ESTTA Tracking number: **ESTTA1054652**

Filing date: **05/11/2020**

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

Proceeding	87707617
Applicant	T3 Productions, LLC
Applied for Mark	PORTAL
Correspondence Address	KEVIN M HAYES KLARQUIST SPARKMAN LLP 121 SW SALMON STREET , ONE WORLD TRADE CENTER SUITE 1600 PORTLAND, OR 97204 UNITED STATES ptotmdocket@klarquist.com, kevin.hayes@klarquist.com 503-595-5300
Submission	Reply Brief
Attachments	Applicants Reply Brief App. SN 87707617.pdf(168431 bytes)
Filer's Name	Kevin M. Hayes
Filer's email	ptotmdocket@klarquist.com, kevin.hayes@klarquist.com
Signature	/Kevin M. Hayes/
Date	05/11/2020

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

Serial No.	87/707,617
Mark:	PORTAL
Applicant:	T3 Productions, LLC
Class:	41
Examining Attorney:	Krystina E. Osgood Law Office 121

APPLICANT'S REPLY BRIEF

Applicant, T3 Productions, LLC, respectfully submits the following reply in response to the Examiner's April 20, 2020 brief.

ARGUMENT

The Examiner discounts that fact that there are other PORTAL formatives for virtual reality game services and other related entertainment services as explained by Applicant in its Appeal Brief. (Appeal Brief p. 6, Response p. 8). The Examiner also discounts that fact, as admitted by the Registrant of the Cited Registration, that the services of the Cited Registration are provided in a "sophisticated" environment and "in individual booths wearing headphones" (Appeal Brief p. 6, Response p. 7).

While just dismissing the facts showing that confusion is unlikely, the Examiner argues that:

1) Applicant's mark is confusingly similar to Registrant's mark because the marks are identical; and
2) Applicant's services are allegedly closely related to Registrant's services, allegedly travel in the same channels of trade, and are allegedly marketed to the same class of consumers.

Applicant respectfully disagrees.

First, that marks are identical, upon which the Examiner leans heavily, does not mean that the marks are likely to cause confusion. While a single *du Pont* factor has been considered an important factor in certain circumstances, Applicant notes that identical mark registrations may and do co-exist even when there is arguable similarity or relatedness in the respective goods. For example, WHITE HOUSE for tea and coffee co-exists with WHITE HOUSE for milk (*Dwinell-Wright Co. v. White House Milk Co.*, 132 F.2d 822, 56 U.S.P.Q. 120 (2d Cir. 1943)); OLÈ for cigars has been allowed to co-exist with OLÈ for tequila (*Schenley Distillers, Inc. v. General Cigar Co.*, 427 F.2d 783, 166 U.S.P.Q. 142 (C.C.P.A. 1970)); SPORTSTICK for lip balm allowed co-existed with SPORT STICK for deodorant (*W.W.W. Pharmaceutical Co. v. Gillette Co.*, 984 F.2d 567 (2d Cir. 1993)). It is well established that even identical marks for arguably similar goods or services will not necessarily create a likelihood of confusion. *See, e.g., In re Mars, Inc.*, 741 F.2d 395 (Fed. Cir. 1984) (finding CANYON for fruit not likely to be confused with CANYON for candy bars).

Second, the services are not closely related. No consumer would walk into an escape room facility and presume it to be a virtual reality arcade or even related to a virtual reality arcade. As explained by the Registrant of the Cited Registration, the services of the Cited Registration are provided in a "sophisticated" environment and "in individual booths wearing headphones" (Appeal Brief p. 6). Applicant's services are live-action team-based games where multiple players discover clues, solve puzzles, and accomplish tasks in one or more rooms in order to accomplish a specific goal (usually escaping from the room) in a limited amount of time. Applicant's services are not for individual players alone (as the services of the Cited Registration

explicitly are, as also evidenced by Registrant's description of its services) – Applicant provides a team activity involving more than one person, in the same room, accomplishing a common goal – solving puzzles to escape the room.

Third, the Examiner is incorrect that the services travel in the same channel of trade. In any event, the Examiner does not define any channel of trade and explain how the identified services travel in the same channels of trade. Without any definition of the channel of trade, the statement that they are the same is merely conclusory.

Fourth, the Examiner is incorrect that the services are marketed to the same class of consumers. First, the Examiner has not defined any class of consumer. Without any definition of a class of consumer, the statement that they are the same is merely conclusory. It is also incorrect. Consumers of virtual reality arcade games are looking for something different than Applicant's services – an arcade game experience. Applicant's consumers are looking for a live action escape room experience. As the consumers are looking for different things, they must not be the same class.

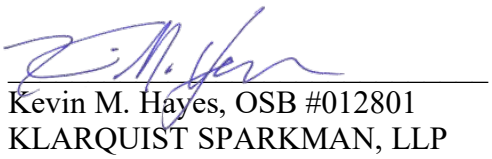
CONCLUSION

Applicant's PORTAL mark for its escape room attractions is not likely to cause confusion with the virtual reality arcades of the Cited Registration. Therefore, given the differences between the services on which the parties' marks are used, the admitted sophistication of the potential customers of the parties, and the number of coexisting PORTAL formative registrations, it certainly cannot be said that confusion is any more than merely "possible." In view of that, the higher and required threshold of "probability" is not reached in this case. Applicant therefore submits that consumer confusion is not likely, and respectfully requests that the application be approved for publication.

Dated: May 11, 2020

Respectfully submitted,

KLARQUIST SPARKMAN, LLP

By 

Kevin M. Hayes, OSB #012801
KLARQUIST SPARKMAN, LLP
One World Trade Center, Suite 1600
121 S.W. Salmon Street
Portland, Oregon 97204
Telephone: (503) 595-5300
Fax: (503) 595-5301

Of Attorneys for Applicant
T3 Productions, LLC