991) (granting summary judgment on equitable defenses of

² Applicant's answer was untimely served and filed. The Board's order serving Universal's Notice of Opposition was mailed on December 2, 2002, making Applicant's answer due to be served and filed 40 days later, or by January 11, 2003. It was served and filed six days later.

laches, estoppel, and acquiescence). For the reasons discussed below, Universal is entitled to summary judgment on each of Applicant's equitable defenses.

I.

THERE IS NO GENUINE ISSUE OF MATERIAL FACT ON APPLICANT'S LACHES DEFENSE AND UNIVERSAL IS ENTITLED TO JUDGMENT AS A MATTER OF LAW STRIKING THAT DEFENSE.

Applicant's first affirmative defense asserts that Universal's claims "are barred by laches based on another incontestable mark 'Universal Games' of which the instant mark is derivative." Answ. First Aff. Def.³ As pleaded, Applicant's laches defense is a "prior registration" or "Morehouse" defense.⁴

"The prior registration or *Morehouse* defense is an equitable defense, to the effect that if the opposer can not be further injured because there already exists an injurious registration, the opposer can not object to an additional registration that does not add to the injury." *O-M Bread Inc. v. United States Olympic Comm.*, 65 F.3d 933, 36 USPQ2d 1041, 1045 (Fed. Cir. 1995). The defense applies, however, only "where the mark and goods in the pre-existing registration are substantially identical to the mark and goods which are the subject of the involved application." *TBC Corp. v. Grand Prix Ltd.*, 12 USPQ2d 1311, 1314 (TTAB 1989) (citations omitted). There is no genuine issue of material fact that neither the mark nor the goods in the prior registration owned by Applicant are "substantially identical" to their counterparts in the opposed application.

³ The referenced mark is shown in Reg. No. 1,990,982, which issued to Applicant on August 6, 1996 for goods identified as "board games." Larkin Decl. Ex. 2.

⁴ *Morehouse Mfg. Co. v. J. Strickland Co.*, 407 F.2d 881, 160 USPQ 715 (CCPA 1969).

A. The Marks Are Not Substantially Identical

The *Morehouse* defense "require[s] that the prior and proposed marks be essentially the same." *O-M Bread*, 36 USPQ2d at 1045. To be "essentially the same," the marks must either be literally the same or "legal equivalents." *Id.* at 1045-46; *La Fara Importing Co. v. F. Lli de Cecco*, 8 USPQ2d 1143, 1147 (TTAB 1988); *DC Comics, Inc. v. Scholastic Magazines, Inc.*, 210 USPQ 299 (TTAB 1980).⁵

The mark "UNIVERSAL GAMES" in the prior registration and the mark "UNIVERSAL TOYS" in the opposed application are not the same or legally equivalent. Although they share a common element, the word "UNIVERSAL," they contain different suffix elements and, when considered in their entireties, do not "create the same, continuing commercial impression." *Van Dyne-Croity*, 17 USPQ2d at 1868. Applicant himself implicitly acknowledged their differences in the prosecution of the opposed application. In a July 31, 2001 cover letter to the Patent and Trademark Office, Applicant stated that "I currently am the registered owner for the tm 'Universal Games.' I am starting a toy division under the name 'Universal Toys.' Please issue the tm Universal Toys. I do not object to the use of the tm 'Universal Toys' as infringing on, or being confusingly similar to my tm 'Universal Games'." Larkin Decl. Ex. 1.

But even if the marks might be considered confusingly similar for § 2(d) purposes, that is not enough; to be legally equivalent, they must be so similar as to be essentially one and the same mark. The marks here fall far short of meeting that exacting standard. *See O-M Bread*, 36 USPQ2d at 1045-46 (marks "OLYMPIC" and "OLYMPIC KIDS" were neither "the same mark nor ... legal equivalents" and the applicant's longstanding registration of "OLYMPIC" for

⁵ Legally equivalent marks "must create 'the same, continuing commercial impression' ... and the later mark should not materially differ from or alter the character of the [prior] mark ..." *Van Dyne-Croity Inc. v. Wear-Guard Corp.*, 926 F.2d 1156, 17 USPQ2d 1866, 1868 (Fed. Cir. 1991) (quotations omitted).

bakery products did not provide *Morehouse* defense to opposer's opposition to registration of "OLYMPIC KIDS" for the identical goods). Applicant's pleaded *Morehouse* defense fails for this reason alone.

B. The Goods Are Not Substantially The Same

For the *Morehouse* defense to apply, the goods in the prior registration and the opposed application must be "identical, substantially the same, or so related so as to represent in law a distinction without a difference." *La Fara, supra* 8 USPQ2d at 1147 (spaghetti sauce and alimentary pastes not sufficiently the same to support *Morehouse* defense).

There is no genuine issue of fact that the board games identified in the prior registration and the toy rockets identified in the opposed application are not "identical, substantially the same, or so related as to represent in law a distinction without a difference." *Id.* By Applicant's own admission in his July 31, 2001 letter to the Patent and Trademark Office, he markets the goods separately, through distinct portions of his business. The goods are also different in nature and have different intended uses. As shown by the specimen of record in the opposed application, Larkin Decl. Ex. 1, the toy rockets in the opposed application, which apparently can travel 400 feet, are intended for use in active outdoor play. By contrast, board games of the sort that are identified in the prior registration are usually intended for quieter, primarily indoor, play. Larkin Decl. Ex. 2.

To be sure, while the goods in the opposed application and the prior registration are somewhat similar, as they are both intended for recreational use by children, that is not sufficient to raise a triable issue of fact on Applicant's *Morehouse* defense. The defense fails as a matter of law where, as here, the goods in the opposed application and the prior registration are at most "related to and within the natural zone of expansion" of each other. *TBC, 12 USPQ2d* at 1314.

Because neither the marks nor the goods are sufficiently identical to sustain a *Morehouse* defense, Applicant's first affirmative defense of laches is insufficient as a matter of law and should be stricken.

II.

THERE IS NO GENUINE ISSUE OF MATERIAL FACT ON APPLICANT'S ESTOPPEL DEFENSE AND UNIVERSAL IS ENTITLED TO JUDGMENT AS A MATTER OF LAW STRIKING THAT DEFENSE.

Applicant's second affirmative defense claims that Universal is "estopped from raising the claims made in this opposition." *Ans. Second Aff. Def.* "[E]stoppel require[s] some affirmative act by opposer which led applicant to reasonably believe that opposer would not oppose applicant's registration of its mark." *DAK Indus. Inc. v. Daiichi Kosho Co. Ltd.*, 25 USPQ2d 1622, 1625 (TTAB 1993). As set forth in the Nielsen declaration, Universal had no contact with Applicant or his representatives regarding the mark shown in the opposed application prior to the publication of the application opposition, and has never stated to Applicant or his representatives that Universal would not oppose registration. Nielsen Decl. ¶ 2. There is an absence of evidence to support Applicant's proof on its estoppel defense, and Universal has carried its burden under Rule 56 of showing that the defense lacks merit. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *Kellogg Co. v. Pack'em Enterprises Inc.*, 951 F.2d 330, 21 USPQ2d 1142, 1145 (Fed. Cir. 1991). Applicant's estoppel defense is insufficient as a matter of law and should be stricken.

III.

THERE IS NO GENUINE ISSUE OF MATERIAL FACT ON APPLICANT'S ACQUIESCENCE DEFENSE AND UNIVERSAL IS ENTITLED TO JUDGMENT AS A MATTER OF LAW STRIKING THAT DEFENSE.

Applicant's third affirmative defense asserts that Universal "has impliedly acquiesced to Applicant's use of the published mark." *Ans. Third Aff. Def.* As pleaded, this defense is a

laches defense based upon Universal's alleged failure to challenge Applicant's claimed use of the mark. See *Nat'l Cable*, 19 USPQ2d at 1431 (equitable defense based upon failure of opposer to challenge applicant's use of mark is defense of laches by acquiescence).⁶

Universal concedes that it has not challenged Applicant's use of the "UNIVERSAL TOYS" mark at any time since such use began. But even assuming, for purposes of this motion only, that Universal has thus "impliedly acquiesced" in Applicant's use of the "UNIVERSAL TOYS" mark, any such acquiescence in Applicant's use of the mark is insufficient as a matter of law as a defense to Universal's right to challenge its registration.

"In the context of a trademark opposition or cancellation proceeding, [the laches] defense must be tied to a party's registration of a mark rather than to its use of the mark." *Turner v. Hops Grill & Bar Inc.*, 52 USPQ2d 1310, 1312 (TTAB 1999). In *Nat'l Cable, supra*, the Federal Circuit rejected, as a matter of law, the underpinning of Applicant's defense of laches by acquiescence: "[L]aches begins to run from the time action could be taken against the acquisition by another of a set of rights to which objection is later made ... Under the view that laches runs from knowledge of use, a trademark owner would be obligated to bring suit to stop use upon learning of a possible conflicting mark or suffer the possibility of being barred by the passage of time from later opposing or canceling registration of the mark. We see nothing in logic or the statute which requires this expansive view of laches." 19 USPQ2d at 1432 (emphasis in original).

Under *Nat'l Cable*, the laches period began to run here when the mark was published for opposition in the Official Gazette on June 18, 2002. Universal timely filed this opposition on October 14, 2002 after obtaining extensions of time to oppose pursuant to § 2.102 of the

⁶As discussed in Point II, *supra*, acquiescence other than by an opposer's failure to challenge the applicant's use of its mark requires an affirmative act relied upon by the applicant.

Trademark Rules of Practice. Applicant's laches defense is insufficient as a matter of law and should be stricken.

CONCLUSION

For all of the foregoing reasons, Universal's motion for partial summary judgment striking Applicant's affirmative defenses should be granted in its entirety.

Dated: March 25, 2003

Respectfully submitted,

SEYFARTH SHAW

By: 

Christopher C. Larkin
Joan Kupersmith Larkin
Attorneys for Opposer
UNIVERSAL CITY STUDIOS, INC.

2029 Century Park East, Suite 3300
Los Angeles, CA 90067-3063
Telephone: (310) 277-7200
Facsimile: (310) 201-5219

CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2003, I served the foregoing Opposer's Notice of Motion and Motion for Partial Summary Judgment on Applicant's Affirmative Defenses, on the applicant by depositing a true copy thereof in a sealed envelope, postage prepaid, in First-Class U.S. mail addressed to applicant's counsel as follows:

Kenneth R. Caldwell, Esq.
Skinner Watson & Rounds
548 California Avenue
Reno, NV 89451

Eleanor Elko

Eleanor Elko

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

In the Matter of Application Serial No. 76/295,515
Published in the Official Gazette on June 18, 2002

UNIVERSAL CITY STUDIOS, INC.,

Opposer,

v.

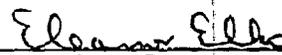
VALEN BROST,

Applicant.

Opposition No. 153,683

CERTIFICATE OF MAILING

I hereby certify that on March 25, 2003, this paper is being deposited with the U.S. Postal Service by "Express Mail Post Office to Addressee" service with Express Mail Label No. EL123675661US for delivery to the Commissioner for Trademarks, Box TTAB NO FEE, 2900 Crystal Drive, Arlington, VA 22202-3513.


Eleanor Elko

**DECLARATION OF CHRISTOPHER C. LARKIN IN SUPPORT OF OPPOSER'S
MOTION FOR PARTIAL SUMMARY JUDGMENT STRIKING APPLICANT'S
AFFIRMATIVE DEFENSES OF LACHES, ESTOPPEL, AND ACQUIESCENCE**

I, CHRISTOPHER C. LARKIN, hereby declare:

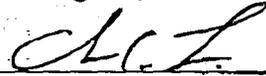
1. I am an attorney licensed to practice in the States of New York and California and am a member of the firm of Seyfarth Shaw, counsel for opposer Universal City Studios, Inc. ("Universal"). I make this declaration on the basis of my own personal knowledge and in support of Universal's motion for partial summary judgment striking the three affirmative defenses pleaded in the answer of applicant Valen Brost ("Applicant").

2. Attached hereto as Exhibit 1 is a true and correct copy of the file history of the opposed Application Serial No. 76/295,515.

3. Attached hereto as Exhibit 2 is a true and correct copy of the certificate of registration for Reg. No. 1,990,982, which is asserted as the basis for Applicant's first affirmative defense, and a copy of the specimen of record from the file history of the registration.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 25th day of March, 2003 at Los Angeles, California.

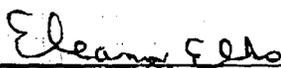


CHRISTOPHER C. LARKIN

CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2003, I served the foregoing Declaration of Christopher C. Larkin in Support of Opposer's Motion for Partial Summary Judgment on Applicant's Affirmative Defenses, on the applicant by depositing a true copy thereof in a sealed envelope, postage prepaid, in First-Class U.S. mail addressed to applicant's counsel as follows:

Kenneth R. Caldwell, Esq.
Skinner Watson & Rounds
548 California Avenue
Reno, NV 89451



Eleanor Elko

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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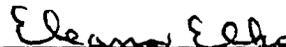
VALEN BROST,

Applicant.

Opposition No. 153,683

CERTIFICATE OF MAILING

I hereby certify that on March 25, 2003, this paper is being deposited with the U.S. Postal Service by "Express Mail Post Office to Addressee" service with Express Mail Label No. EL123675661US for delivery to the Commissioner for Trademarks, Box TTAB NO FEE, 2900 Crystal Drive, Arlington, VA 22202-3513.


Eleanor Elko

**DECLARATION OF ANNE B. NIELSEN IN SUPPORT OF OPPOSER'S MOTION FOR
PARTIAL SUMMARY JUDGMENT STRIKING APPLICANT'S AFFIRMATIVE
DEFENSES OF LACHES, ESTOPPEL, AND ACQUIESCENCE**

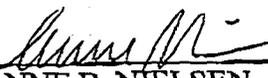
I, ANNE B. NIELSEN, hereby declare:

1. I am Vice President and Senior Trademark Counsel for opposer Universal City Studios LLLP ("Universal"), successor-in-interest to Universal City Studios, Inc. I make this declaration on the basis of my own personal knowledge and in support of Universal's motion for partial summary judgment striking the three affirmative defenses pleaded in the answer of applicant Valen Brost ("Applicant").

2. Prior to the publication of the Application Serial No. 76/295,515 (the "Opposed Application"), Universal never had any correspondence or communication with Applicant or his representatives regarding use or registration of the mark shown in the Opposed Application. Universal has never stated to Applicant or his representatives that Universal would not oppose registration of the mark shown in the Opposed Application.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

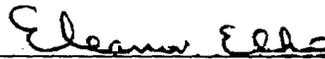
Executed this 18 day of March, 2003 at Universal City, California.


ANNE B. NIELSEN

CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2003, I served the foregoing Declaration of Anne B. Nielsen in Support of Opposer's Motion for Partial Summary Judgment on Applicant's Affirmative Defenses, on the applicant by depositing a true copy thereof in a sealed envelope, postage prepaid, in First-Class U.S. mail addressed to applicant's counsel as follows:

Kenneth R. Caldwell, Esq.
Skinner Watson & Rounds
548 California Avenue
Reno, NV 89451



Eleanor Elko

05-19-03

05:40pm From-Seyfarth Shaw

3102015219

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Exhibit 1

08-06-2001

U.S. Patent & TMO/TM Mail Rcpt Dt. #26

SKY ROCKET™ SUPER PERFORMANCE

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76295515



CONTENTS: STOMP PAD AND HOSE,
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CASE PACK	WEIGHT	MASTER CASE PACK	WHOLESALE PRICE	SHIP FROM	ITEM NUMBER
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76-295515



FILING DATE
August 6, 2001

ORIGINAL APPLICANT
Brost, Valen

GOODS/SERVICES (CLASS 028)
toys

FILING BASIS
USE

ORIGINAL CORRESPONDENT
VALEN BROST

UNIVERSAL TOYS

UNIVERSAL TOYS

PRINCIPAL

LAW OFFICE 106

76-295515

Linda Mickleburgh

ATTORNEY ADVISOR:

[Handwritten signature]
Approved for Filing (Name) (Date) (Signature) (Date)
Approved for Filing (Name) (Date) (Signature) (Date)

PUBLISHED
06/18/02

NGA

ADAPTOR

Serial Number



76295515

PROSECUTION HISTORY

Initials

Date

Initials

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6/18/02

*** User: lmicklebur ***

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02	12	N/A	0	0	0:01	Brost[on]
03	15	N/A	0	0	0:01	Valen[on]
04	9	2	7	7	0:01	2 and 3
05	3557	N/A	0	0	0:01	sky*[bi,ti]
06	1064	N/A	0	0	0:02	*rocket*[bi,ti]
07	2057	N/A	0	0	0:01	universal[bi,ti]
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10	19	6	13	13	0:01	5 and 6

Session started 09/18/01 10:49:44 AM
Session finished 09/18/01 10:52:28 AM
Total search duration 0:12 minutes
Session Duration 2:44 minutes

Default NEAR limit= 1 ADJ limit= 1

Print: Apr 23, 2002

76295515

UNIVERSAL TOYS

Serial Number

76295515

Status

PUBLICATION/ISSUE REVIEW COMPLETE

Word Mark

UNIVERSAL TOYS

Type of Mark

TRADEMARK

Register

PRINCIPAL

Mark Drawing Code

(1) TYPED DRAWING

Owner

Brost, Valen INDIVIDUAL UNITED STATES 770 Southwood # 1 Incline
Village NEVADA 89451

Goods/Services

Class Status -- ACTIVE. IC 028. US 022 023 038 050. G & S: Toy
rockets. First Use: 2001/07/01. First Use In Commerce: 2001/07/31.

Disclaimer Statement

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "TOYS" APART FROM THE
MARK AS SHOWN.

Filing Date

2001/08/06

Examining Attorney

MICKLEBURGH, LINDA

Apr 19, 2002

76295515

12:08 PM

UNIVERSAL TOYS**Serial Number**

76295515

Examining AttorneyMICKLEBURGH, LINDA
LAW OFFICE 106**Filing Date**

Aug 6, 2001

Original Filing Basis

1A

Current Filing Basis

1A

Amended Filing Basis

NONE

Status of Application

APPROVED FOR PUBLICATION

Type of Mark

TRADEMARK

Register

PRINCIPAL

Word Mark

UNIVERSAL TOYS

OTHER MARK DATA**Color Drawing Indicator**

NO COLOR DRAWING

Mark Drawing Code

(1) TYPED DRAWING

OWNER DATA

Apr 19, 2002

76295515

12:08 PM

ASSIGNMENT RECORDED: NO

Brost, Valen
UNITED STATES
INDIVIDUAL
770 Southwood # 1
Incline Village, NEVADA 89451

GOODS AND SERVICES DATA

G & S: Class Status -- ACTIVE. Toy rockets. IC 028. US 022 023 038
050. First Use: Jul 1, 2001. First Use In Commerce: Jul 31, 2001

OTHER DATA**Disclaimer Statement**

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "TOYS" APART FROM THE
MARK AS SHOWN.

FOREIGN REGISTRATION DATA**CORRESPONDENCE DATA**

Correspondence Address
VALEN BROST
770 SOUTHWOOD # 1
INCLINE VILLAGE NV 89451

Automatic Last Update

NOT UPDATED

HISTORY OF CORRESPONDENCE CHANGES

LO 106

TRADEMARK LAW OFFICE 106
Serial Number: 76/295515
Mark: UNIVERSAL TOYS

****Please Place on Upper Right Corner****
****of Response to Office Action ONLY ****

12/13/01

Commissioner for Trademarks
2900 Crystal Drive
Arlington, VA 22202 - 3513



12-26-2001

U.S. Patent & TMO/TM Mail Rcpt Dt #70

RE: application for Trademark Ser # 76/295515
Applicant: Valen Brost, 770 Southwood #1, Incline village, NV 89451
Phone # (775) 833-4263 or (530) 268-6397
Examining Attorney: Linda E B Mickleburg Law Office # 106
Filing Date: 7/31/01
Office action mailing date: 9/20/01

Please add the following disclaimer to the application:

(No claim is made to the exclusive right to use TOYS apart from the mark as shown.) *PR*

Please amend the application to clarify the identification of goods as: "Toy Rockets", in class 28.

Applicant is citizen of the United States of America.

Sincerely,

Valen Brost

RECEIVED
2002 JAN -4 P 2:45
LAW OFFICE 106
T.M.E.O.

UNITED STATES PATENT AND TRADEMARK OFFICE

SERIAL NO. 76/295515 Brost, Valen		PAPER NO.	
APPLICANT 			
MARK UNIVERSAL TOYS		ADDRESS: Commissioner for Trademarks 2900 Crystal Drive Arlington, VA 22202-3513 www.uspto.gov	
ADDRESS VALEN BROST 770 SOUTHWOOD # 1 INCLINE VILLAGE NV 89451		ACTION NO. 01	If no fees are enclosed, the address should include the words "Box Responses - No Fee."
		MAILING DATE 09/20/01	
		REF. NO.	Please provide in all correspondence:
FORM PTO-1526 (5-98)		U.S. DEPT. OF COMM. PAT. & TM OFFICE	
<ol style="list-style-type: none"> 1. Filing Date, serial number, mark and Applicant's name. 2. Mailing date of this Office action. 3. Examining Attorney's name and Law Office number. 4. Your telephone number and ZIP code. 			

A PROPER RESPONSE TO THIS OFFICE ACTION MUST BE RECEIVED WITHIN 6 MONTHS FROM THE DATE OF THIS ACTION IN ORDER TO AVOID ABANDONMENT. For your convenience and to ensure proper handling of your response, a label has been enclosed. Please attach it to the upper right corner of your response. If the label is not enclosed, print or type the Trademark Law Office No., Serial No., and Mark in the upper right corner of your response.

RE: Serial Number: 76/295515

The assigned examining attorney has reviewed the referenced application and determined the following.

SEARCH RESULTS

The examining attorney has searched the Office records and has found no similar registered or pending mark which would bar registration under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d). TMEP section 1105.01.

DISCLAIMER

The applicant must disclaim the descriptive wording "TOYS" apart from the mark as shown. Trademark Act Section 6, 15 U.S.C. Section 1056; TMEP sections 1213 and 1213.02(a). The wording is merely descriptive because it is the type of goods.

The computerized printing format for the *Trademark Official Gazette* requires a standard form for a disclaimer. TMEP section 1213.09(a)(i). A properly worded disclaimer should read as follows:

No claim is made to the exclusive right to use TOYS apart from the mark as shown.

See In re Owatonna Tool Co., 231 USPQ 493 (Comm'r Pats. 1983).

IDENTIFICATION OF GOODS

The applicant must clarify the identification of goods by adopting: "Toy rockets", in class 28. TMEP section 804.

Please note that, while an application may be amended to clarify or limit the identification, additions to the identification are not permitted. 37 C.F.R. Section 2.71(b); TMEP section 804.09. Therefore, the applicant may not amend to include any goods that are not within the scope of goods set forth in the present identification.

CITIZENSHIP OMITTED

The applicant must indicate his national citizenship for the record. Trademark Act Section 1, 15 U.S.C. Section 1051; 37 C.F.R. Section 2.32(a)(3)(i); TMEP section 802.04.

No set form is required for response to this Office action. The applicant must respond to each point raised. The applicant should simply set forth the required changes or statements and request that the Office enter them. The applicant must sign the response. In addition to the identifying information required at the beginning of this letter, the applicant should always provide a telephone number to speed up further processing.



Linda E B Mickleburgh
Trademark Attorney
Law Office 106
(703) 308-9106 ext 222

Valen Brost
770 Soutwood #1
Incline Village, NV 89451
775 833 4263

7/31/01

Assistant Commissioner for Trademarks
Arlington, VA

RE: App for tm "Universal Toys"

Dear TM App Examiner,

I currently am the registered owner for the tm "Universal Games." I am starting a toy division under the name "Universal Toys". Please issue the tm Universal Toys. I do not object to the use of the tm "Universal Toys" as infringing on, or being confusingly similar to my tm "Universal Games."

Sincerely,



Valen Brost

TRADEMARK/SERVICE MARK APPLICATION, PRINCIPAL REGISTER, WITH DECLARATION

MARK (Word(s) and/or Design)

Universal Toys

28

TO THE ASSISTANT COMMISSIONER FOR TRADEMARKS:

APPLICANT'S NAME: Valen Brost

APPLICANT'S BUSINESS ADDRESS: 770 Southwood #1 Incline Village, NV 89451

APPLICANT'S ENTITY TYPE (Check one and supply requested information)

Individual - Citizen of (Country):

Partnership - State where organized (Country, if appropriate):

Names and Citizenship (Country) of General Partners:

Corporation - State (Country, if appropriate) of Incorporation:

Other (Specific Nature of Entity and Domicile):

GOODS AND/OR SERVICES:

Applicant requests registration of the trademark/service mark shown in the accompanying drawing in the United States Patent and Trade-mark Office on the Principal Register established by the Act of July 5, 1946 (15 U.S.C. 1051 et. seq., as amended) for the following goods/ services (SPECIFIC GOODS AND/OR SERVICES MUST BE INSERTED HERE):

Toys

BASIS FOR APPLICATION (Check boxes which apply, but never both the first AND second boxes, and supply requested information related to each box checked)

Applicant is using mark in commerce on or in connection with the above identified goods/services. (15 U.S.C. 1051(a), as amended.) Three specimens showing the mark as used in commerce are submitted with this application. Date of first use of the mark in commerce which the U.S. Congress may regulate (for example, interstate or between the U.S. and a foreign country): July 31st, 2001 Specify the type of commerce: Interstate (for example, interstate or between the U.S. and a specified foreign country) Date of first use anywhere (the same as or before use in commerce date): 7/01/01 Specify intended manner or mode of use of mark on or in connection with the goods/services: Trademark is applied to labels (for example, trademark is applied to labels, service mark is used in advertisements)

Applicant has a bona fide intention to use the mark in commerce on or in connection with the above identified goods/services. (15 U.S.C. 1051(b), as amended.) Specify manner or mode of use of mark on or in connection with the goods/services: (for example, trademark will be applied to labels, service mark will be used in advertisements)

Applicant has a bona fide intention to use the mark in commerce on or in connection with the above identified goods/services and asserts a claim of priority based upon a foreign application in accordance with 15 U.S.C. 1126(d), as amended. Country of foreign filing: Date of foreign filing:

Applicant has a bona fide intention to use the mark in commerce or in connection with the above identified goods/services, and, accompanying this application, submits a certification or certified copy of a foreign registration in accordance with 15 U.S.C 1126(e), as amended. Country of registration: Registration number:

NOTE: Declaration, on Reverse Side, MUST be Signed

DECLARATION

The undersigned being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. 1001, and that such willful false statements may jeopardize the validity of the application or any resulting registration, declares that he/she is properly authorized to execute this application on behalf of the applicant; he/she believes the applicant to be owner of the trademark/service mark sought to be registered, or if the application is being filed under 15 U.S.C. 1051(b), he/she believes applicant to be entitled to use such mark in commerce; to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the above identified mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive; and that all statements made of his/her own knowledge are true and that all statements made on information and belief are believed to be true.

DATE 7-31-01
 TELEPHONE NUMBER 775-833-4263

SIGNATURE *Vale R. Brost*
 PRINT OR TYPE NAME Vale R. Brost

INSTRUCTIONS AND INFORMATION FOR APPLICANT

TO RECEIVE A FILING DATE, THE APPLICATION MUST BE COMPLETED AND SIGNED BY THE APPLICANT AND SUBMITTED ALONG WITH:

1. The prescribed FEE of ^{325⁰⁰} ~~\$245.00~~* for each class of goods/services listed in the application;
2. A DRAWING PAGE displaying the mark in conformance with 37 CFR 2.52;
3. If the application is based on use of the mark in commerce, THREE (3) SPECIMENS (evidence) of the mark as used in commerce for each class of goods/services listed in the application. All three specimens may be in the nature of: (a) labels showing the mark which are placed on the goods; (b) photographs of the mark as it appears on the goods, (c) brochures or advertisements showing the mark as used in connection with the services.
4. An APPLICATION WITH DECLARATION (this form) - The application must be signed in order for the application to receive a filing date. Only the following person may sign the declaration, depending on the applicant's legal entity: (a) the individual applicant; (b) an officer of the corporate applicant; (c) one general partner of a partnership applicant; (d) all joint applicants.

SEND APPLICATION FORM, DRAWING PAGE, FEE AND SPECIMENS (IF APPROPRIATE) TO:

Assistant Commissioner for Trademarks
 Box New App / Fee
 2900 Crystal Drive
 Arlington, VA 22202-3513

Additional information concerning the requirements for filing an application is available in a booklet entitled **Basic Facts About Registering a Trademark**, which may be obtained by writing to the above address or by calling: (703) 308-9000.

* Fees are subject to change; changes usually take effect on October 1. If filing on or after October 1, 1995, please call the PTO to confirm the correct fee.

If submitted on one page, side two of the form should be Upside Down" in relation to page 1.

DECLARATION

The undersigned being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. 1001, and that such willful false statements may jeopardize the validity of the application or any resulting registration, declares that he/she is properly authorized to execute this application on behalf of the applicant; he/she believes the applicant to be owner of the trademark/service mark sought to be registered, or if the application is being filed under 15 U.S.C. 1051(b), he/she believes applicant to be entitled to use such mark in commerce; to the best of his/her knowledge and belief, no other person, firm, corporation, or association has the right to use the above identified mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive; and that all statements made of his/her own knowledge are true and that all statements made on information and belief are believed to be true.

DATE

7-31-01

SIGNATURE

Vale R. Brost

TELEPHONE NUMBER

775-833-4263

PRINT OR TYPE NAME

Vale R. Brost

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