PTO Form 1930 (Rev 9/2007)
OMB No. 0651-0050 (Exp. 4/30/2009)

Request for Reconsideration after Final Action

The table below presents the data as entered.

Input Field	Entered
SERIAL NUMBER	77138340
LAW OFFICE ASSIGNED	LAW OFFICE 103
MARK SECTION (no change)	
ARGUMENT(S)	

Likelihood of Confusion

The mark R ROGERS ATHLETIC COMPANY was rejected under Trademark Act §2 (d), 15 U.S.C. §1052(d), because the Examiner held the mark, when used on or in connection with the identified goods, so resembles the mark in United States Registration No. 1277533 be likely to cause confusion, to cause mistake, or to deceive. Applicant respectfully disagrees and maintains that its mark as used in association with apparel (namely, shirts, shorts, workout clothing), athletic equipment (namely, football equipment), athletic training equipment (namely, football training equipment) and storage units (namely, storage racks) is not likely to be confused with the mark in the '533 registration.

There is no likelihood of confusion because the Applicant's goods are clearly distinct from the goods in the '533 registration. The '533 registration relates to bases, anchor systems for bases and plugs, and base anchor systems. In particular, the goods in the '533 registration are directed toward break away bases for baseball or softball, as shown in the company website: www.rogersusainc.com. Incorporating the break away feature into the base helps limit injury when a baseball or softball player slides into the base. The Applicant's goods relate to football and associated athletic training, not baseball or softball. As known, bases are not used in football competitions.

The rejection states in part that the "goods and/or services of the parties need not be identical or directly competitive to find a likelihood of confusion," and further that the goods "need only to be related in some manner" or have conditions surrounding their marketing such that they would be encountered by the "same purchasers" having the mistaken belief that the goods and/or services come from a "common source." In support of this position, the rejection cites, *inter alia*, *On-line Careline Inc. v. America Online Inc.*, 229 F.3d 1080, (Fed. Cir. 2000); *In re Melville Corp.*, 18 USPQ2d 1386, (TTAB 1991); and *In re Martin's Famous Pastry Shoppe, Inc.* 748 F. 2d 1565 (Fed. Cir. 1984). These cases, however, are clearly distinguishable from the instant case.

As an example, the court in *On-line* noted that the parties, which were internet users, were no more knowledgeable or sophisticated that the general public. Similarly, in *Melville Corp.* the consumers were noted as ordinary average consumers. In *Martin's*, the court noted that, due to the staple, relatively inexpensive products involved (bread and cheese), purchasers of such products are

held to a lesser standard of purchasing care. Thus, each of these cases involved purchasers that were general members of the public or purchasers held to an even lesser standard of care.

By contrast, the parties in the instant case certainly more sophisticated that the general public and have the have the knowledge to distinguish between the provided goods. Football coaches and football trainers are likely purchasers of the goods associated with the Applicant's mark. Conversely, the likely purchasers of the goods described in the '533 registration are baseball coaches, softball coaches, or persons interested in preventing injuries to a sliding baseball players. The purchasers of the goods described in the '533 registration would not look to football training equipment to help bases break away when impacted by a sliding baseball player. Similarly, football coaches would not purchase break-away bases to train football players. Careful selection and examination of the goods is critical for both types of goods, especially given the element of safety involved.

There is thus no likelihood of confusion because the goods are marketed to different types of sophisticated consumers. Confusion is in fact highly unlikely, at least because of the sophistication of the consumers who purchase Applicant's goods.

There is also no likelihood of confusion at least because the marks have been used concurrently without any evidence of actual confusion. The '533 registration asserts that the mark has been used since 1982. Furthermore, the Applicant's mark has been continually used since 1989. Accordingly, there has been almost two decades of concurrent use of the '533 registration and Applicant's mark, and the Applicant is not aware of any actual confusion among consumers. The previously submitted declaration from the Applicant's General Manager states that there has been no actual confusion. Concurrent use with no confusion is just one factor establishing that there is no likelihood of confusion between the Applicant's mark and the '533 registration.

GOODS AND/OR SERVICES SECTION (025)(current)	
INTERNATIONAL CLASS	025
DESCRIPTION	Apparel, namely, shirts, shorts, workout clothing
FILING BASIS	Section 1(a)
FIRST USE ANYWHERE DATE	At least as early as 01/31/1983
FIRST USE IN COMMERCE DATE	At least as early as 01/31/1983
GOODS AND/OR SERVICES SECTION (025)(proposed)	
INTERNATIONAL CLASS	025
DESCRIPTION	
Apparel, namely, shirts, shorts, workout clothing in the nature of T-shirts, athletic shorts, sweatshirts, sweatpants.	
FILING BASIS	Section 1(a)
FIRST USE ANYWHERE DATE	At least as early as 01/31/1983
FIRST USE IN COMMERCE DATE	At least as early as 01/31/1983
GOODS AND/OR SERVICES SECTION (028)(current)	

INTERNATIONAL CLASS	028
DESCRIPTION	
Athletic equipment, namely, football equipment; athletic training equipment namely, football training equipment, weight training equipment; storage units, namely, storage racks for athletic equipment, storage racks for athletic training equipment	
FILING BASIS	Section 1(a)
FIRST USE ANYWHERE DATE	At least as early as 01/31/1983
FIRST USE IN COMMERCE DATE	At least as early as 01/31/1983
GOODS AND/OR SERVICES SECTION (028)(proposed)	
INTERNATIONAL CLASS	028
DESCRIPTION	
Athletic equipment, namely, football equipment in the nature of goal posts, field pads, down-markers, boundary markers, officials' vests, stencils, tarps; athletic training equipment, namely, football training equipment in the nature of sleds, tackling simulators, chutes, blocking dummies, tackling dummies, tackling shields, agility apparatus, nets, mats, treadmills, footballs, hydration stations, weight training equipment in the nature of dumbbells, barbells, free weights, weight plates, benches, adjustable benches, bars, weight trees, dumbbell stands, barbell stands, resistance bands; storage units, namely, storage racks for athletic equipment, storage racks for athletic training equipment	
FILING BASIS	Section 1(a)
FIRST USE ANYWHERE DATE	At least as early as 01/31/1983
FIRST USE IN COMMERCE DATE	At least as early as 01/31/1983
SIGNATURE SECTION	
DECLARATION SIGNATURE	/Benjamin J. Coon/
SIGNATORY'S NAME	Benjamin J. Coon
SIGNATORY'S POSITION	Attorney of Record
DATE SIGNED	08/11/2008
RESPONSE SIGNATURE	/Benjamin J. Coon/
SIGNATORY'S NAME	Benjamin J. Coon
SIGNATORY'S POSITION	Attorney of Record
DATE SIGNED	08/11/2008
AUTHORIZED SIGNATORY	YES
CONCURRENT APPEAL NOTICE FILED	YES
FILING INFORMATION SECTION	
SUBMIT DATE	Mon Aug 11 13:43:38 EDT 2008

TEAS STAMP	USPTO/RFR-75.46.35.249-20 080811134338570162-771383 40-4305c10855a6574376b671 87753ebee0e7-N/A-N/A-2008 0811125703194067

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OMB No. 0651-0050 (Exp. 4/30/2009)

Request for Reconsideration after Final Action

To the Commissioner for Trademarks:

Application serial no. **77138340** has been amended as follows:

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

Likelihood of Confusion

The mark R ROGERS ATHLETIC COMPANY was rejected under Trademark Act §2(d), 15 U.S.C. §1052(d), because the Examiner held the mark, when used on or in connection with the identified goods, so resembles the mark in United States Registration No. 1277533 be likely to cause confusion, to cause mistake, or to deceive. Applicant respectfully disagrees and maintains that its mark as used in association with apparel (namely, shirts, shorts, workout clothing), athletic equipment (namely, football equipment), athletic training equipment (namely, football training equipment) and storage units (namely, storage racks) is not likely to be confused with the mark in the '533 registration.

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CLASSIFICATION AND LISTING OF GOODS/SERVICES
Applicant proposes to amend the following class of goods/services in the application:
Current: Class 025 for Apparel, namely, shirts, shorts, workout clothing
Original Filing Basis:
Filing Basis: Section 1(a), Use in Commerce: The applicant is using the mark in commerce, or the applicant's related company or licensee is using the mark in commerce, on or in connection with the identified goods and/or services. 15 U.S.C. Section 1051(a), as amended. The mark was first used at least as early as 01/31/1983 and first used in commerce at least as early as 01/31/1983, and is now in use in such commerce.

Proposed: Class 025 for Apparel, namely, shirts, shorts, workout clothing in the nature of T-shirts, athletic shorts, sweatshirts, sweatpants.
Filing Basis: Section 1(a), Use in Commerce: The applicant is using the mark in commerce, or the applicant's related company or licensee is using the mark in commerce, on or in connection with the identified goods and/or services. 15 U.S.C. Section 1051(a), as amended. The mark was first used at least as early as 01/31/1983 and first used in commerce at least as early as 01/31/1983, and is now in use in such commerce.
Applicant proposes to amend the following class of goods/services in the application:
Current: Class 028 for Athletic equipment, namely, football equipment; athletic training equipment namely, football training equipment, weight training equipment; storage units, namely, storage racks for athletic equipment, storage racks for athletic training equipment

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