

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

August 04, 2014

Applicant: Ashley Pines
Serial No.: 86099473
Filing Date: October 23, 2013
Mark: TAKE A BOW
Examining Attorney: Alex S. Keam
Law Office: Law Office 114

APPLICANT'S RESPONSE TO OFFICE ACTION

The Examining Attorney has refused registration of the proposed trademark, **TAKE A BOW** pursuant to Trademark Act Section 2(d), 15 U.S.C. § 1052(d), on the grounds that the mark is likely to be confused with the mark in U.S. Registration No. 3418104: **DANCING CLASSROOMS TEACHING CHILDREN TO TAKE A BOW (with design)**. It is Applicant's position that there is no likelihood of confusion between Applicant's mark and the cited mark based on the dissimilarity of the marks, dissimilarity of the services provided, weakness of the shared material, and the sophistication of purchasers in regard to the relevant services. As such, Applicant respectfully asks that the Examining Attorney reconsider the refusal and allow Applicant's mark to proceed to publication.

1. NO LIKELIHOOD OF CONFUSION EXISTS

The Office Action preliminarily refuses registration based on a perceived likelihood of confusion with U.S. Trademark Registration No. 3418104: **DANCING CLASSROOMS TEACHING CHILDREN TO TAKE A BOW (with design)**. Applicant seeks to register its distinct mark, TAKE A BOW. The dissimilarities between the marks at issue prevent any perceived likelihood of confusion.

In a likelihood of confusion determination, the question is whether the goods or services are so related that the circumstances surrounding their marketing are such that they are likely to be encountered by the same persons under circumstances that would give rise to the mistaken belief that they originate from the same source. *On-line Careline Inc. v. America Online Inc.*, 229 F.3d 1080, 56 USPQ 2d 1471 (Fed. Cir. 2000). This question is answered on a case-by-case basis, taking into account all relevant factors. *In re E.I. du Pont De Nemours & Co.*, 177 U.S.P.Q. 563, 567 (C.C.P.A. 1973); *In re National Data Corp.*, 753 F.2d 1056, 1058, 224 U.S.P.Q. 749, 750-51 (Fed. Cir. 1985).

In *du Pont*, the Court listed several marketplace factors that must be considered in determining whether confusion is likely to occur. When balancing these factors, no single factor should be treated as dispositive; nor should the inquiry be mechanical by which the party with the greatest number of factors win. *Nabisco II: Nabisco Inc Nabisco Brands Company v. Warner-Lambert Company*, 220 F. 3d 43, 46 (2nd Cir. 2000). Instead, the focus should be on the ultimate question of whether consumers are likely to be confused. *Paddington Corp. v. Attiki Imps & Distribs., Inc.*, 996 F.2d 577, 584 (2d Cir. 1993).

The two key considerations are the similarity of the marks and the similarities between the goods and/or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976) (“The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks”), *see also In re E.I. du Pont De Nemours & Co.*, 177 U.S.P.Q. at 567. Among other factors, further consideration includes the sophistication of the respective purchasers. *du Pont* at 567. In analyzing all relevant factors, one finds that there is no likelihood of confusion between the marks at issue.

A. Differences in the Marks

Under *du Pont*, the mark comparison includes, among other factors, appearance, sound, meaning, and commercial impression. *In re E.I. du Pont De Nemours & Co.*, 177 USPQ 563, 567 (C.C.P.A.1973). Applicant’s mark TAKE A BOW is vastly different from Registrant’s mark DANCING CLASSROOMS TEACHING CHILDREN TO TAKE A BOW (with design). In a case where one mark contains additional features that distinguish its overall appearance from another, confusion is less likely, even when the two marks also contain similar features. *See, e.g., Miller Brewing Co. v. Premier Beverages, Inc.*, 210 USPQ 43, 48-49 (T.T.A.B. 1981) (No likelihood of confusion found in MILLER and OL’ BOB MILLER’S for beverages). Even slight differences can distinguish two marks. *In re Electrolyte Laboratories Inc.*, 929 F.2d 645, 647, 16 USPQ 2d 1239, 1240 (Fed. Cir. 1990) (K+ and design for dietary supplement was held not likely to be confused with K+EFF (stylized) for dietary potassium supplements).

It is well settled that trademarks must be compared in their entireties. For example, in *In re Hearst Corp.*, 982 F.2d 493, 494 (C.A. Fed., 1992), the United States Court of Appeals found no confusion between VARGA GIRL for calendars and the registered trademark VARGAS for calendars when evaluating all relevant factors. *In re Hearst Corp.*, at 494 (The TTAB erred in analyzing the marks VARGA GIRL and VARGAS giving too much weight to the similarities between VARGA and VARGAS, and not giving appropriate weight to the descriptive element GIRL.). The Court of Appeals held that the Board erred in its analytic approach and that the marks must be considered “in the way they are used and perceived.” *Id.*; *See also In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). The Court held that the appearance, sound, sight, and commercial impression of VARGA GIRL derived “significant contribution from the component ‘girl.’” *In re Hearst Corp.*, 982 F.2d 493, 494 (C.A. Fed. 1992). By stressing the portion “varga” and diminishing the portion “girl,” the court found that the TTAB “inappropriately changed the mark.” *Id.* The court concluded that “[w]hen GIRL is given fair weight, along with VARGA, confusion with

VARGAS becomes less likely.” The court held that the marks VARGA GIRL and VARGAS were sufficiently different in sound, appearance, connotation, and commercial impression, to negate likelihood of confusion. *Id.*

Here, Applicant argues that the examining attorney has stressed a portion of Registrant’s mark, “...take a bow”, and diminished the remaining features of the mark. Applicant asserts that its mark is greatly different in appearance, sound, meaning, and commercial impression when compared to the Registrant’s mark, as a whole. In the case at hand, both Applicant’s and Registrant’s marks must be perceived in their entireties, and all components of the marks, not just the phrase “...take a bow”, must be given appropriate weight. *See In re Hearst Corp.*, 982 F.2d 493, 494 (C.A. Fed., 1992) and *Opryland USA Inc. v. Great American Music Show, Inc.*, 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1992). Here, there are more than slight variations to distinguish Applicant’s mark from the Registrant’s:

i. Appearance

Despite the shared wording, Applicant’s mark, TAKE A BOW, is fundamentally different in appearance from Registrant’s mark. Applicant’s mark differs drastically in both wording and design. In a case where one mark contains additional features that distinguish its overall appearance from another, confusion is less likely, even when the two marks also contain similar features. *See e.g., Miller Brewing Co. v. Premier Beverages, Inc.*, 210 USPQ 43, 48-49 (T.T.A.B. 1981) (no likelihood of confusion found in MILLER and OL’ BOB MILLER’S for beverages). Simply because two marks share wording does not mean that likelihood of confusion exists. *General Mills, Inc. v. Kellogg Co.*, 824 F.2d 622, 627, 3 U.S.P.Q.2d 1442 (8th Cir. 1987). Even slight differences can distinguish two marks. *In re Electrolyte Laboratories Inc.*, 929 F.2d 645, 647, 16 USPQ 2d 1239, 1240 (Fed. Cir. 1990).

Here, there are more than slight variations to distinguish the two marks. Applicant’s mark and Registrant’s mark both contain the wording “take a bow”. However, this is the only feature they share. Applicant’s mark is not likely to be confused with Registrant’s mark in appearance due to the abundance of distinguishing material contained in Registrant’s mark’s appearance. The Examining Attorney argues that, “[m]arks may be confusingly similar in appearance where that are similar terms or phrases or similar parts of terms or phrases appearing in both applicant’s and registrant’s mark.” Office Action dated February 07, 2014 (Citing *Crocker Nat’l Bank v. Canadian Imperial Bank of Commerce*, 228 USPQ 689 (TTAB 1986)). However, it is well recognized that “marks tend to be perceived in their entireties, and all components thereof must be given appropriate weight”. *In re Hearst Corp.*, 2 USPQ 2d 1238, 1239 (Fed. Cir. 1992).

Registrant’s mark contains several prominent features. The mark consists of the wording “DANCING CLASSROOMS” in large, blue font. Below this wording is the wording “TEACHING CHILDREN TO TAKE A BOW” in smaller, light blue font. These two phrases arch in a rainbow shape, leading to an image of a dancing couple, consisting of a boy and girl, in silhouette. This image shares the same blue color of the “DANCING CLASSROOMS” wording, and is a prominent element of the mark.

Visually prominent designs are typically dominant over associated wording within a mark. *See Smith v. Ames Dept. Stores, Inc.*, 988 F. Supp. 827, 840 (D.N.J. 1997), *see also Boise Cascade Corporation v. Mississippi Pine Manufacturers Associations*, 164 USPQ 364, 368 (T.T.A.B. 1969). Here, the most visually prominent design of Registrant's mark is the stylized image of a dancing boy and girl. This design is a dramatic addition that sharply distinguishes the mark from Applicant's mark. This image draws the eye of an observer, and relates the image to a second prominent design element of Registrant's mark: DANCING CLASSROOMS. This dancing image is undoubtedly a dominant portion of Registrant's mark and is one of the first elements that would be encountered by a purchaser, due to its size and placement as a focal point in Registrant's mark. This design element is the portion of Registrant's mark that dominates over the other elements of the mark. As the dominant portion of Registrant Urgent Care's mark it must therefore be given due consideration. *See Association of Co-op. Members, Inc. v. Farmland Industries, Inc.*, 216 USPQ 361, 367 (5th Cir.1982). *See also Smith v. Ames Dept. Stores, Inc.*, 988 F. Supp. 827, 840 (D.N.J. 1997), *and Boise Cascade Corporation v. Mississippi Pine Manufacturers Associations*, 164 USPQ 364, 368 (T.T.A.B. 1969).

This dancing image is directly related to a second prominent design in Registrant's mark: DANCING CLASSROOMS. Both elements share the same dominant color and are much larger in size than the remaining elements of Registrant's mark. The appearance of Registrant's mark emphasizes the wording "DANCING CLASSROOMS", as it appears as both the largest, and first words encountered by a consumer observing the mark. Although marks are compared in their entireties, one feature of a mark may be more significant or dominant in creating a commercial impression. *See In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Nat'l Data Corp.*, 753 F.2d 1056, 1058, 224 USPQ 749, 751 (Fed. Cir. 1985); TMEP §1207.01(b)(viii), (c)(ii). Consumers are generally more inclined to focus on the first word, prefix, or syllable in any trademark or service mark. *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 1372, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005); *Presto Prods. Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) ("it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered" when making purchasing decisions). DANCING CLASSROOMS is the dominant feature of Registrant's mark.

Applicant does not dispute that its mark shares the wording TAKE A BOW with the Registrant. However, this wording consists of the entirety of Applicant's mark. Registrant's mark, in contrast, utilizes this wording as a part of a phrase: TEACHING CHILDREN TO TAKE A BOW. This wording is smaller and differs in color from the more dominant elements of Registrant's mark. Trademarks must be compared in their entireties, and the additional, dominant components of Registrant's mark must be given fair weight. *See In re Hearst Corp.*, 982 F.2d 493, 494 (C.A. Fed., 1992). Even slight differences can distinguish two marks. *In re Electrolyte Laboratories Inc.*, 929 F.2d 645, 647, 16 USPQ 2d. 1239, 1240 (Fed. Cir. 1990) (K+ and design for dietary supplements was held not likely to be confused with K+EFF (stylized) for dietary potassium supplements).

Even when there are similarities between marks, comparing elements as a whole, including features such as the respective color schemes, lettering styles, and box designs, two marks with a shared element can be different enough to avoid consumer confusion. *General Mills, Inc. v. Kellogg Co.*, 824 F.2d 622, 627, 3 U.S.P.Q.2d 1442 (8th Cir. 1987); *See, e.g., Sun Banks of Fla., Inc. v. Sun Fed. Sav. and Loan Ass'n*, 651 F.2d 311, 317–18 (5th Cir.1981); Restatement of Torts § 729 comment b. Surely, the overall design of Registrant’s mark creates a visually prominent impression in the minds of consumers. As a dominant portion of Registrant’s mark it must therefore be given due consideration. *See Association of Co-op. Members, Inc. v. Farmland Industries, Inc.*, 216 USPQ 361, 367 (5th Cir.1982).

Applicant asserts that, as a whole, there are more than slight variations to distinguish the two marks. Applicant’s mark is **TAKE A BOW**. Registrant’s mark is **DANCING CLASSROOMS TEACHING KIDS TO TAKE A BOW (with design)** (Emphasis added). Applicant’s mark and Registrant’s mark both contain the wording “take a bow”. However, the marks differ in almost every other respect. Applicant’s mark is not likely to be confused with Registrant’s mark in appearance, due to an excess of distinguishing material. Potential consumers are unlikely to confuse Applicant’s mark with that of the Registrant.

ii. Sound:

Applicant’s mark and Registrant’s mark differ in sound. Differences in sound can obviate a likelihood of confusion finding, even when the services are related. *See Coca-Cola Co. v. Essential Products Co.*, 164 USPQ 628, 630 (C.C.P.A. 1970) (“Coca Cola” and “Coco Loco” were aurally dissimilar, likelihood of confusion was avoided).

Applicant’s mark shares the phrase “...take a bow” with the mark at issue. However, “...take a bow” is just one portion of Registrant’s mark. Registrant’s mark also includes five additional words proceeding this phrase: “dancing”, “classrooms”, “teaching”, “children”, and “to”. In comparison, the marks are aurally dissimilar. As such, Applicant’s mark and Registrants’ marks bear little resemblance when spoken aloud. Due to these differences, Applicant argues that its mark would not cause confusion with the Registrant’s mark.

iii. Meaning

Registrant’s mark emphasizes a prominent meaning that differs significantly that the meaning of Applicant’s mark. Every element of Registrant’s mark emphasizes the prominent element “DANCING CLASSROOMS”. When considering a mark’s meaning, the focus is on the recollection of the average purchaser who normally retains a general, rather than specific, impression of the trademarks. *See e.g., In re M. Sherman & Company, Inc.*, 233 USPQ 52, 53 (T.T.A.B. 1984). Even when marks are identical, likelihood of confusion can be avoided if there is a difference in meaning in respect to their goods and services. For example, CROSS-OVER for bras was held not likely to be confused with CROSSOVER for ladies’ sportswear, as CROSS-OVER applied to bras suggests the physical construction of the bras, while CROSSOVER for ladies’ sportswear is suggestive of multi-sport goods. *See In re Sears, Roebuck and Co.*, 2 USPQ 2d. 1312 (T.T.A.B. 1987). Here, the meaning between Applicant’s mark and those of the Registrants’ differs considerably.

The wording “DANCING CLASSROOMS” is one of the most prominent features of Registrant’s mark. This wording is accentuated by the stylized image of two children dancing. A mark’s meaning must be determined in relation to the services provided and the overall context in which the mark is used and encountered by purchasers. *See Elvis Presley v. Capece*, 141 F.3d 182 (5th Cir. 1998). Registrant’s services include, “[e]ducational and entertainment services, namely, conducting course in **dance** and **dance** history, conducting **dance** competitions, presenting **dance** exhibitions and **dance** performances.” (Emphasis added). Further, Registrant’s business is named “DANCING CLASSROOMS, INC.”. Each element of Registrant’s mark and the services Registrant provides emphasize a focus on dance and dance classrooms. As evidence of this emphasis on DANCING CLASSROOMS, Registrant’s mark has an acquired distinctiveness claim, in part, for the phrase based on exclusive and continuous use in commerce. When purchasers encounter Registrant’s mark, they will surely be left with the strong impression of “DANCING CLASSROOMS”, the dominant portion of the mark.

Applicant’s mark, in contrast, clearly focuses on the broader meaning of the phrase “TAKE A BOW”. Applicant’s services include, “[e]ducational services, namely, providing classes and instruction in the fields of voice, acting and musical theater.” Through Applicant’s services, consumers can learn a wide variety of performance-based skills.

Applicant’s mark is suggestive of the concept of a curtain call. A “curtain call”, or bowing, “...occurs at the end of a performance when individuals return to the stage to be recognized by the audience for their performance. *Curtain Call*, WIKIPEDIA.COM, available at http://en.wikipedia.org/wiki/Curtain_call (last accessed July 24, 2014), attached as Exhibit 1. Curtain calls are not solely limited to actors in theatres, for example, athletes that perform well may return to the field of play after a big play or at the conclusion of the game for recognition. *Id.* In a performance context, taking a bow is, “an appearance by actors or performers at the end of the concert or play in order to acknowledge the applause of the audience. *Bow*, Thesaurus entry 7, THEFREEDICTIONARY.COM, available at <http://www.thefreedictionary.com/bow> (last accessed July 14, 2014), attached as Exhibit 2. This gesture is an acknowledgment of appreciation. *Id.*

Registrant’s mark also utilizes the phrase TAKE A BOW. However, Registrant’s use of this phrase conveys a different meaning. Registrant uses the wording in the greater phrase: **TEACHING CHILDREN TO TAKE A BOW**. (Emphasis added). This larger phrase, as a whole, again emphasizes the distinctive meaning of Registrant’s mark: **DANCING CLASSROOMS**. (Emphasis added). Proper consideration must be given to the meanings of the marks, and even slight differences in connotation can obviate likelihood of confusion. *See Eli Lilly & Co. v. Revlon, Inc.*, 577 F. Supp. 477, 233 USPQ 251, 256 (S.D.N.Y. 1983) (LIP-FIX and LIP REPAIR, for similar goods, found to have sufficiently different meanings). Applicant’s use of the term “TAKE A BOW” in its mark creates a substantially different meaning than the phrase used by Registrant.

Registrant’s mark denotes a clear meaning in the mind of a consumer: through Registrant’s DANCE CLASSROOMS, Registrant will teach CHILDREN to dance. Again, this is

emphasized by the image of two CHILDREN dancing. Further, the act of bowing is an action, a verb. As used in Registrant's slogan, the CHILDREN Registrant will TEACH to DANCE at a DANCING CLASSROOM will bow. Applicant's mark, in contrast, takes this action and uses the phrase as a noun – referring to a source of educational services, not the action this phrase typically refers to. As such, purchasers are not likely to associate the meaning of the two marks with each other, due to the strength of the emphasized material in Registrant's mark. Applicant's mark has a distinct meaning from Registrant's mark, and confusion is unlikely to occur.

iv. Commercial Impression

When assessing the overall commercial impression, marks must be considered in their entireties. *Package Press, Inc. v. Hewlett-Packard Co.*, 227 F.3d 1352, 1357, 56 USPQ 1351, 1353 (Fed. Cir. 2000) (The court held that the T.T.A.B. erred by relying only the shared material "Packard", without evaluating the marks in their entireties). Merely because marks share material, does not mean that there is a likelihood of confusion. *General Mills, Inc. v. Kellogg Co.*, 824 F.2d 622, 3 U.S.P.Q.2d 1442 (8th Cir. 1987). "The phrase 'commercial impression' is occasionally used as a proxy for the ultimate conclusion of similarity or dissimilarity of marks resulting from a comparison of their appearance, sound, and meaning" *Palm Bay v. Veuve Clicquot*, 396 F.3d 1369, 1372, 73 U.S.P.Q.2d 1689, 1692 (Fed. Cir. 2005). Applicant argues that its mark creates a distinct commercial impression when compared to the Registrant's mark.

The Examining Attorney argues that Applicant's mark does not create a distinct commercial impression because it contains the same common wording as registrant's mark, and there is no other wording to distinguish it from registrant's mark. *See* Office Action dated February 07, 2014. However, Applicant argues that focusing on this one-shared factor unfairly overlooks the distinctive elements of Registrant's mark. Registrant's mark does include significant wording that distinguishes the mark from Applicant's mark. Registrant's mark includes the wording DANCING CLASSROOMS and TEACHING CHILDREN. The Examining Attorney claims that this wording is generic. However, "...it is well settled that disclaimed material still forms a part of the mark and cannot be ignored in determining likelihood of confusion." *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 1570 (Fed. Cir. 1983). Here, the commercial impression left by Registrant's mark is clearly DANCING CLASSROOMS. This is reinforced by the design elements of Registrant's mark – the image of dancing children and the size, positioning, and focus of this wording. Further, Registrant has claimed that this wording, generic on its face, has acquired distinctiveness through Registrant's use of the mark. Applicant agrees. Despite the generic nature of the distinguishing elements of Registrant's mark, this disclaimed matter cannot be ignored. *See* 3 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 19:72 (4th ed. 2011).

Applicant's mark is distinctive in sound, appearance, and meaning. When compared separately, these individual elements may vary in persuasiveness. However, the mere fact that the marks in issue share elements does not compel a conclusion of likely confusion. *General Mills, Inc. v. Kellogg Co.*, 824 F.2d 622, 627 3 U.S.P.Q.2d 1442 (8th Cir. 1987); *See*

also Freedom Sav. & Loan Ass'n v. Way, 757 F.2d 1176, 1183, 226 U.S.P.Q. 123, 127 (11th Cir. 1985) (“The use of identical, even dominant, words in common does not automatically mean that two marks are similar.”). The proper comparison is between the overall commercial impressions of the marks as consumers would view and remember them. *See E.g., Long John Distilleries, Ltd. v. Sazerac*, 426 F.2d 1406, 166 U.S.P.Q. 30 (C.C.P.A. 1970).

When considered in its entirety, Applicant’s mark conveys a very different commercial impression than the Registrant’s mark. Applicant’s mark focuses on, and only on, TAKE A BOW. Registrant’s mark, in contrast, focuses on and emphasizes “DANCING CLASSROOMS”. The phrase “...take a bow” is utilized in Registrant’s mark, but this shared use is an element of the secondary focus in the mark, Registrant’s slogan. This slogan has a different focus and meaning than Applicant’s mark, even though the same three words are used. When encountered by consumers, Registrant’s mark will almost certainly be referred to as DANCING CLASSROOMS. It is very unlikely that a consumer will ignore the clearly dominant elements of Registrant’s mark, ignore the first portion of Registrant’s slogan, and refer to Registrant’s services merely as “...TAKE A BOW”. Applicant’s mark, in contrast, clearly creates a distinct commercial impression in the mind of consumers. Therefore, Applicant’s mark is not likely to cause confusion.

B. Dissimilarity of the Services Provided

The Examining Attorney argues that Applicant’s services are too similarly related to Registrant’s services, contending that purchasers encountering these marks could form the mistaken belief that the services come from a common source. *See Office Action* dated February 07, 2014 (Citing *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012)). Applicant respectfully disagrees. Applicant argues that its services differ from Registrant’s services, rendering confusion unlikely.

Registrant owns U.S. Trademark Registration No. 3418104, DANCING CLASSROOMS TEACHING CHILDREN TO TAKE A BOW (with design). Registrant’s mark is used in connection with, “[e]ducational and entertainment services, namely, conducting courses in **dance** and **dance** history, conducting **dance** competitions, presenting **dance** exhibitions and **dance** performances”. (Emphasis added). Clearly there is an emphasis here, and that emphasis is on “dance.”

Applicant argues that Registrant’s mark identifies a distinct service. Applicant’s services, in contrast, include, “[e]ducational services, namely, providing classes and instruction in the fields of **voice**, **acting** and **musical theater**.” (Emphasis added). Although all services at issue are performance based, Applicant does not market itself as a “dancing company”. Applicant’s mission is to introduce the art of *musical theatre* to its students. Applicant provides a wide variety of services aimed at promoting the development of artistic abilities. Applicant and Registrant focus on two differing elements in the greater “performance marketplace,” making confusion very unlikely.

In the Office Action dated February 07, 2014, the Examiner cites excerpted materials from a GOOGLE® search engine as evidence that dancing and singing lessons are provided

by the same entities. However, Applicant finds this evidence unpersuasive. Such evidence merely supports the assertion that organizations often have a varied line of goods or services. For example, using a similar type of analysis, there is evidence to support that “dance lessons”, “office supplies”, and “bed sheets” may emanate from the same source. *See* Exhibit 3 (FEMINICITY, Reg. No. 3836492).

C. Sophistication of the respective purchasers and the strength of the shared material within the respective marks

While the fact that consumers are sophisticated in a field does not preclude source confusion, such knowledge and sophistication may lower the likelihood of confusion. *See In Re Decombe*, 9 USPQ 2d 1812 (TTAB 1988); *In Re Pellerin Milnor Corp.*, 221 USPQ 558 (TTAB 1983). Indeed, purchasers of expensive goods are elevated to the standard of a “discriminating” or sophisticated purchaser, who do not buy casually, but only after careful consideration. *Weiss Assoc., Inc. v. HRL Assoc., Inc.*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990); *see e.g. McGregor-Doniger, Inc. v. Drizzle, Inc.*, 599 F.2d 1126, 1137, 202 USPQ 81, 92 (2d Cir. 1979) (holding purchasers of women’s coats priced from \$100-\$900 “to be sophisticated and knowledgeable about women’s apparel”).

With respect to the Applicant, its clientele are made up of highly sophisticated consumers. The degree of care that can be anticipated when consumers seek expensive educational services can fairly be characterized as high when compared with more casual, everyday purchases such as, e.g., soda pop. Applicant’s services are not purchased on a whim. Consumers of Applicant’s services will seek out a specific type of instruction, namely, voice, acting, or musical theater; and they will pay several hundred dollars for this service. *See* Exhibit 4 (Screenshot of Applicant’s website, available at <http://takeabowplayhouse.com/class-schedule/> (last visited July 24, 2014) (indicating the current prices of Applicant’s services)).

Not only are the services at issue expensive, they are marketed to a discriminating class of consumers: parents seeking to enroll their children in dance or performance based education classes. (Registrant’s mark clearly indicates that at least some portion of its services are marketed to children. *See* “TEACHING CHILDREN TO...”). Most parents are selective when it comes to the supervision of their children. Educational services of this nature can be expected to rely, at least in part, on referrals and word of mouth reputation. Further, most performance lessons occur over the course of several lessons. Parents can expect to enroll their children into lessons that will occur daily, weekly, monthly, etc. Certainly, parents will be aware of who is providing these services and exercise due care when making purchasing decisions.

To the extent that a customer is likely to exercise a high degree of care when selecting goods or services, the less chance that confusion, mistake, or deception will occur between two or more competing marks. In this instance, the marketplace can be fairly characterized as one in which customers can be expected to exercise a higher degree of care than would be true of most other goods; thus, the likelihood of confusion, mistake, or deception will be minimized.

CONCLUSION

The ultimate question of likelihood of confusion is one of fact and numerous factors are relevant in making such a determination. Such factors include, inter alia, a comparison of the relevant marks, the nature of services, and the degree of consumer sophistication. *See E.I. DuPont*, 476 F.2d at 566-67; *see also* TMEP § 1207.01. As Applicant respectfully submits and discusses above, the relevant factors weigh in favor of Applicant and against finding a likelihood of confusion. As such, Applicant respectfully asks that the Examining Attorney withdraw the refusal and allow Applicant's mark to proceed to publication.

If further information or response is required, please contact Applicant's attorney at 574.536.7185, or by email at travis@stahlinlaw.com. Travis Copenhagen, Esq., Associate of the Attorney of Record, Shannon C. Stahlin.

Exhibits

- Exhibit 1: *Curtain Call*, WIKIPEDIA.COM, available at http://en.wikipedia.org/wiki/Curtain_call (last accessed July 24, 2014)
- Exhibit 2: *Bow*, Thesaurus entry 7, THEFREEDICTIONARY.COM, available at <http://www.thefreedictionary.com/bow> (last accessed July 24, 2014)
- Exhibit 3: FEMINICITY, Reg. No. 3836492
- Exhibit 4: Screenshot of Applicant's website, available at <http://takeabowplayhouse.com/class-schedule/> (last visited July 24, 2014) (Indicating the current prices of Applicant's services)