

**THIS OPINION IS NOT A
PRECEDENT OF THE TTAB**

Mailed:
April 20, 2011

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Nirve Sports, Ltd.

Serial No. 77696654

Kit M. Stetina of Stetina Brunda Garred & Brucker for Nirve Sports, Ltd.

Michael Webster, Trademark Examining Attorney, Law Office 102 (Karen M. Strzyz, Managing Attorney).

Before Quinn, Bergsman and Wellington,
Administrative Trademark Judges.

Bergsman, Administrative Trademark Judge:

This application is before the Board on appeal from the final refusal of the Trademark Examining Attorney on the ground that applicant's mark for the letter "N" and design for "bicycle structural parts," in Class 12 is likely to cause confusion with four previously registered marks for the letter "N" and designs for, *inter alia*, "bicycles and structural parts thereof," in Class 12.

Applicant attached a "Trademark Consent and Coexistence Agreement" and a "Trademark Consent Agreement" to its brief. In his brief, the Examining Attorney

objected to the agreements on the ground that they were untimely filed. Trademark Rule 2.142(d) (the record in an application should be complete before filing an appeal).

On November 8, 2010, applicant subsequently filed a request to suspend the appeal and remand the application to the Examining Attorney to review the consent agreements. The Board approved the request. In his December 16, 2010 Office Action, the Examining Attorney denied the request for reconsideration based on the agreements, and the application file was returned to the Board. Proceedings in the appeal were resumed but applicant did not file a reply brief.

Upon further review, we find that the Examining Attorney did not follow the proper procedure as set forth in the TMEP. If an applicant files an executed consent agreement in response to a *final* refusal under §2(d) of the Trademark Act, and the Examining Attorney finds the consent agreement insufficient to overcome the refusal, the examining attorney should issue a *new final* refusal (*i.e.*, an "Examiner's Subsequent Final Refusal,") with a six-month response clause. TMEP §714.05(d) (7th ed. 2010). In this case, the Examining Attorney should have issued a new final refusal to permit applicant to respond to the Examining Attorney's refusal to accept the consent agreements.

Accordingly, the Board's resumption order dated December 23, 2010 is vacated. The appeal is suspended and the application is remanded to the Examining Attorney to issue a new final refusal pursuant to TMEP §714.05(d) within thirty days of the mailing date of this order.

In the event that the Examining Attorney is ultimately persuaded by any request for reconsideration filed by applicant, the appeal will be moot. If, however, the Examining Attorney ultimately is not persuaded by the arguments and denies any request for reconsideration, the six-month response clause should be omitted therefrom, and the file returned to the Board for appropriate action, including allowing applicant and the Examining Attorney time to submit supplemental appeal briefs directed to the arguments and their role in the likelihood of confusion determination.