

Request for Reconsideration after Final Action

The table below presents the data as entered.

Input Field	Entered
SERIAL NUMBER	85190309
LAW OFFICE ASSIGNED	LAW OFFICE 108
MARK SECTION (no change)	
ARGUMENT(S)	<p>This is submitted in response to an official action bearing a transmission date of 24 August 2011 in which registration for applicant's mark was again refused and the refusal was made "final". The refusal was based on alleged deficiency in the identification of goods as being excessively indefinite and on the alleged descriptive character of the mark for which registration is sought.</p> <p>Applicant traverses the refusal of registration on the grounds of alleged indefiniteness in the identification of goods and on the grounds of alleged descriptiveness of the mark with respect to the goods for which registration is sought, and requests reconsideration of the application.</p> <p>Without prejudice to the foregoing traverse, and in an effort to move this application forward towards publication of the mark for opposition purposes, please strike the current recitation of goods in its entirety and substitute therefor the following:</p> <p style="padding-left: 40px;">Accessories for personal mobility devices in the nature of scooters and power chairs for use by elderly, infirm and disabled persons, namely, metal and plastic decorative and novelty trim in the nature of moldings, fittings, liners, and overlays for attachment to such scooters and power chairs for use by elderly, infirm and disabled persons in International Class 012.</p> <p>This is the recitation of goods as suggested by the examining attorney.</p> <p>Applicant respectfully submits that the examining attorney's descriptiveness position fails to appreciate and accept the case law authority cited by applicant in the previously submitted response.</p> <p>In the official action of 24 August, the examining attorney asserts that the recitation of goods, as it stood</p>

in the application at that time, comprised goods that “presumably” are capable of providing “some element of protection” to scooters and power chairs. However, the examining attorney has not presented any evidence to support this presumption. Rather the examining attorney only cited the familiar *In re Opendahl* case for the proposition that a mark may be merely descriptive and rejected as such if the mark describes one significant function, attribute or property of the product(s) for which registration of the mark is sought.

Applicant’s products for which registration of this mark is sought are decorative and novel. Any element of “protection” as provided by applicant’s decorative and novel products when attached to applicant’s scooters and power chairs, is *de minimis* and purely incidental. Applicant’s accessory products for which applicant seeks registration of this mark are in the nature of novelty products, to give the elderly, infirm and disabled persons purchasing those products and using applicant’s scooters and power something to attach to their scooters and power chairs to provide a unique appearance for one person’s power chair or scooter relative to another person’s power chair or scooter. Applicant’s novelty accessory products provide something for the purchasers to speak about to their contemporaries having similar or even identical scooters and power chairs produced by Pride Mobility Products Corporation. Accordingly, applicant respectfully submits that the *Opendahl* case, stating that a mark may be rejected as being descriptive if the mark describes only one significant function, attribute or property of the products for which registration of the mark is sought is inapplicable here -- applicant’s mark does not describe any *significant* function, attribute or property of the decorative and novelty accessory products for which registration of the mark is sought.

Applicant further respectfully notes the examining attorney’s comment that “applicant points to a different definition in the dictionary evidence provided in the office action, and one that is not as pertinent to the identified goods because it relates to protective gear for soldiers”. The examining attorney then critiques applicant’s argument, stating that applicant’s argument is based on a link between this definition and the question of whether the mark immediately conveys this meaning to consumers in relation to the identified goods.

Applicant respectfully makes two points concerning this part of the examining attorney’s action: First, there is no evidence of record indicating that the portion of the proffered definition provided in the earlier office action, on which the examining attorney relied, is any more relevant to the descriptiveness

issue than the portion of the same dictionary definition on which applicant relied. Indeed, applicant relied on the first definition set forth in the dictionary excerpt provided by the examining attorney. That definition or “sense” (in the language of dictionary organization) is the sense or meaning most commonly and popularly attributed to the word and hence to the mark at issue. This being the case, and since the question is whether the average ordinary elderly or handicapped consumer would immediately perceive applicant’s mark as descriptive, the definition to be used in evaluating such descriptiveness question should be the first definition provided in the dictionary. It is the first definition that most commonly understood by consumers as to the meaning and connotation of a word and, as such, is the definition that should normally be applied in determination of any descriptiveness issue. Applicant respectfully submits that the examining attorney has erred in this regard.

Second, the examining attorney has ignored fundamental black letter law that there must be speed of cognitive recognition of the purported ingredient, quality, characteristic, function, feature or purpose of the goods for which registration of the mark is sought, in order for a descriptiveness rejection to stand. Speed of cognitive recognition is the *sine qua non* of a descriptiveness rejection. As applicant has previously noted, the case law is clear on this point. The examining attorney’s attention is again respectfully directed to the cases of *In re Gyulay*, 820 F.2d 1216; *In re Oppendahl & Larson LLP*, 373 F.3d; 71 USPQ2d 1370, (Fed. Cir. 2004); *In re Dial-A-Mattress Operating Corporation*, 240 F.3d 1341; 57 USPQ2d 1807 (Fed. Cir. 2001); *In re Quik Print Copy Shops, Inc.*, 616 F.2d 523; 201 USPQ 505 (CCPA 1980); *In re STEELBUILDING.COM*, 415 F.3d 1293; 75 USPQ 1293 (Fed. Cir. 2005); *Application of Abcor Development Corporation*, 588 F.2d 811; 200 USPQ 215 (CCPA 1978); and *In re American Greetings Corporation*, 226 USPQ 365 (TTAB 1985).

These cases individually and collectively hold that a mark may not be rejected as being merely descriptive if some imagination, thought or perception is required to arrive at the qualities or characteristics of the goods for which registration of the mark is sought.

Applicant respectfully submits that elderly consumers and handicapped consumers would not immediately jump to the conclusion that applicant’s goods to be sold under the mark “ARMOR” are protective of the scooter and power chair products purchased by those elderly and handicapped persons. Indeed, those elderly and handicapped persons, being ordinary consumers, would presumably think of the first sense of the definition of “armor” as presented by the examining attorney in the prior official action as respecting applicant’s goods, and would envision a suit of armor, perhaps on a knight in full

jousting gear, participating in a jousting contest on horseback or engaging the enemy in battle.

Applicant respectfully submits that those consumers would not immediately think of any protective function needed by or to be applied to their scooters and powers chairs, when most of those scooters and power chairs are used exclusively indoors, operate at very low speeds, and require no such protection, as erroneously postulated by the examining attorney. Applicant's goods in this regard are more analogous to cowls and the like that one may purchase in an automotive after-market store and add to one's automobile to give it a distinctive appearance. Applicant's products are not in the nature of replacement or protective bumpers, but are more in the nature of cowls one might apply to the hood of one's automobile to give it a "souped up" appearance.

Applicant respectfully submits that the examining attorney should reconsider applicant's application and applicant's position as set forth above. Applicant further submits that upon such reconsideration of applicant's position, the examining attorney will realize that speed of cognitive recognition is a factor required to be included in the analysis and that the current analysis supporting the rejection of applicant's mark is deficient in that respect. Accordingly, applicant respectfully solicits reconsideration and withdrawal of the descriptiveness rejection and notification that this mark has been approved for publication for opposition purposes.

GOODS AND/OR SERVICES SECTION (current)

INTERNATIONAL CLASS

012

DESCRIPTION

Accessories for scooters and power chairs for use by elderly, infirm and disabled persons; namely, metal and plastic decorative and novelty trim in the nature of moldings, fittings, liners, and overlays for attachment to such scooters and power chairs for use by elderly, infirm and disabled persons

FILING BASIS

Section 1(b)

GOODS AND/OR SERVICES SECTION (proposed)

INTERNATIONAL CLASS

012

TRACKED TEXT DESCRIPTION

~~Accessories for scooters and power chairs for use by elderly, infirm and disabled persons;~~ Accessories for personal mobility devices in the nature of scooters and power chairs for use by elderly, infirm and disabled persons, namely, metal and plastic decorative and novelty trim in the nature of moldings, fittings, liners, and overlays for attachment to such scooters and power chairs for use by elderly, infirm and disabled persons; ~~namely, metal and plastic decorative and novelty trim in the nature of moldings, fittings, liners, and overlays for attachment to such scooters and power chairs for use by elderly, infirm and disabled persons~~

FINAL DESCRIPTION	
Accessories for personal mobility devices in the nature of scooters and power chairs for use by elderly, infirm and disabled persons, namely, metal and plastic decorative and novelty trim in the nature of moldings, fittings, liners, and overlays for attachment to such scooters and power chairs for use by elderly, infirm and disabled persons	
FILING BASIS	Section 1(b)
SIGNATURE SECTION	
RESPONSE SIGNATURE	/Charles N. Quinn/
SIGNATORY'S NAME	Charles N. Quinn, Esq.
SIGNATORY'S POSITION	Attorney for Applicant, Member PA Bar
SIGNATORY'S PHONE NUMBER	610-458-4984
DATE SIGNED	02/23/2012
AUTHORIZED SIGNATORY	YES
CONCURRENT APPEAL NOTICE FILED	YES
FILING INFORMATION SECTION	
SUBMIT DATE	Thu Feb 23 13:31:41 EST 2012
TEAS STAMP	USPTO/RFR-38.115.17.84-20 120223133141630198-851903 09-4909fe6da833ad2eee82bb ed5d99fe07eb3-N/A-N/A-201 20223131213390688

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

Application serial no. **85190309** has been amended as follows:

ARGUMENT(S)

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

This is submitted in response to an official action bearing a transmission date of 24 August 2011 in which

registration for applicant's mark was again refused and the refusal was made "final". The refusal was based on alleged deficiency in the identification of goods as being excessively indefinite and on the alleged descriptive character of the mark for which registration is sought.

Applicant traverses the refusal of registration on the grounds of alleged indefiniteness in the identification of goods and on the grounds of alleged descriptiveness of the mark with respect to the goods for which registration is sought, and requests reconsideration of the application.

Without prejudice to the foregoing traverse, and in an effort to move this application forward towards publication of the mark for opposition purposes, please strike the current recitation of goods in its entirety and substitute therefor the following:

Accessories for personal mobility devices in the nature of scooters and power chairs for use by elderly, infirm and disabled persons, namely, metal and plastic decorative and novelty trim in the nature of moldings, fittings, liners, and overlays for attachment to such scooters and power chairs for use by elderly, infirm and disabled persons in International Class 012.

This is the recitation of goods as suggested by the examining attorney.

Applicant respectfully submits that the examining attorney's descriptiveness position fails to appreciate and accept the case law authority cited by applicant in the previously submitted response.

In the official action of 24 August, the examining attorney asserts that the recitation of goods, as it stood in the application at that time, comprised goods that "presumably" are capable of providing "some element of protection" to scooters and power chairs. However, the examining attorney has not presented any evidence to support this presumption. Rather the examining attorney only cited the familiar *In re Oppendahl* case for the proposition that a mark may be merely descriptive and rejected as such if the mark describes one significant function, attribute or property of the product(s) for which registration of the mark is sought.

Applicant's products for which registration of this mark is sought are decorative and novel. Any element of "protection" as provided by applicant's decorative and novel products when attached to applicant's scooters and power chairs, is *de minimis* and purely incidental. Applicant's accessory products for which applicant seeks registration of this mark are in the nature of novelty products, to give the elderly, infirm and disabled persons purchasing those products and using applicant's scooters and power something to attach to their scooters and power chairs to provide a unique appearance for one person's power chair or scooter relative to another person's power chair or scooter. Applicant's novelty accessory products

provide something for the purchasers to speak about to their contemporaries having similar or even identical scooters and power chairs produced by Pride Mobility Products Corporation. Accordingly, applicant respectfully submits that the *Oppendahl* case, stating that a mark may be rejected as being descriptive if the mark describes only one significant function, attribute or property of the products for which registration of the mark is sought is inapplicable here -- applicant's mark does not describe any *significant* function, attribute or property of the decorative and novelty accessory products for which registration of the mark is sought.

Applicant further respectfully notes the examining attorney's comment that "applicant points to a different definition in the dictionary evidence provided in the office action, and one that is not as pertinent to the identified goods because it relates to protective gear for soldiers". The examining attorney then critiques applicant's argument, stating that applicant's argument is based on a link between this definition and the question of whether the mark immediately conveys this meaning to consumers in relation to the identified goods.

Applicant respectfully makes two points concerning this part of the examining attorney's action: First, there is no evidence of record indicating that the portion of the proffered definition provided in the earlier office action, on which the examining attorney relied, is any more relevant to the descriptiveness issue than the portion of the same dictionary definition on which applicant relied. Indeed, applicant relied on the first definition set forth in the dictionary excerpt provided by the examining attorney. That definition or "sense" (in the language of dictionary organization) is the sense or meaning most commonly and popularly attributed to the word and hence to the mark at issue. This being the case, and since the question is whether the average ordinary elderly or handicapped consumer would immediately perceive applicant's mark as descriptive, the definition to be used in evaluating such descriptiveness question should be the first definition provided in the dictionary. It is the first definition that most commonly understood by consumers as to the meaning and connotation of a word and, as such, is the definition that should normally be applied in determination of any descriptiveness issue. Applicant respectfully submits that the examining attorney has erred in this regard.

Second, the examining attorney has ignored fundamental black letter law that there must be speed of cognitive recognition of the purported ingredient, quality, characteristic, function, feature or purpose of the goods for which registration of the mark is sought, in order for a descriptiveness rejection to stand.

Speed of cognitive recognition is the *sine qua non* of a descriptiveness rejection. As applicant has previously noted, the case law is clear on this point. The examining attorney's attention is again respectfully directed to the cases of *In re Gyulay*, 820 F.2d 1216; *In re Oppendahl & Larson LLP*, 373 F.3d 1341; 71 USPQ2d 1370, (Fed. Cir. 2004); *In re Dial-A-Mattress Operating Corporation*, 240 F.3d 1341; 57 USPQ2d 1807 (Fed. Cir. 2001); *In re Quik Print Copy Shops, Inc.*, 616 F.2d 523; 201 USPQ 505 (CCPA 1980); *In re STEELBUILDING.COM*, 415 F.3d 1293; 75 USPQ 1293 (Fed. Cir. 2005); *Application of Abcor Development Corporation*, 588 F.2d 811; 200 USPQ 215 (CCPA 1978); and *In re American Greetings Corporation*, 226 USPQ 365 (TTAB 1985).

These cases individually and collectively hold that a mark may not be rejected as being merely descriptive if some imagination, thought or perception is required to arrive at the qualities or characteristics of the goods for which registration of the mark is sought.

Applicant respectfully submits that elderly consumers and handicapped consumers would not immediately jump to the conclusion that applicant's goods to be sold under the mark "ARMOR" are protective of the scooter and power chair products purchased by those elderly and handicapped persons. Indeed, those elderly and handicapped persons, being ordinary consumers, would presumably think of the first sense of the definition of "armor" as presented by the examining attorney in the prior official action as respecting applicant's goods, and would envision a suit of armor, perhaps on a knight in full jousting gear, participating in a jousting contest on horseback or engaging the enemy in battle.

Applicant respectfully submits that those consumers would not immediately think of any protective function needed by or to be applied to their scooters and power chairs, when most of those scooters and power chairs are used exclusively indoors, operate at very low speeds, and require no such protection, as erroneously postulated by the examining attorney. Applicant's goods in this regard are more analogous to cowls and the like that one may purchase in an automotive after-market store and add to one's automobile to give it a distinctive appearance. Applicant's products are not in the nature of replacement or protective bumpers, but are more in the nature of cowls one might apply to the hood of one's automobile to give it a "souped up" appearance.

Applicant respectfully submits that the examining attorney should reconsider applicant's application and applicant's position as set forth above. Applicant further submits that upon such reconsideration of applicant's position, the examining attorney will realize that speed of cognitive recognition is a factor required to be included in the analysis and that the current analysis supporting the rejection of applicant's

mark is deficient in that respect. Accordingly, applicant respectfully solicits reconsideration and withdrawal of the descriptiveness rejection and notification that this mark has been approved for publication for opposition purposes.

CLASSIFICATION AND LISTING OF GOODS/SERVICES

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

Current: Class 012 for Accessories for scooters and power chairs for use by elderly, infirm and disabled persons; namely, metal and plastic decorative and novelty trim in the nature of moldings, fittings, liners, and overlays for attachment to such scooters and power chairs for use by elderly, infirm and disabled persons

Original Filing Basis:

Filing Basis: Section 1(b), Intent to Use: The applicant has had a bona fide intention to use or use through the applicant's related company or licensee the mark in commerce on or in connection with the identified goods and/or services as of the filing date of the application. (15 U.S.C. Section 1051(b)).

Proposed:

Tracked Text Description: ~~Accessories for scooters and power chairs for use by elderly, infirm and disabled persons;~~ Accessories for personal mobility devices in the nature of scooters and power chairs for use by elderly, infirm and disabled persons, namely, metal and plastic decorative and novelty trim in the nature of moldings, fittings, liners, and overlays for attachment to such scooters and power chairs for use by elderly, infirm and disabled persons; ~~namely, metal and plastic decorative and novelty trim in the nature of moldings, fittings, liners, and overlays for attachment to such scooters and power chairs for use by elderly, infirm and disabled persons~~

Class 012 for Accessories for personal mobility devices in the nature of scooters and power chairs for use by elderly, infirm and disabled persons, namely, metal and plastic decorative and novelty trim in the nature of moldings, fittings, liners, and overlays for attachment to such scooters and power chairs for use by elderly, infirm and disabled persons

Filing Basis: Section 1(b), Intent to Use: The applicant has a bona fide intention to use or use through the applicant's related company or licensee the mark in commerce on or in connection with the identified goods and/or services as of the filing date of the application. (15 U.S.C. Section 1051(b)).

SIGNATURE(S)

Request for Reconsideration Signature

Signature: /Charles N. Quinn/ Date: 02/23/2012

Signatory's Name: Charles N. Quinn, Esq.

Signatory's Position: Attorney for Applicant, Member PA Bar

Signatory's Phone Number: 610-458-4984

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: 85190309

Internet Transmission Date: Thu Feb 23 13:31:41 EST 2012

TEAS Stamp: USPTO/RFR-38.115.17.84-20120223133141630

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