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UNITED STATES PATENT AND TRADEMARK OFFICE

SERIAL NO: 78/479366

APPLICANT: Alarmax Distributors, Inc.



**BEFORE THE
TRADEMARK TRIAL
AND APPEAL BOARD
ON APPEAL**

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant:	Alarmax Distributors., Inc	:	BEFORE THE
Trademark:	ALARMAX	:	TRADEMARK TRIAL
Serial No:	78479366	:	AND
Attorney:	Thomas C. Wettach	:	APPEAL BOARD
Address:	Thomas c. Wettach Cohen & Grigsby, P.C. 11 Stanwix St., Suite 15 Pittsburgh, PA 15222-1312	:	ON APPEAL

EXAMINING ATTORNEY'S APPEAL BRIEF

The applicant has appealed the examining attorney's¹ final refusal to register the proposed mark, ALARMAX (in standard character form) for "wholesale distributorship featuring security systems and alarm equipment" in International Class 35, under Section 2(d) of the Trademark Act. Registration was refused under Trademark Act Section 2(d), 15 U.S.C. 1052(d) because the proposed mark so resembled the mark in U.S. Registration No. 1784455 for ALARMEX (in typed form) for "installation maintenance, and repair of burglar, holdup, fire alarms and closed circuit television systems used for surveillance purposes" in International Class 37 and "design of burglar, holdup, and fire alarms for others; monitoring of burglar, holdup, and fire alarms" in International Class 42.

FACTS

On September 7, 2004, the applicant applied to register the mark ALARMAX for "wholesale distributorship featuring security systems and alarm equipment" in International Class 35.

On April 7, 2005, the examining attorney issued its first Office Action refusing the applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d).

On October 6, 2005, the applicant submitted a response to the first Office Action, arguing against the Section 2(d) refusal to register.

On November 30, 2005, the examining attorney issued a final Office Action that maintained the refusal to register the applicant's mark under Section 2(d) of the Trademark Act.

¹ The Office has reassigned this case to the undersigned examining attorney.

On May 22, 2006, the applicant filed a Notice of Appeal with the Trademark Trial and Appeal Board.

On July 21, 2006, the applicant filed its Appeal Brief in support of registration of application serial number 78479366 for the proposed mark, ALARMAX.

ISSUE

The sole issue for consideration on this appeal is whether the applicant's proposed mark, ALARMAX (in standard character form), when used in connection with its Class 35 "wholesale distributorship featuring security systems and alarm equipment" services, so resembles the mark in U.S. Registration No. 1784455 for the mark ALARMEX (in typed form) for "installation maintenance, and repair of burglar, holdup, fire alarms and closed circuit television systems used for surveillance purposes" in International Class 37 and "design of burglar, holdup, and fire alarms for others; monitoring of burglar, holdup, and fire alarms" in International Class 42, as to be likely to cause confusion or mistake, or to deceive within the meaning of Section 2(d) of the Trademark Act.

ARGUMENT

I. CONFUSION IS LIKELY BETWEEN THE APPLICANT'S PROPOSED MARK "ALARMAX" AND REGISTRANT'S MARK "ALARMEX."

The examining attorney refused registration under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d), because the applicant's proposed mark, ALARMAX, when used on or in connection with the identified services, so resembles the mark in U.S. Registration No. 1784455, ALARMEX, as to be likely to cause confusion, mistake, or to deceive. TMEP Section 1207; See attached, U.S. Registration No. 1784455.

The Court in *In re E. I. Du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973), listed the principal factors to be considered in determining whether there is a likelihood of confusion under Section 2(d). Any one of the factors listed may be dominant in any given case, depending upon the evidence of record. *In re Dixie Restaurants, Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997). In this case, the following factors are the most relevant: similarity of the marks, similarity of the goods and/or services, and similarity of trade channels of the goods and/or services. See *In re Opus One, Inc.*, 60 USPQ2d 1812 (TTAB 2001); *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593 (TTAB 1999); *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999); *In re L.C. Licensing Inc.*, 49 USPQ2d 1379 (TTAB 1998); TMEP §§1207.01 *et seq.*

Taking into account the relevant *Du Pont* factors, a likelihood of confusion determination in this case involves a two-part analysis. First, the marks are compared for similarities in appearance, sound, connotation and commercial impression. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973). Second, the goods or services are compared to determine whether they are similar or related or whether the activities surrounding their marketing are such that confusion as to origin is likely. *In re National Novice Hockey League, Inc.*, 222 USPQ 638 (TTAB 1984); *In re August Storck KG*, 218 USPQ 823 (TTAB 1983); *In re Int'l Tel. and Tel. Corp.*, 197 USPQ 910 (TTAB 1978); *Guardian Prods. Co., v. Scott Paper Co.*, 200 USPQ 738 (TTAB 1978); TMEP §§1207.01 *et seq.*

The applicant seeks to register the standard character mark ALARMAX, while registrant owns the typed form registration for the mark ALARMEX. Registration of a

mark in typed or standard character form means that the mark may be displayed in any lettering style. 37 C.F.R. §2.52(a). The rights associated with a mark in typed or standard character form reside in the wording itself, and registrant is free to adopt any style of lettering, including lettering identical to that used by applicant. Therefore, applicant's presentation of its mark in standard character will not avoid likelihood of confusion with a mark that is registered in typed form because the marks could be used in the same manner of display. *See In re Melville Corp.*, 18 USPQ2d 1386, 1387-88 (TTAB 1991); *In re Pollio Dairy Prods. Corp.*, 8 USPQ2d 2012, 2015 (TTAB 1988); *Sunnen Prods. Co. v. Sunex Int'l Inc.*, 1 USPQ2d 1744, 1747 (TTAB 1987); *In re Hester Indus., Inc.*, 231 USPQ 881, 882, n.6 (TTAB 1986); *United Rum Merchants, Ltd. v. Fregal, Inc.*, 216 USPQ 217, 220 (TTAB 1982); *Frances Denney, Inc. v. Vive Parfums, Ltd.*, 190 USPQ 302, 303-04 (TTAB 1976); TMEP §1207.01(c)(iii).

When analyzing the marks at issue under Section 2(d), the examining attorney must look at the marks in their entireties. In the present case, the only difference between the marks is the sixth letter. Specifically, the applicant uses an "a" as its next-to-last letter, where the registrant uses an "e." The examining attorney respectfully requests that the Board take judicial notice of the attached Pronunciation Guide from the *Meriam-Webster Dictionary*, which states that the letters "a" and "e" may be pronounced so as to produce the same, or a similar sound.² See attached, Pronunciation Guide from Meriam-Webster Online (last accessed August 17, 2006).

Since the only difference between the marks is the use of a similar sounding vowel as the next to last letter, the marks are essentially phonetic equivalents. It should

² Judicial notice may be taken of the dictionary definition of words. *Industrial Adhesive Co. v. Borden Inc.*, 218 USPQ 945, 951 at n.5 (TTAB 1983).

be noted that similarity in sound alone may be sufficient to support a finding of likelihood of confusion. *RE/MAX of America, Inc. v. Realty Mart, Inc.*, 207 USPQ 960, 964 (TTAB 1980); *Molenaar, Inc. v. Happy Toys Inc.*, 188 USPQ 469 (TTAB 1975); *In re Cresco Mfg. Co.*, 138 USPQ 401 (TTAB 1963); TMEP §1207.01(b)(iv).

Furthermore, there is no correct pronunciation of a trademark. *Kabushiki Kaisha Hattori Tokeiten v. Scuotto*, 228 USPQ 461 (TTAB 1985); *In re Great Lakes Canning, Inc.*, 227 USPQ 483 (TTAB 1985); *In re Teradata Corp.*, 223 USPQ 361, 362 (TTAB 1984); *In re Mack*, 197 USPQ 755 (TTAB 1977); TMEP §1207.01(b)(iv). The marks in question, ALARMEX (registrant) and ALARMAX (applicant), could clearly be pronounced the same. Similarity in sound alone may be sufficient to support a finding of likelihood of confusion. *RE/MAX of America, Inc. v. Realty Mart, Inc.*, 207 USPQ 960, 964 (TTAB 1980); *Molenaar, Inc. v. Happy Toys Inc.*, 188 USPQ 469 (TTAB 1975); *In re Cresco Mfg. Co.*, 138 USPQ 401 (TTAB 1963); TMEP §1207.01(b)(iv).

Regarding the issue of likelihood of confusion, the question is not whether people will confuse the marks, but whether the marks will confuse people into believing that the services the marks identify come from the same source. *In re West Point-Pepperell, Inc.*, 468 F.2d 200, 175 USPQ 558 (C.C.P.A. 1972). For that reason, the test of likelihood of confusion is not whether the marks can be distinguished when subjected to a side-by-side comparison. The question is whether the marks create the same overall impression. *Recot, Inc. v. M.C. Becton*, 214 F.2d 1322, 54 USPQ2d 1894, 1890 (Fed. Cir. 2000); *Visual Information Inst., Inc. v. Vicon Indus. Inc.*, 209 USPQ 179 (TTAB 1980). The focus is on the recollection of the average purchaser who normally retains a general rather than specific impression of trademarks. *Chemetron Corp. v. Morris Coupling &*

Clamp Co., 203 USPQ 537 (TTAB 1979); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975); TMEP §1207.01(b).

In its Appeal Brief, the applicant did not address the examining attorney's arguments regarding the likelihood of confusion between ALARMAX and ALARMEX in terms of sound, appearance and meaning. See applicant's appeal brief.

The applicant's mark, ALARMAX, is identical in sound and highly similar in appearance and meaning to the registrant's mark, ALARMEX. As a result, source confusion is likely, and the applicant's mark must be refused under Section 2(d).

II. THE SERVICES ARE RELATED TO SUCH AN EXTENT THAT CONSUMERS WOULD BELIEVE THAT THEY ORIGINATE FROM THE SAME SOURCE

As discussed above, the second prong in analyzing likelihood of confusion is to compare the goods and/or services to determine if they are related. The goods and/or services of the parties need not be identical or directly competitive to find a likelihood of confusion. Instead, they need only be related in some manner, or the conditions surrounding their marketing are such that they would be encountered by the same purchasers under circumstances that would give rise to the mistaken belief that the goods and/or services come from a common source. *On-line Careline Inc. v. America Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471 (Fed. Cir. 2000); *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991); *In re Corning Glass Works*, 229 USPQ 65 (TTAB 1985); *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984); *Guardian Prods. Co., Inc. v. Scott*

Paper Co., 200 USPQ 738 (TTAB 1978); *In re Int'l Tel. & Tel. Corp.*, 197 USPQ 910 (TTAB 1978); TMEP §1207.01(a)(i).

The applicant's services are identified as "wholesale distributorship featuring security systems and alarm equipment" in International Class 37. See application for registration. The registrant's services are "installation maintenance, and repair of burglar, holdup, fire alarms and closed circuit television systems used for surveillance purposes" in International Class 37, and the "design of burglar, holdup, and fire alarms for others; monitoring of burglar, holdup, and fire alarms" in International Class 42. See registration. The examining attorney respectfully requests that the Board take judicial notice of the attached definitions from the *American Heritage Dictionary* of the terms "wholesale," "distributor," "installation," "maintenance," "repair," "design," and "monitor."³ See attached definitions. As illustrated by the attached definitions, the pending application and cited registration, the applicant is selling security systems and alarm equipment, and the registrant is providing the design and maintenance services of such systems. As a result, the parties' services are highly related because they all involve a stage of service in the ownership of security alarm systems. The marks are therefore used in the same manner and in closely related channels of trade.

Attached are copies of printouts from the USPTO X-Search database, which show third-party registrations of marks used in connection with the same or similar services as those of the applicant and registrant in this case. The same four registrations (RN 1868608, 2071142, 2344148 and 2917643) were initially included as evidence in the examining attorney's Office Action dated November 30, 2005, illustrating the relatedness

³ Judicial notice may be taken of the dictionary definition of words. *Industrial Adhesive Co. v. Borden Inc.*, 218 USPQ 945, 951 at n.5 (TTAB 1983).

of the applicant's and registrant's trade channels. These printouts have probative value to the extent that they serve to suggest that the services listed therein, namely the installation, maintenance, repair, design, monitoring and wholesale retail or distributorship services of security alarm systems, are of a kind that may emanate from a single source. *See In re Infinity Broad. Corp.*, 60 USPQ2d 1214, 1217-1218 (TTAB 2001); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co., Inc.*, 6 USPQ2d 1467, 1470 at n.6 (TTAB 1988); See attached registrations.

The applicant's proposed mark is nearly identical to the registrant's mark, and its services are highly related to the registrant's because both parties offer services that can emanate from the same source. Accordingly, the proposed mark must be refused under Section 2(d) because source confusion is likely.

III. APPLICANT'S ATTEMPT TO ADD TO THE RECORD IS IMPROPER AND NOT TIMELY

The examining attorney objects to the additional evidence submitted by the applicant at Exhibits A, C through E, F (except for the first page, which is page 29 of the Appeal Brief), G and I as untimely and improper as it was not previously provided to the trademark examining attorney. The submission is improper as "it has long been standing policy of Patent and Trademark Office not to permit introduction of any evidence into application file record after appeal has been filed." *In re Gagliardi Bros. Inc.*, 218 U.S.P.Q. 181 (TTAB 1983). *See also In re August Storck, K.G.*, 218 (TTAB 1983); TMEP §2.142(d). The applicant offers no explanation concerning the untimely

presentation of evidence that should have been filed with communications prior to the appeal.

IV. THE APPLICANT'S ARGUMENTS OPPOSING A LIKELIHOOD OF CONFUSION ARE NOT PERSURASIVE

a. *Actual confusion is not dispositive as to a likelihood of confusion between the marks*

The applicant argues that it is unaware of any actual confusion between its proposed mark and the registrant's mark. It argues that the examining attorney's contention that the marks are phonetic equivalents is not enough to support a likelihood of confusion where the applicant is unaware of actual confusion in the marketplace. See Appeal Brief, p. 2-3. The applicant did not provide any evidence illustrating a lack of actual confusion, e.g. affidavits from customers of both the applicant and the registrant that know that the services are provided by two separate and distinct entities.

The test under Trademark Act Section 2(d), however, is whether there is a *likelihood* of confusion. It is unnecessary to show actual confusion in establishing likelihood of confusion. *See Weiss Associates Inc. v. HRL Associates Inc.*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990), and cases cited therein. *See also In re Kangaroos U.S.A.*, 223 USPQ 1025 (TTAB 1984), wherein the Board stated as follows:

[A]pplicant's assertion that it is unaware of any actual confusion occurring as a result of the contemporaneous use of the marks of applicant and registrant is of little probative value in an ex parte proceeding such as this where we have no evidence pertaining to the nature and extent of the use by applicant and registrant (and thus cannot ascertain whether there has been ample opportunity for confusion to arise, if it were going to); and registrant has no chance to be heard (at least in the absence of a consent agreement, which applicant has not submitted in this case).

Id. at 1026-1027.

Again, the examining attorney notes that similarity in sound alone may be sufficient to support a finding of likelihood of confusion. *RE/MAX of America, Inc. v. Realty Mart, Inc.*, 207 USPQ 960, 964 (TTAB 1980); *Molenaar, Inc. v. Happy Toys Inc.*, 188 USPQ 469 (TTAB 1975); *In re Cresco Mfg. Co.*, 138 USPQ 401 (TTAB 1963); TMEP §1207.01(b)(iv).

b. The applicant's and registrant's services are related and likely to result in confusion

In addition to the relatedness of the applicant's services to the registrant's services already addressed, the applicant also contends that confusion is not likely between its mark and that of the registrant because its consumers are different. Appeal Brief, p. 4-5. Specifically, the applicant states that its consumers are "licensed dealers and installers." *Id.* at 5.

A determination of whether there is a likelihood of confusion is made solely on the basis of the goods and/or services identified in the application and registration, without limitations or restrictions that are not reflected therein. *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593, 1595 (TTAB 1999). If the cited registration describes the goods and/or services broadly and there are no limitations as to their nature, type, channels of trade or classes of purchasers, then it is presumed that the registration encompasses all goods and/or services of the type described, that they move in all normal channels of trade, and that they are available to all potential customers. *In re Linkvest S.A.*, 24

USPQ2d 1716 (TTAB 1992); *In re Elbaum*, 211 USPQ 639 (TTAB 1981); TMEP §1207.01(a)(iii).

Any goods or services in the registrant's normal fields of expansion must also be considered in order to determine whether the registrant's goods or services are related to the applicant's identified goods or services for purposes of analysis under Section 2(d). *In re General Motors Corp.*, 196 USPQ 574 (TTAB 1977). The test is whether purchasers would believe the product or service is within the registrant's logical zone of expansion. *CPG Prods. Corp. v. Perceptual Play, Inc.*, 221 USPQ 88 (TTAB 1983); TMEP §1207.01(a)(v).

Since neither the applicant nor the registrant narrowed its field of use in its identification of goods and/or services, it must be assumed that either party could pursue any logical avenue of trade at any time. As a result, the applicant's argument that its consumers are different from the registrant's consumers, and even include the registrant itself, is not persuasive. The registrant's services could logically expand into the marketplace of the applicant, and vice versa. Source confusion under Section 2(d) is therefore likely.

c. Applicant's allegation of a "weak mark" does not alter registrant's entitlement to protection under Section 2(d)

The applicant contends that the registrant's mark is weak and should not be protected as widely as other strong marks. Appeal Brief, p. 5. The applicant also states that the registrant is not using its mark with its security services. *Id.* at 5-6. Even if applicant has shown that the cited mark is "weak," i.e. descriptive or a commonly used mark, such marks are still entitled to protection against registration by a subsequent user

of the same or similar mark for the same or closely related goods or services. *See Hollister Incorporated v. Ident A Pet, Inc.*, 193 USPQ 439 (TTAB 1976) and cases cited therein.

Aside from using the term ALARMAX in its proposed mark, the applicant offers no evidence illustrating that the registered mark, ALARMEX, is descriptive or common. Applicant's suggestion that registrant's mark is not entitled to protection because it is used by "others who appear to be unrelated to the registrant" may not be considered inasmuch as that allegation comprises an attack on the validity of the registrant's registration, which is not permitted in an *ex parte* proceeding. *See In re Calgon Corp.*, 435 F.2d 596, 168 USPQ 278,280 (CCPA 1971); and *In re White Swan Ltd.*, 8 USPQ2d 1534 (TTAB 1988); Appeal Brief, p. 5-6. So long as the cited registration is subsisting, it is entitled to the statutory presumptions and benefits of Section 7(b) and may properly constitute a bar under Section 2(d) to the registration of a similar mark.

Furthermore, it is the registrant's decision as to how and/or when to use its mark. As long as the registration is live, e.g. has not abandoned or expired in the USPTO database, then the mark must be considered for the identified goods and/or services for likelihood of confusion purposes under Section 2(d). The presumption under Trademark Act Section 7(b), 15 U.S.C. §1057(b), is that the registrant is the owner of the mark and that use of the mark extends to all goods and/or services identified in the registration. The presumption also implies that the registrant operates in all normal channels of trade and reaches all classes of purchasers of the identified goods and/or services. *In re Melville Corp.*, 18 USPQ2d 1386, 1389 (TTAB 1991); *McDonald's Corp. v. McKinley*, 13 USPQ2d 1895, 1899 (TTAB 1989); *RE/MAX of America, Inc. v. Realty Mart, Inc.*,

207 USPQ 960, 964-5 (TTAB 1980). Here, the registrant renewed its registration under Section 8 on September 22, 2003 for ten (10) years. See attached registration. The registrant may therefore use its mark with the identified services and in the corresponding channels of trade at least until the expiration of said renewal. Whether or not the registrant currently chooses to use its mark on its website in conjunction with the identified services is a strategic marketing decision for the registrant, and is not relevant in a Section 2(d) likelihood of confusion analysis.

d. *Scope expansion to date does not eliminate possible expansion in the future*

Next, the applicant correctly argues that expansion of trade must be considered in a Section 2(d) analysis. The test is whether purchasers would believe the product or service is within the registrant's logical zone of expansion. *CPG Prods. Corp. v. Perceptual Play, Inc.*, 221 USPQ 88 (TTAB 1983); TMEP §1207.01(a)(v). As previously discussed, however, the expansion of scope for an applicant's or registrant's goods and/or services is considered in relation to those goods and/or services specified in the identification section of the application or registration.

Again, a determination of whether there is a likelihood of confusion is made solely on the basis of the goods and/or services identified in the application and registration, without limitations or restrictions that are not reflected therein. *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593, 1595 (TTAB 1999). If the cited registration describes the goods and/or services broadly and there are no limitations as to their nature, type, channels of trade or classes of purchasers, then it is presumed that the registration encompasses all goods and/or services of the type described, that they move in all normal

channels of trade, and that they are available to all potential customers. *In re Linkvest S.A.*, 24 USPQ2d 1716 (TTAB 1992); *In re Elbaum*, 211 USPQ 639 (TTAB 1981); TMEP §1207.01(a)(iii).

Even though the applicant contends that it and the registrant have not overlapped in the same channels of trade in the past fourteen (14) years, this is not evidence that the marks could not overlap in the future. Appeal Brief, p. 6-7. Neither the applicant nor the registrant narrowed its field of use in its identification of services. See attached application and registration. Consequently, it must be assumed that either party could pursue any logical avenue of trade at any time. The applicant's argument regarding the registrant's current usage of its mark in a narrow marketplace is therefore without merit.

e. *Previous registration and expiration of the proposed mark does not obviate a likelihood of confusion*

As its final argument, the applicant contends that it is entitled to registration because the proposed mark was previously registered, and “unintentionally not renewed due to circumstances beyond its control.” Appeal Brief, p. 7. The applicant asserts that since its previously registered mark for ALARMAX was registered over the registrant's current mark for ALARMEX, it is entitled to registration.

Prior decisions and actions of other trademark examining attorneys in registering different marks are without evidentiary value and are not binding upon the Office. Each case is decided on its own facts, and each mark stands on its own merits. *AMF Inc. v. American Leisure Products, Inc.*, 177 USPQ 268, 269 (C.C.P.A. 1973); *In re International Taste, Inc.*, 53 USPQ2d 1604 (TTAB 2000); *In re Sunmarks Inc.*, 32

USPQ2d 1470 (TTAB 1994); *In re National Novice Hockey League, Inc.*, 222 USPQ 638, 641 (TTAB 1984); *In re Consolidated Foods Corp.*, 200 USPQ 477 (TTAB 1978).

Therefore, the examining attorney is not bound by the prior decision to allow the applicant to register its proposed mark, ALARMAX. The examining attorney maintains that the proposed mark, ALARMAX, is likely to cause confusion with the registered mark, ALARMEX, under Section 2(d).

CONCLUSION

For the foregoing reasons, the examining attorney submits that the refusal to register applicant's proposed mark, ALARMAX (in standard character form), as used in connection with its Class 35 "wholesale distributorship featuring security systems and alarm equipment" services should be *affirmed* on the basis that it is confusingly similar to registrant's mark in U.S. Registration No. 1784455 for the mark ALARMEX (in typed form) for "installation maintenance, and repair of burglar, holdup, fire alarms and closed circuit television systems used for surveillance purposes" in International Class 37 and "design of burglar, holdup, and fire alarms for others; monitoring of burglar, holdup, and fire alarms" in International Class 42, under Trademark Act Section 2(d), 15 U.S.C. 1052(d).

Respectfully submitted,

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