

Request for Reconsideration after Final Action

The table below presents the data as entered.

Input Field	Entered
SERIAL NUMBER	87095472
LAW OFFICE ASSIGNED	LAW OFFICE 125
MARK SECTION	
MARK FILE NAME	https://tmng-al.uspto.gov/resting2/api/img/87095472/large
LITERAL ELEMENT	DRYCAP
STANDARD CHARACTERS	NO
USPTO-GENERATED IMAGE	NO
ARGUMENT(S)	
Please see the actual argument text attached within the Evidence section.	
EVIDENCE SECTION	
EVIDENCE FILE NAME(S)	
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DESCRIPTION OF EVIDENCE FILE	Request for Reconsideration
SIGNATURE SECTION	
RESPONSE SIGNATURE	/BHLabutta/
SIGNATORY'S NAME	Bridget H Labutta
SIGNATORY'S POSITION	Attorney of record, PA and FL bar member
SIGNATORY'S PHONE NUMBER	215-965-1388
DATE SIGNED	01/16/2018
AUTHORIZED SIGNATORY	YES
CONCURRENT APPEAL NOTICE FILED	YES
FILING INFORMATION SECTION	
SUBMIT DATE	Tue Jan 16 22:22:54 EST 2018
	USPTO/RFR-XX.XXX.XXX.XX-2 0180116222254687940-87095

TEAS STAMP

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PTO Form 1960 (Rev 10/2011)

OMB No. 0651-0050 (Exp 09/20/2020)

Request for Reconsideration after Final Action

To the Commissioner for Trademarks:

Application serial no. **87095472** DRYCAP (Stylized and/or with Design, see <https://tmng-al.uspto.gov/resting2/api/img/87095472/large>) has been amended as follows:

ARGUMENT(S)

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

Please see the actual argument text attached within the Evidence section.

EVIDENCE

Evidence in the nature of Request for Reconsideration has been attached.

Original PDF file:

[evi_6320917811-20180116221847562573_.01183809.PDF](#)

Converted PDF file(s) (6 pages)

[Evidence-1](#)

[Evidence-2](#)

[Evidence-3](#)

[Evidence-4](#)

[Evidence-5](#)

[Evidence-6](#)

SIGNATURE(S)

Request for Reconsideration Signature

Signature: /BHLabutta/ Date: 01/16/2018

Signatory's Name: Bridget H Labutta

Signatory's Position: Attorney of record, PA and FL bar member

Signatory's Phone Number: 215-965-1388

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 owner's/holder'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 owner/holder in this matter: (1) the owner/holder 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 owner/holder has filed a power of attorney appointing him/her in this matter; or (4) the owner's/holder'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: 87095472

Internet Transmission Date: Tue Jan 16 22:22:54 EST 2018

TEAS Stamp: USPTO/RFR-XX.XXX.XXX.XX-2018011622225468

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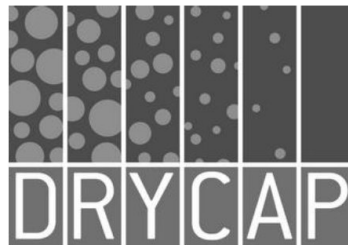
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Serial No. 87/095,472
Request for Reconsideration

Applicant submits this request for reconsideration of the final refusal to register the applied-for mark and presents the following arguments and information in support thereof. Applicant is concurrently filing a Notice of Appeal with the Trademark Trial and Appeal Board, with a request to suspend the appeal pending the outcome of this request for reconsideration.

I. Introduction

Applicant has applied to register the design mark shown below:



The applied-for mark consists of the stylized word “DRYCAP” with each letter in the word contained in a series of individual shaded rectangles under another series of individual rectangles containing circle designs, with the exception of the rectangle above the letter “P” which contains no circle designs and is a shaded rectangle.

The applied-for mark is identified for use on “metal caps for medicine bottles,” in Class 6; “laboratory equipment, namely, vial plugs,” in Class 9; “non-metallic bottle caps; non-metal caps for medicine bottles,” in Class 20; and “plastic safety caps for medicine bottles,” in Class 21, as amended.

In the First Office Action dated October 24, 2016, the Examining Attorney issued a refusal to register the applied-for mark due to a purported likelihood of confusion with the mark in U.S. Registration No. 3999443, which mark is shown below:

dri+Cap

The cited mark is a standard character mark; however, the mark is displayed in the registration certificate with the stylized format displayed above, namely: the letter “D” is in lower case, the letter “C” is capitalized, and “dri” and “Cap” are combined with a plus or positive or and symbol. The specimen of use submitted by the Registrant on March 5, 2017, also displays the mark in this stylized format.

The cited mark is identified for use on “non-metallic sealing caps,” in Class 20.

In that First Office Action, the Examining Attorney argued that “the word portions of the marks are similar in appearance, sound, and commercial impression; therefore, the addition of a design element does not obviate the similarity of the marks in this case.”

Regarding the respective goods, the Examining Attorney argued “the applicant’s vial plugs, caps for medicine bottles, and non-metallic bottle caps are related to the registrant’s non-metallic sealing caps because they are all common goods used to cover other objects, such as bottles. Furthermore, it is common for a single entity to provide a variety of plugs and caps, including those of the applicant and registrant.”

In its response filed on April 24, 2016, Applicant argued that “the applied-for mark is not simply the words DRYCAP, as it also contains a significant amount of design elements that are presented as a dominant element of the mark as they are significantly larger and more eye-catching than the word elements,” and as such, the applied-for mark has a unique commercial impression. Applicant also argued that “[t]he respective goods at issue here are clearly NOT found within the same industry and are not interchangeable,” and as such, there is no likelihood of confusion.

Notwithstanding Applicant’s arguments, a second and Final Office Action that maintains the refusal under Section 2(d) was issued on July 17, 2017. Applicant respectfully requests reconsideration.

II. Applicant’s Mark is Not Likely to Cause Confusion with the Cited Mark

The factors to be considered in a likelihood of confusion analysis are set forth in *In re E.I. du Pont de Nemours & Co.*, 177 U.S.P.Q. 563 (C.C.P.A. 1973). The relevance and weight to be given to the various *du Pont* factors differs from case to case, depending on the relevant facts. *Opryland USA Inc. v. The Great American Music Show, Inc.*, 23 U.S.P.Q.2d 1471, 1473 (Fed. Cir. 1992). The most relevant likelihood of confusion factors to be considered in this instance are the dissimilarities of the goods; the dissimilarity of the marks in their entireties as to appearance, connotation, and commercial impression; and the sophistication of the respective consumers. *See du Pont*, 177 USPQ 563; TMEP §1207.01.

When the cumulative effect of all contributing factors are weighed together, the balance strongly tips away from any likelihood of confusion between Applicant’s mark and the cited mark. *Electronic Design & Sales, Inc. v. Electronic Data Systems Corporation*, 954 F.2d 713, 21 U.S.P.Q.2d 1388 (CAFC 1992) (we are “not concerned with mere theoretical possibilities of confusion, deception, or mistake or with de minimus situations but with the practicalities of the commercial world, with which the trademark laws deal”).

A. The Goods are Unrelated and Have Different Purposes and Functions

Confusion is unlikely because the respective goods are not so related that consumers would assume they all emanate from the same source. *In re Dakin’s Miniatures, Inc.*, 59 USPQ2d 1593, 1595 (TTAB 1999). This is because the purpose and function of the respective goods are completely different.

As stated above, the applied-for mark is identified for use on “metal caps for medicine bottles,” in Class 6; “laboratory equipment, namely, vial plugs,” in Class 9; “non-metallic bottle caps; non-metal caps for medicine bottles,” in Class 20; and “plastic safety caps for medicine bottles,” in Class 21, as amended. The identification of goods itself (as amended) clarifies that these “caps” are all for medicine bottles and medical lab equipment.

On the other hand, the cited mark is identified for use on “non-metallic sealing caps,” in Class 20. As evidenced by the specimen of record submitted by the Registrant on March 5, 2017, in support of the registrant’s Section 8&15 filing (a copy of which was submitted previously), it is obvious these “caps” are specifically a dehumidifying lens cap system for cameras.

The products, although both are generally referred to as “caps,” are not only unrelated but not interchangeable nor otherwise comparable. A medicine bottle cap is not going to be confused with a camera cap because those goods are not sold within the same industry, much less the same stores. These products will necessarily be marketed in very different ways, through different channels, to reach very different consumers who require very different products with specific functions.

The Examining Attorney has failed to identify a class of consumers that could be confused between these products. To the contrary, the differences between these goods means the marks will never be encountered under circumstances such that consumers could ever be confused as to the source of the goods.

In support of the conclusion that consumers would expect Applicant’s and Registrant’s goods to emanate from a single source, the Examining Attorney refers to “previously attached third-party websites demonstrat[ing] that entities providing a combination of vial plugs, caps for medicine bottles, and non-metallic bottle caps also provide non-metallic sealing caps. This evidence establishes that the same entity commonly manufactures the relevant goods and markets the goods under the same mark and that the relevant goods are sold through the same trade channels and used by the same classes of consumers.”

None of the Examining Attorney’s evidence supports a likelihood of confusion. There is no evidence of record that any of these third parties have registered or applied to register marks that are identified for use on any of the goods at issue in this case. As importantly, none of the third-party websites show any caps that are used on cameras, specifically. Moreover, none of this evidence shows that third parties sell both Applicant’s actual goods and Registrant’s actual goods through the same trade channels or to the same classes of consumers under the same mark. The Examining Attorney’s evidence merely shows that third parties sell a wide variety of goods – many single entities sell a wide variety of goods, but this cannot be considered relevant to the instant case.

In sum, it is unlikely that a purchaser will believe that Applicant’s and Registrant’s goods emanate from a single source. Accordingly, this significantly weighs against a finding of likelihood of confusion.

B. The Marks are Different in Appearance and Connotation and Convey a Different Commercial Impression

When comparing marks, “[a]ll relevant facts pertaining to appearance, sound, and connotation must be considered before similarity as to one or more of those factors may be sufficient to support a finding that the marks are similar or dissimilar.” TMEP § 1207.01(b) (citing *Recot, Inc. v. M.C. Becton*, 54 U.S.P.Q.2d 1894, 1899 (Fed. Cir. 2000)). Here, the respective marks are not identical, and they vary vastly in appearance, connotation, and commercial impression. *In re E.I. DuPont de Nemours*, 177 USPQ 563 (CCPA 1973) (listing factors to be considered when determining likelihood of confusion).

As stated above, the applied-for mark includes the word DRYCAP, whereas the cited mark is the word DRI+CAP. The Examining Attorney has placed undue emphasis on the fact that Applicant’s mark and the cited mark each contain the terms “DRY”/“DRI” and “CAP” – however, the similarity in this respect is not determinative on the issue of likelihood of confusion. *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1043 (TTAB 1987) (similarity of the marks in one respect will not automatically result in a finding of likelihood of confusion, even if the goods are identical or closely related). Moreover, it is possible these marks are not pronounced the same: while Applicant’s mark would be read aloud as “dry cap”, the cited mark contains a plus or positive or and sign and could logically be read aloud as “dry and cap” or “dry plus cap”.

There are no confusing similarities between these marks because the applied-for mark is not simply the words DRYCAP. It contains a significant amount of design elements that seem to have been improperly disregarded by the Examining Attorney. *Franklin Mint Corp. v. Master Manufacturing Co.*, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole.”).

The design elements of the applied-for mark are a significant and dominant element of the mark. They are much larger and more eye-catching than the word elements, and contribute significantly to creating a unique commercial impression. *In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (one feature of a mark may be more significant or dominant in creating a commercial impression). When considered as a whole, the applied-for mark is presented in a unique and very distinguishing manner and connotes a very individualized commercial impression that is in no way shared by the cited mark, and this overcomes any insignificant similarities in the word elements of the respective marks.

In sum, due to the different words, spelling, punctuation, and perhaps pronunciation, as well as the unique design elements present in the applied-for mark, consumers can readily distinguish between the two marks and they are not likely to be confused with one another – especially in light of the parties’ different goods. Accordingly, this significantly weighs against a finding of likelihood of confusion.

C. The Customers are Sophisticated and the Products are Intended for a Very Specific Purpose

“[C]ircumstances suggesting care in purchasing may tend to minimize the likelihood of confusion.” TMEP § 1207.01(d)(vii); see also *Electronic Design & Sales Inc. v. Electronic Data Systems Corp.*, 21 USPQ2d 1388 (Fed. Cir. 1993) (stressing sophistication of discriminating customers is an extremely important likelihood of confusion factor, even in cases where the marks are identical.).

The Examining Attorney argues that where “the relevant consumer of these products includes both professionals and the general public, the standard of care for purchasing the goods is that of the least sophisticated potential purchaser.” However, confusion is not likely between two marks where the customers of at least one party are sophisticated and unlikely to mistakenly believe that the parties’ goods emanate from a single source. *Magnaflux Corp. v. Sonoflux Corp.*, 236 F.2d 423 (C.C.P.A. 1956); *In re N.A.D., Inc.*, 224 USPQ 969, 971 (Fed. Cir. 1985) (discussing the fact that there would be no likelihood of confusion if sophisticated purchasers exercise great care to purchase the goods/services).

The products offered under Applicant’s mark involve safety caps for medicine bottles. Applicant’s consumers are presumably all professionals within or selling to the medical and laboratory industry, which are arguably sophisticated purchasers that are not going to mistakenly believe that Registrant, as a seller of camera caps, is also the source of Applicant’s medicine bottle caps.

The goods sold by the parties at issue here are very particular products that are each intended for a very specific, distinct purpose. Customers do not acquire either of these goods by impulse; rather, customers are very likely going to do their research and carefully consider such purchases before buying either product and using it. Accordingly, this significantly weighs against a finding of likelihood of confusion.

D. No Known Instances of Confusion

Applicant is unaware of any issues or disputes between the parties, including any actual confusion among consumers. Consumers have and will continue to come to recognize Applicant specifically as the source of the goods offered under the applied-for mark.

While this detail is not, on its own, determinative on the issue of likelihood of confusion, it is nonetheless persuasive evidence when balanced with the other factors discussed herein. *In re E.I. DuPont de Nemours*, 177 USPQ 563.

III. Conclusion

As cited above, the court in *Electronic Design & Sales, Inc. v. Electronic Data Systems Corporation*, 954 F.2d 713, 21 U.S.P.Q.2d 1388 (CAFC 1992) stated we should “not [be] concerned with mere theoretical possibilities of confusion, deception, or mistake or with de minimus situations but with the practicalities of the commercial world, with which the trademark

laws deal.” While there may be a theoretical possibility of confusion in this case, there is insufficient support to uphold a finding of probable or likelihood of confusion. When the cumulative effect of all contributing factors are weighed together, the balance strongly tips away from any likelihood of confusion between Applicant’s mark and the cited mark.

Accordingly, Applicant respectfully requests that the Examiner reconsider the refusal to register the applied-for mark, withdraw the 2(d) refusal, and approve the subject application for publication.