

ESTTA Tracking number: **ESTTA797933**

Filing date: **01/27/2017**

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

Proceeding	86590394
Applicant	Nextlink Internet
Applied for Mark	NEXTLINK
Correspondence Address	BOBBY W BRAXTON BRAXTON HILTON & PERRONE PLLC 4975 PRESTON PARK BLVD, SUITE 490 PLANO, TX 75093-3678 UNITED STATES braxton@bhp-ip.com, hilton@bhp-ip.com
Submission	Appeal Brief
Attachments	BNEXTFINAL01272017.pdf(88801 bytes)
Filer's Name	Bobby W. Braxton
Filer's e-mail	braxton@bhp-ip.com, mirshams@bhp-ip.com
Signature	/Bobby W. Braxton/
Date	01/27/2017

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

Applicant:	Nextlink Internet	Attorney Docket No.:	BNEXT.00001
Serial No.:	86/590394	Examiner:	Ronald Aikens
Filed:	April 8, 2015	Law Office:	112
Mark:	Nextlink		

APPLICANT'S APPEAL BRIEF

TABLE OF CONTENTS

INTRODUCTION..... 3

JURISDICTION..... 3

BACKGROUND AND PROCEDURAL HISTORY..... 3

ISSUE ON APPEAL..... 4

ARGUMENT: NO LIKELIHOOD OF CONFUSION EXISTS..... 5

 Dissimilarity of Services..... 6

CONCLUSION..... 8

INTRODUCTION

Pursuant to Notice of Appeal filed on April 8, 2015, the Applicant, Netlink Internet (“Applicant”) hereby appeals the Examining Attorney’s final refusal to register the Applicant’s mark “Nextlink” (“Applicant’s Mark”) which is subject of the Application Serial No. 86/590394. The Examining Attorney refused registration under Section 2(d) of the Trademark Act, indicating that Applicant’s Mark resembles the mark shown in existing U.S. Registration No. 3,139,494 and U.S. Registration No. 4,067,637. Applicant respectfully requests that the Trademark Trial and Appeal Board (“Board”) reverse the Examining Attorney’s final refusal and provide the publication and allowance of this application.

JURISDICTION

This jurisdiction of the Trademark Trial and Appeal Board is invoked under the provisions of 15 U.S.C. § 1070 and 37 C.F.R. §§ 2.141 and 2.142.

BACKGROUND AND PROCEDURAL HISTORY

Applicant filed an application for the trademark Nextlink on April 8, 2015, for use in connection with “Internet service provider (ISP)” services.

On July 22, 2015, the Examining Attorney issued an Office Action refusing registration of the Applicant’s Mark based upon likelihood of confusion between Applicant’s Mark and the mark found in ‘494 and the ‘637 Registration.

On January 22, 2016, Applicant responded to the first Office Action by providing that with regards to the Registration cited by the Examining Attorney, confusion as to the source of the


services is unlikely because the service provided by the Applicant's mark is sufficiently different than the service provided by the Registered marks.

Despite the Applicant's response, the Examining Attorney filed a Final Office Action dated February 11, 2016. In the Final Office Action the Examining Attorney made a final refusal to the registration of the Applicant's mark. The Examining Attorney found the Applicant's arguments unpersuasive with regards to the confusion between the mark and the '494 and '637 Registration.

Applicant disagrees with the Examining Attorney's refusal and respectfully requests the Board to review the Applicant's trademark application and responses. Applicant respectfully submits that Applicant's mark is not likely to cause confusion with the '494 and '637 Registration and requests that the Board allow the mark to move forward in registration.

ISSUE ON APPEAL

Before the Trademark Trial and Appeal Board in the present Appeal is whether the Applicant's Mark is confusingly similar to the following registration:

Reg. No.	Mark	Goods/Services
3,139,494	NEXTLINK	Telecommunications services, namely, providing Internet access services utilizing local point-to-point and local multipoint distribution services
4,067,637		Telecommunications services, namely, broadband communications and transmission of voice, video, images and data.

In support of the present Appeal, Applicant relies on the arguments set forth below, the arguments made in the previously filed responses, and the evidence on file in the application file wrapper, all of which are incorporated by reference herein as if fully set forth at length.

ARGUMENT: NO LIKELIHOOD OF CONFUSION EXISTS

Applicant's Mark and the mark of the '494 and the '637 Registration are dissimilar as to appearance as well as the services provided by each of the marks and consumers within the relevant industry are not likely to confuse the source of the services.

Applicant respectfully submits that the Examining Attorney has failed to properly consider the grounds that have been set forth in the Applicant's responses that effectively provide that the Applicant's Mark is sufficiently dissimilar to the mark of the '494 and the '637 Registration indicating that there would be no likelihood of confusion.

When taking into consideration the similarity of a mark in comparison to another mark, a factor taken into consideration is when a mark is used on a particular product and a consumer or purchasing public would likely be confused as to the source of the product. To determine whether a likelihood of confusion exists between two marks, the Examining Attorney must take into consideration all of the DuPont factors that are relevant to the case. *See Application of E.I. DuPont DeNemours & Co. ("DuPont")*, 177 U.S.P.Q., 567 (C.C.P.A. 1973); *see also Recot, Inc. v. Becton*, 54 U.S.P.Q.2d 1894 (Fed. Cir. 2000) (Whether likelihood of confusion exists is determined "specific basis" using the DuPont factors).

The Examining Attorney has refused registration of the applied for mark under Section 2(d) of the Lanham Act on the grounds that the Applicant's Mark, resembles the mark found in the '494 and the '637 Registration as to cause a likelihood of confusion. Applicant respectfully

disagrees with the Examining Attorney in this regard and asserts that confusion between the cited registration and the applied for mark is not likely for the reasons discussed in further detail below.

Dissimilarity of Services

With respect to the *DuPont* factors, “the relatedness of the goods or services,” the Applicant respectfully disagrees that the services identified by the Applicant are sufficiently related or similar to those identified in the cited Registration marks such that it would cause confusion among consumers of the goods. As further discussed below, the services associated with the Applicant’s Mark and the services associated with the Registered Mark pertain to completely different services.

The Applicant respectfully provides that the Board has repeatedly held that “in order to find that goods and services are related, there must be more than a connection than that a single term...may be used to generally describe them.” *Calypso Tech, Inc. v. Calypso Capital Mgmt., LP*, 100 UPQ2d 1213 (TTAB 2011) (citing *In re W.W. Henry Co.*, 82 USPQ2d 12123, 1215 (TTAB 2007)).

Applicant respectfully submits that the Board has repeatedly held that with respect to the relatedness of goods and services pertaining to computers and software, that “there is certainly no rule that all computer products and services are related.” See *Toro Co. v. Torohead*, 61 USPQ2d 1164, 1168 (TTAB 2011); see also *Elec. Data Sys. Corp. v. EDSA Micro Corp.*, 23 USPQ2d 1460, 1463 (TTAB 1992)(rejecting ‘the view that a relationship exists between goods and services simply because each involves the use of computers.’).

The Applicant’s mark “NEXTLINK” is specific to services that are in association with “Internet service provider (ISP)” services. Internet access is actually provided to a consumer.

The Applicant respectfully submits that the services associated with both of the registered marks however, are different. The registered mark with U.S. Registration No. 4,067,637 (“NEXTLINK”) is registered for goods specific to telecommunication services, specific to broadband communications and transmissions of voice, image and data. It is unlikely that a consumer looking for an internet service provider would confuse it for one that is specific to telecommunication services, namely, broadband communications and transmission of voice, image and data. Applicant respectfully submits that there would not be a likelihood of confusion among consumers between the Applicant’s Mark and the Registered Mark.

Applicant respectfully submits that the mere fact that the identified services includes the internet which are tangentially related to Registrant's identified services in that they are broadly related to the internet and telecommunications, is insufficient to conclude that relatedness exists for purposes of a likelihood of confusion analysis. Applicant’s mark is one for services associated with an internet service provider. Registrant, conversely, provides telecommunication services. Applicant respectfully submits that the services associated with the Applicant’s mark and those associated with the previously Registered marks are not similar and unlikely to cause a likelihood of confusion among a consumer.

With respect to the U.S. registered mark No. 3,139,494, the mark is associated with “Telecommunications services, namely, providing Internet access services utilizing local point-to-point and local multipoint distribution services.” The services associated with each of the registered marks are specific unlike those associated with the applied for mark, which is general to an “Internet service provider.”

Applicant respectfully submits that there would be no likelihood of confusion of the services associated with the applied-for mark and those of the registered marks. Applicant

respectfully submits that the services associated with the registered marks are specific and those associated with the applied mark are general, one is an ISP service while the other two marks provide telecommunication services. The Examining Attorney has not identified any significant similarities between the goods and services.

In view of the material differences between the two marks as to the dissimilarities of the goods and the sophistication of the target purchasers, the Applicant respectfully requests that the Examining Attorney withdraw his refusal of the registration based on Section 2(d) of the Trademark Act.

CONCLUSION

The Board must determine whether the Applicant's Mark and the marks of '494 and the '637 trademark registration, when compared in their entirety in terms of commercial impression and consumer confusion, are similar or dissimilar. Applicant respectfully submits that the applied for mark and the registered marks are significantly dissimilar when each mark is taken into consideration in its entirety.

For the reasons set forth in this appeal brief, Applicant respectfully submits that the mark "Nextlink" is not likely to be confused with the marks of the '494 and the '637 Registration. Accordingly, Applicant respectfully requests that Section 2(d) rejection in the present application by the Trademark Attorney be reversed and Applicant Serial No. 86/590,394 be allowed to proceed to publication and issuance.

Dated: January 27, 2017

Respectfully submitted,



Bobby W. Braxton
Texas Bar. No. 24059484
USPTO Reg. No. 57544
braxton@bhp-ip.com

BRAXTON, HILTON & PERRONE, PLLC
4975 Preston Park Blvd., Suite 490
Plano, Texas 75093
Phone: (469) 814-0032
Fax: (469) 814-0023