

PTO Form 1930 (Rev 9/2007)

OMB No. 0651-0050 (Exp. 4/30/2009)

Request for Reconsideration after Final Action

The table below presents the data as entered.

Input Field	Entered
SERIAL NUMBER	77375526
LAW OFFICE ASSIGNED	LAW OFFICE 106
MARK SECTION (no change)	
ARGUMENT(S)	
<p>The Examining Attorney has issued a final refusal to register Applicant's mark on two grounds: (1) Section 2(d) Likelihood of Confusion, and (2) Section 2(e)(1) Mere Descriptiveness. Applicant respectfully requests reconsideration of these grounds in light of the following arguments.</p> <p>At the outset, Applicant notes that the Examining Attorney cited three marks in the Likelihood of Confusion rejection. These marks include U.S. Registration No. 1167193, for HOLIDAY; U.S. Registration No. 1503973, also for HOLIDAY; and U.S. Registration No. 2738879, for HOLIDAY BY SARDI DESIGN LLC. Notably, the second mark cited by the Examining Attorney, U.S. Registration No. 1503973, was canceled on May 16, 2009, which actually pre-dates the Examining Attorney's final office action. Moreover, the third mark cited by the Examining Attorney--U.S. Registration No. 2738879--missed the six-year date for filing its Section 8 declaration of use and is thus due for cancellation in less than two months. Indeed, that registration has entered the grace period and will be canceled if the Section 8 declaration of use is not filed by January 15, 2010.</p> <p>Applicant notes that it is filing a Notice of Appeal of the Final Rejection herewith.</p> <p>I. Section 2(d) Likelihood of Confusion Refusal</p> <p>Despite the Examining Attorney's acknowledgement that the mark HOLIDAY!HOLIDAY! is unitary, the Examining Attorney merely glosses over that fact to assert that "does not change the fact that the proposed mark and the registered mark share the common significant term holiday." The fact that two marks share a "common significant term," however, is irrelevant given that a proper analysis of the similarity of marks requires examining "the similarity or dissimilarity of the marks <i>in their entirety</i> as to appearance, sound, connotation and commercial impression." <i>In re E. I. du Pont de Nemours & Co.</i>, 476 F.2d 1357, 1361 (C.C.P.A. 1973) (emphasis added); TMEP § 1207.01(b). When Applicant's mark <i>in its entirety</i> is compared to the cited registrations, significant differences with respect to each of these factors are apparent. The cited registrations simply use the term HOLIDAY. Applicant's mark, however, uses that term twice, however, making the appearance and sound between Applicant's mark and cited registrations different. Moreover, Applicant's use of two exclamation marks changes the connotation and, thus, the overall commercial impression to be an exclamatory phrase rather than simply a word.</p>	

The Examining Attorney concedes that the term "HOLIDAY" is descriptive of holiday-related goods, but then ignores this fact by failing to recognize that where "the common element of two marks is 'weak' in that it is generic [or] descriptive [of the recited] goods or services, consumers typically will be able to avoid confusion unless the overall combinations have other commonality." TMEP § 1207 (b)(viii) (citing *In re Bed & Breakfast Registry*, 791 F.2d 157 (Fed. Cir. 1986)). Here, the overall combinations of the cited registrations--the singular word HOLIDAY--compared to Applicant's mark--the repeated word HOLIDAY in conjunction with two exclamation points-- do not have *any* other commonality besides the one word that suggests the type of goods to be sold under the mark.

Even if the term HOLIDAY is merely descriptive, a "mark is considered 'unitary' when it creates a commercial impression separate and apart from any unregistrable component." TMEP § 1213.05. That is exactly the case here--again, the repeated use of the term "HOLIDAY" along with exclamation points creates an entirely distinct commercial impression from that of the simply stated term within the cited registrations. Indeed, "in determining whether matter is part of a single or unitary mark, [the Examining Attorney must assess]: whether it is physically connected by lines or other design features; the relative location of the respective elements; and the meaning of the terminology as used on or in connection with the goods or services." *Dena Corp. v. Belvedere Int'l Inc.*, 950 F.2d 1555, 1561 (Fed. Cir. 1991). Despite the Examining Attorney's failure to even consider these factors, Applicant notes that the exclamation points distinguish the mark by acting as design features connecting the repeated terms, inducing consumers to read the mark as an exclamatory phrase rather than merely the singularly suggestive term HOLIDAY. Moreover, the term HOLIDAY, while potentially descriptive for purely "holiday-related items" such as Christmas lights and decorations, is *not* descriptive for all of the cited goods, such as candles, candleholders, decorative pillows, tableware, etc. Rather, these items--sold year-round and not intrinsically related to holidays in any way--are merely suggested to be holiday-themed by virtue of the repeated term expressed as an exclamatory phrase.

Indeed, the Trademark Office has already recognized that such repeated terms expressed as exclamatory phrases create distinct commercial impressions in U.S. Registration Nos. 1439558 and 1399730 for the marks PIZZA!PIZZA! (the "Little Caesar's Marks"), covering pizza as a good in Class 30 as well as for restaurant services relating thereto in Class 42. Moreover, U.S. Registration No. 2994238 for the mark LIP LIP LIP!, in connection with cosmetics and makeup in Class 3, demonstrates that the repetition of a single word in an exclamatory phrase creates a distinct commercial impression from that word alone, as the term LIP could hardly be registered for makeup goods on its own. Furthermore, U.S. Registration No. 1275148 for PIZZA PIZZA PIZZA varies little from the Little Caesar's Marks, other than the added repetition of the word and the exclamatory nature of the latter. Indeed, the fact that these two registrations for related goods can coexist demonstrates that even these minor differences between marks are sufficient to distinguish them in the minds of consumers. In light of the foregoing, Applicant respectfully requests reconsideration of the Examining Attorney's final refusal for likelihood of confusion.

II. Section 2(e)(1) Merely Descriptive Refusal

Applicant respectfully submits that the Examining Attorney's refusal under Section 2(e)(1) is premised on arguments which are inapplicable to Applicant's mark. First, the Examining Attorney simply assumes that the term HOLIDAY is descriptive for holiday-related items as if the goods recited are all related to holidays. Moreover, the cases cited by the Examining Attorney are entirely inapposite to the instant mark because of the Examining Attorney's erroneous assumption that the goods covered under Applicant's mark are all "holiday-related items." Finally, the Examining Attorney cites a case for her Section 2(d) refusal, failing to acknowledge that that case cuts entirely

against her argument for ignoring third-party registrations. *AMF Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 1406 (C.C.P.A. 1973). Indeed, the Examining Attorney improperly rejected evidence of such registrations, which are “relevant to show that the mark or a portion of the mark is descriptive, suggestive, or so commonly used that the public will look to other elements to distinguish the source of the goods or services.” TMEP § 1207.01(d)(iii) (citing *AMF Inc.*, 474 F.2d at 1406).

The Examining Attorney twice produced Applicant’s recitation of goods, yet still failed to recognize that many of those goods are in no way intrinsically related to holidays. Indeed, among the goods cited are “candles in Class 004; tableware, namely, knives, forks and spoons in Class 008; . . . decorative pillows in Class 020; . . . servingware for serving food, beverage ware; dinnerware, bath accessories, namely, lotion dispensers; and candleholders in Class 021; bath towels, namely, tip towels, hand towels, wash cloth sets, throws; kitchenware, namely, hand towels, dish cloths, potholders in Class 024; [and] artificial tabletop flower arrangements in Class 026.” These goods represent the *vast majority* of the goods cited and *none* of these goods are intrinsically related to the holiday season. All of these items are sold year-round and may carry themes entirely apart from holidays.

The goods at issue in the cases cited by the Examining Attorney, however, were purely descriptive of the repeated or exclamatory terms therein. For example, the Examining Attorney cites *In re Samuel Moore & Co.*, for the proposition that SUPERHOSE! is merely descriptive of a hydraulic hose. 195 U.S.P.Q. 237, 240 (TTAB 1977). The Examining Attorney further cites *In re Lighthouse, Inc.* and *In re Disc Jockeys, Inc.* for the propositions that CAESAR!CAESAR! is merely descriptive for salad dressing and that DJDJ is merely descriptive for disc jockey services. None of these cases apply here--Caesar is a type of salad dressing, while DJ is simply an acronym for disc jockey and the term SUPERHOSE! includes the very term it purports to sell. In contrast, Applicant does not propose to sell holidays or even holiday services under its HOLIDAY!HOLIDAY! mark. Rather, the majority of the goods Applicant will sell are simply everyday goods that may be sold in connection with holidays. Indeed, the Examining Attorney does not cite a single case in which the goods to be sold under a repeated or exclamatory word mark are held to be descriptive when those goods are not intrinsically described by the mark itself. Applicant, however, has cited several registrations--including the Little Caesar’s Marks and LIP LIP LIP! above--for which the Trademark Office has accepted marks comprised of a term that merely describes the goods offered, which is repeated multiple times with added punctuation, because the repeated terms or exclamatory nature of those marks are sufficient to overcome suggestions that the mark merely describes the goods. As with the Little Caesar’s Marks and LIP LIP LIP!, while the single term may be used to describe the goods or services, the repetition of that term is not necessary for third parties to describe their goods and services. For example, the Little Caesar’s marks do not prevent a pizzeria from using the single descriptive term PIZZA to describe their goods or services; rather, they only prevent a pizzeria from using the repeated PIZZA!PIZZA! mark to describe those goods or services. The same is true here: Applicant’s mark would not prevent any other business from using the term “HOLIDAY” to describe their goods and services. It would only prevent those businesses from using the mark itself--HOLIDAY! HOLIDAY!--to describe their goods and services. And again, that mark *as a whole* is not purely descriptive of Applicant’s goods or services, and would likely not be used to describe any other businesses’ goods or services.

Moreover, Applicant must emphasize that the Examining Attorney improperly rejected evidence of third-party use. Indeed, as noted above, the “public will look to other elements to distinguish the source of the goods or services” when a mark or a portion thereof is descriptive, suggestive, or very commonly used. TMEP § 1207.01(d)(iii) (citing *AMF Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 1406 (C.C.P.A. 1973)). The other elements to which the public may look are can include

repeated terms and exclamations, which are used in the marks cited above to overcome descriptiveness concerns. In fact, where “the consuming public is exposed to third-party use of similar marks on similar goods, [third-party] evidence ‘is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.’” TMEP § 1207.01(d)(iii) (quoting *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 1373 (Fed. Cir. 2005)). Indeed, the term HOLIDAY is so often used within marks that, on its own, the scope of protection it should be afforded is almost negligible. Thus, as shown above, repetitions and exclamatory phrases can overcome not only descriptiveness concerns, but similarities between marks to minimize likelihood of confusion.

If the Examining Attorney considers the term “HOLIDAY” to be merely descriptive of Applicant’s goods, the proper course of action is not to reject the application under Section 2(e)(1), but rather to require a disclaimer of “holiday.” Indeed, neither the Little Caesars Marks and the LIP LIP LIP! mark mentioned above, were registrable absent a disclaimer of “PIZZA” and “LIP,” respectively. Therefore, the Examining Attorney should retract his refusal to register under Section 2(e)(1) and, if necessary, request a disclaimer of the term “HOLIDAY” apart from the mark as shown.

III. Conclusion

In light of all the foregoing, Applicant respectfully requests reconsideration on both of the Examining Attorney’s grounds for refusal.

SIGNATURE SECTION

RESPONSE SIGNATURE	/Jeffrey P. Dunning/
SIGNATORY'S NAME	Jeffrey P. Dunning
SIGNATORY'S POSITION	Attorney of record, Illinois bar member.
DATE SIGNED	11/25/2009
AUTHORIZED SIGNATORY	YES
CONCURRENT APPEAL NOTICE FILED	YES

FILING INFORMATION SECTION

SUBMIT DATE	Wed Nov 25 16:56:07 EST 2009
TEAS STAMP	USPTO/RFR-66.151.14.170-2 0091125165607192223-77375 526-4603c7289a7811267c435 0ba72f114d15b-N/A-N/A-200 91125165320041284

Request for Reconsideration after Final Action

To the Commissioner for Trademarks:

Application serial no. 77375526 has been amended as follows:

ARGUMENT(S)

In response to the substantive refusal(s), please note the following:

The Examining Attorney has issued a final refusal to register Applicant's mark on two grounds: (1) Section 2(d) Likelihood of Confusion, and (2) Section 2(e)(1) Mere Descriptiveness. Applicant respectfully requests reconsideration of these grounds in light of the following arguments.

At the outset, Applicant notes that the Examining Attorney cited three marks in the Likelihood of Confusion rejection. These marks include U.S. Registration No. 1167193, for HOLIDAY; U.S. Registration No. 1503973, also for HOLIDAY; and U.S. Registration No. 2738879, for HOLIDAY BY SARDI DESIGN LLC. Notably, the second mark cited by the Examining Attorney, U.S. Registration No. 1503973, was canceled on May 16, 2009, which actually pre-dates the Examining Attorney's final office action. Moreover, the third mark cited by the Examining Attorney--U.S. Registration No. 2738879--missed the six-year date for filing its Section 8 declaration of use and is thus due for cancellation in less than two months. Indeed, that registration has entered the grace period and will be canceled if the Section 8 declaration of use is not filed by January 15, 2010.

Applicant notes that it is filing a Notice of Appeal of the Final Rejection herewith.

I. Section 2(d) Likelihood of Confusion Refusal

Despite the Examining Attorney's acknowledgement that the mark HOLIDAY!HOLIDAY! is unitary, the Examining Attorney merely glosses over that fact to assert that "does not change the fact that the proposed mark and the registered mark share the common significant term holiday." The fact that two marks share a "common significant term," however, is irrelevant given that a proper analysis of the similarity of marks requires examining "the similarity or dissimilarity of the marks *in their entirety* as to appearance, sound, connotation and commercial impression." *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (C.C.P.A. 1973) (emphasis added); TMEP § 1207.01(b). When Applicant's mark *in its entirety* is compared to the cited registrations, significant differences with respect to each of these factors are apparent. The cited registrations simply use the term HOLIDAY. Applicant's mark, however, uses that term twice, however, making the appearance and sound between Applicant's mark and cited registrations different. Moreover, Applicant's use of two exclamation marks changes the connotation and, thus, the overall commercial impression to be an exclamatory phrase rather than simply a word.

The Examining Attorney concedes that the term "HOLIDAY" is descriptive of holiday-related goods, but then ignores this fact by failing to recognize that where "the common element of two marks is 'weak' in that it is generic [or] descriptive [of the recited] goods or services, consumers typically will be able to avoid confusion unless the overall combinations have other commonality." TMEP § 1207(b) (viii) (citing *In re Bed & Breakfast Registry*, 791 F.2d 157 (Fed. Cir. 1986)). Here, the overall combinations of the cited registrations--the singular word HOLIDAY--compared to Applicant's mark--the repeated word HOLIDAY in conjunction with two exclamation points-- do not have *any* other commonality besides the one word that suggests the type of goods to be sold under the mark.

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commercial impression separate and apart from any unregistrable component.” TMEP § 1213.05. That is exactly the case here--again, the repeated use of the term “HOLIDAY” along with exclamation points creates an entirely distinct commercial impression from that of the simply stated term within the cited registrations. Indeed, “in determining whether matter is part of a single or unitary mark, [the Examining Attorney must assess]: whether it is physically connected by lines or other design features; the relative location of the respective elements; and the meaning of the terminology as used on or in connection with the goods or services.” *Dena Corp. v. Belvedere Int’l Inc.*, 950 F.2d 1555, 1561 (Fed. Cir. 1991).

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III. Conclusion

In light of all the foregoing, Applicant respectfully requests reconsideration on both of the Examining Attorney's grounds for refusal.

SIGNATURE(S)

Request for Reconsideration Signature

Signature: /Jeffrey P. Dunning/ Date: 11/25/2009

Signatory's Name: Jeffrey P. Dunning

Signatory's Position: Attorney of record, Illinois bar member.

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 applicant'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 applicant in this matter: (1) the applicant 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 applicant has filed a power of attorney appointing him/her in this matter; or (4) the applicant'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 filing a Notice of Appeal in conjunction with this Request for Reconsideration.

Serial Number: 77375526

Internet Transmission Date: Wed Nov 25 16:56:07 EST 2009

TEAS Stamp: USPTO/RFR-66.151.14.170-2009112516560719

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