

UNITED STATES PATENT AND TRADEMARK OFFICE

SERIAL NO: 79/016728

APPLICANT: Obschestvo s ogranichennoj; otvetstvenno ETC.

79016728

CORRESPONDENT ADDRESS:

O.V. Shterz
P.O. box 242
RU-630132 Novosibirsk RUSSIAN FED.

RETURN ADDRESS:

Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451

MARK: O2 FACTOR

CORRESPONDENT'S REFERENCE/DOCKET NO: N/A

CORRESPONDENT EMAIL ADDRESS:

Please provide in all correspondence:

1. Filing date, serial number, mark and applicant's name.
2. Date of this Office Action.
3. Examining Attorney's name and Law Office number.
4. Your telephone number and e-mail address.

OFFICE ACTION

RESPONSE TIME LIMIT: TO AVOID ABANDONMENT, THE OFFICE MUST RECEIVE A PROPER RESPONSE TO THIS OFFICE ACTION WITHIN 6 MONTHS OF THE MAILING OR E-MAILING DATE.

Serial Number 79/016728

INTERNATIONAL REGISTRATION NO. 0865886

This is a **PROVISIONAL FULL REFUSAL** of the trademark and/or service mark in the above-referenced U.S. application. 15 U.S.C. §1141h(c).

APPLICANT OR ATTORNEY CAN RESPOND TO PROVISIONAL REFUSAL:

Applicant may respond directly to this provisional refusal Office action, or applicant's attorney may respond on applicant's behalf.

NOTE: Attorneys hired to represent an applicant in a trademark matter before the Office must be eligible under 37 C.F.R. §10.14:

- (1) *Attorneys residing in the United States* who are in good standing with the bar of any United States court or the highest court of any state, may practice before the Office in trademark matters.
- (2) *A foreign attorney not residing in the United States* who is in good standing before the patent or trademark office of the country in which he or she resides, may practice before the Office in trademark matters only in cases where the patent and trademark office of that foreign country allows substantially reciprocal privileges to those permitted to practice before the Office. Currently, Canadian attorneys are the only foreign attorneys recognized as meeting this criterion. A foreign attorney who meets the requirements of 37 C.F.R. §10.14(c) can only represent parties located in the country in which the foreign attorney resides and practices. TMEP §602.

The Office cannot aid in the selection of an attorney. 37 C.F.R. §2.11.

If applicant is not represented by an attorney, applicant may appoint a domestic representative who would receive correspondence from the Office and be served process or notice of proceedings affecting the application. 15 U.S.C. §1141h(d); 37 C.F.R. §2.24.

THE APPLICATION HAS BEEN PROVISIONALLY REFUSED AS FOLLOWS:

The assigned examining attorney has reviewed the referenced application and determined the following.

LIKELIHOOD OF CONFUSION

The examining attorney refuses registration under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d), because the applicant's mark, when used on or in connection with the identified goods, so resembles the mark in U.S. Registration No. 2169405 as to be likely to cause confusion, or to cause mistake, or to deceive. TMEP section 1207. See the enclosed registration.

The examining attorney must analyze each case in two steps to determine whether there is a likelihood of confusion. First, the examining attorney must look at the marks themselves for similarities in appearance, sound, connotation and commercial impression. *In re E. I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). Second, the examining attorney must compare the goods or services to determine if they are related or if the activities surrounding their marketing are such that confusion as to origin is likely. *In re August Storck KG*, 218 USPQ 823 (TTAB 1983); *In re International Telephone and Telegraph Corp.*, 197 USPQ 910 (TTAB 1978); *Guardian Products Co., v. Scott Paper Co.*, 200 USPQ 738 (TTAB 1978).

The test of likelihood of confusion is not whether the marks can be distinguished when subjected to a side-by-side comparison. The issue is whether the marks create the same overall impression. *Visual Information Institute, Inc. v. Vicon Industries Inc.*, 209 USPQ 179 (TTAB 1980). The focus is on the recollection of the average purchaser who normally retains a general rather than specific impression of trademarks. *Chemetron Corp. v. Morris Coupling & Clamp Co.*, 203 USPQ 537 (TTAB 1979); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975); TMEP section 1207.01(b).

The examining attorney must look at the marks in their entireties under Section 2(d). Nevertheless, one feature of a mark may be recognized as more significant in creating a commercial impression. Greater weight is given to that dominant feature in determining whether there is a likelihood of confusion. *In re National Data Corp.*, 224 USPQ 749 (Fed. Cir. 1985); *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693 (CCPA 1976). *In re J.M. Originals Inc.*, 6 USPQ2d 1393 (TTAB 1988).

The applicant's mark in this case consists of the wording "O2 FACTOR." The registrant's mark in U.S. Registration No. 2169405 consists of the identical wording, "O2 FACTOR," presented in the same style in that the "2" is presented in subscript. The marks are identical in sound and nearly identical in appearance and as such create the same commercial impression.

If the marks of the respective parties are identical or highly similar, the examining attorney must consider the commercial relationship between the goods or services of the respective parties carefully to determine whether there is a likelihood of confusion. *In re Concordia International Forwarding Corp.*, 222 USPQ 355 (TTAB 1983).

The goods or services of the parties need not be identical or directly competitive to find a likelihood of confusion. They need only be related in some manner, or the conditions surrounding their marketing be such, that they could be encountered by the same purchasers under circumstances that could give rise to the mistaken belief that the goods or services come from a common source. *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); *In re Corning Glass Works*, 229 USPQ 65 (TTAB 1985); *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984); *Guardian Products Co., Inc. v. Scott Paper Co.*, 200 USPQ 738 (TTAB 1978); *In re International Telephone & Telegraph Corp.*, 197 USPQ 910 (TTAB 1978).

It is well settled that the issue of likelihood of confusion between marks must be determined on the basis of the goods or services as they are identified in the application and the registration. *Canadian Imperial Bank of Commerce v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987); *Paula Payne Products Co. v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76 (CCPA 1973). Since the identification of the applicant's goods is very broad, it is presumed that the application encompasses all goods of the type described, including those in the registrant's more specific identification, that they move in all normal channels of trade and that they are available for all potential customers.

The examining attorney must resolve any doubt regarding a likelihood of confusion in favor of the prior registrant. *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir., 1988).

APPLICANT MAY RESPOND

Although the examining attorney has refused registration, the applicant may respond to the refusal to register by submitting evidence and arguments in support of registration. If the applicant chooses to respond to the refusal to register, the applicant must also respond to the following requirements.

STANDARD CHARACTER CLAIM MUST BE DELETED

Applicant has submitted a special form drawing and must delete the standard character claim from the application. 37 C.F.R. §2.52(b). An applicant can make a standard character claim only if the mark on the drawing is presented without any claim to a particular font style, size or color. In the present case, the standard character claim is inappropriate because the drawing includes the number “2” in subscript.

In a standard character drawing, the mark on the drawing consists of only words, letters or numbers, but does not include any designs or claims as to particular font style, size, or color. A registration for a mark using a standard character drawing affords protection not only for the standard character version of the mark, but for any possible renderings of the mark, as long as those renderings do not contain any design elements; i.e., a registered standard character drawing of the mark gives protection for display on the specimens in any lettering style. A special-form drawing, on the other hand, shows the mark in stylized letters and/or with a design element and provides protection for only that specific rendering. 37 C.F.R. §2.52; Exam Guide 01-03, section I; *See* TMEP §§807.06 *et seq.* and TMEP §807.07 *et seq.*

APPLICANT’S ENTITY TYPE/COUNTRY OF ORGANIZATION

Applicant must specify its entity type and citizenship. For example, an applicant can apply as an individual, a partnership, a corporation or a joint venture. 37 C.F.R. §2.32(a)(3); TMEP §§803.03 *et seq.* If applicant is an individual, then applicant must indicate his or her national citizenship for the record. 37 C.F.R. §2.32(a)(3)(i). If applicant is a corporation or association, then applicant must set forth the U.S. state or country (for foreign applicants only) under whose laws applicant is organized. 37 C.F.R. §2.32(a)(3)(ii). If applicant is a partnership or joint venture, then applicant must list the names and the national citizenship or the U.S. state or country (for foreign applicants only) of organization or incorporation of all the general partners or joint venturers, as well as specify the state or country under whose laws the partnership or joint venture is organized. 37 C.F.R. §§2.32(a)(3)(ii) and (iii).

AMENDED IDENTIFICATION REQUIRED

Applicant must clarify the identification of goods to specify the common commercial or generic name for the goods. If there is no common commercial or generic name, then applicant must describe the product and intended consumer as well as its main purpose and intended uses. In addition, the applicant must specify the conditions or illnesses which pharmaceutical preparations remedy, e.g., angina, diabetes. TMEP §1402.01.

For assistance with identifying goods and/or services in trademark applications, please see the online searchable *Manual of Acceptable Identifications of Goods and Services* at <http://tess2.uspto.gov/netahtml/tidm.html>.

Please note that, while the identification of goods and services may be amended to clarify or limit the goods and services, adding to or broadening the scope of the goods and services is not permitted. 37 C.F.R. §2.71(a); TMEP §1402.06. Therefore, applicant may not amend the identification to include goods or services that are not within the scope of the goods and services set forth in the present identification.

The international classification of goods and/or services in applications filed under Trademark Act Section 66(a) cannot be changed from the classification given to the goods and/or services by the International Bureau of the World Intellectual Property Organization in the corresponding international registration. TMEP §§1401.03(d), 1401.04 and 1904.02(b).

The applicant may adopt the following identification of goods in International Class 5, if accurate:

Processed albuminous food adapted for medical purposes; pharmaceutical preparations containing albumen for the treatment of viral infections; antiseptics; bacterial preparations for medical and veterinary use; analgesic balms for medical purposes; biocides; biological preparations for medical purposes; biocides; biological preparations for medical purposes; dietetic bread adapted for medical use by diabetics; dietetic beverages adapted for medical use; dietetic foods adapted for medical use; dietetic processed foods adapted for medical use; pharmaceutical preparations for use in aiding digestion; disinfectants for hygiene purposes; ferments for pharmaceutical purposes; food for babies; fumigating incense sticks; germicides; herbs teas for medicinal purposes; lacteal flour adapted for use as baby food; liniments; medicated skin lotions for pharmaceutical purposes; medicinal herbs in dried or preserved form; herbal infusions for medicinal purposes; herbal mud packs for medicinal purposes; medicinal castor oils; herbal roots for medicinal purposes; mineral food-supplements; medicated mouthwashes for medical purposes; pharmaceutical preparations for the treatment

of nerve disorders; nutritional additives for use in food for medical purposes; organotherapy pharmaceutical preparations for the treatment of skin disorders; pharmaceutical preparations for skin care; pharmaceutical preparations for treating dandruff; pharmaceutical preparations composed of trace elements for human and animal use to treat skin conditions; pharmaceutical preparation remedies for perspiration; sanitary towels used as sanitizing wipes; sea water for medicinal bathing; medicated serums for use in treating skin conditions; styptic pencils; medicated therapeutic preparations for the bath for medical purposes; tissues impregnated with pharmaceutical lotions to treat skin conditions; medicated tonics to treat digestive problems; and multi-vitamin preparations.

DISCLAIMER REQUIRED

The applicant must disclaim the descriptive wording “O2” apart from the mark as shown. Trademark Act Section 6, 15 U.S.C. §1056; TMEP §§1213 and 1213.03(a). The wording is merely descriptive because it is the acronym for “oxygen,” an active ingredient or byproduct of the applicant’s goods.

Trademark Act Section 6(a), 15 U.S.C. §1056(a), permits the Office to require a disclaimer of an unregistrable component of a mark. Trademark Act Section 2(e), 15 U.S.C. §1052(e), bars the registration of a mark which is merely descriptive or deceptively misdescriptive, or primarily geographically descriptive of the goods. Therefore, the examining attorney may require the disclaimer of a portion of a mark which, when used in connection with the goods or services, is merely descriptive or deceptively misdescriptive, or primarily geographically descriptive. If an applicant does not comply with a disclaimer requirement, the examining attorney may refuse registration of the entire mark. TMEP §1213.01(b).

The computerized printing format for the *Trademark Official Gazette* requires a standard form for a disclaimer. TMEP §1213.08(a)(i). A properly worded disclaimer should read as follows:

No claim is made to the exclusive right to use “O2” apart from the mark as shown.

See In re Owatonna Tool Co., 231 USPQ 493 (Comm’r Pats. 1983).

RESPONSE GUIDELINES

No set form is required for response to this Office action. The applicant must respond to each point raised. The applicant should simply set forth the required changes or statements and request that the Office enter them. The applicant must sign the response. In addition to the identifying information required at the beginning of this letter, the applicant should provide a telephone number to speed up further processing.

Pursuant to the restrictions set forth above, applicant may wish to hire a specialist attorney to assist in prosecuting this application because of the technicalities involved. The Office cannot aid in the selection of a trademark attorney. 37 C.F.R. §2.11. Applicant may wish to consult the Yellow Pages for a listing of attorneys specializing in trademark or intellectual property law, or seek guidance from its local Bar Association attorney-referral service.

If the applicant’s has questions regarding the status of the application, the Trademark Applications and Registrations Retrieval (TARR) database on the USPTO website at <http://tarr.uspto.gov> provides detailed, up to the minute information about the status and prosecution history of trademark applications and registrations. Please note that an application serial number or registration number is needed to be able to access this database. TARR is available 24 hours a day, 7 days a week.

If the applicant has any questions or needs assistance in responding to this Office action, please telephone the assigned examining attorney.

/Verna Beth Ririe/
 Trademark Attorney
 Law Office 104
 (571) 272-9310
 (571) 273-9104 (office fax)

HOW TO RESPOND TO THIS OFFICE ACTION:

- ONLINE RESPONSE: You may respond formally using the Office’s Trademark Electronic Application System

(TEAS) Response to Office Action form (visit <http://www.uspto.gov/teas/index.html> and follow the instructions, but if the Office Action has been issued via email, you must wait 72 hours after receipt of the Office Action to respond via TEAS).

- **REGULAR MAIL RESPONSE:** To respond by regular mail, your response should be sent to the mailing return address above and include the serial number, law office number and examining attorney's name in your response.

STATUS OF APPLICATION: To check the status of your application, visit the Office's Trademark Applications and Registrations Retrieval (TARR) system at <http://tarr.uspto.gov>.

VIEW APPLICATION DOCUMENTS ONLINE: Documents in the electronic file for pending applications can be viewed and downloaded online at <http://portal.uspto.gov/external/portal/tow>.

GENERAL TRADEMARK INFORMATION: For general information about trademarks, please visit the Office's website at <http://www.uspto.gov/main/trademarks.htm>

FOR INQUIRIES OR QUESTIONS ABOUT THIS OFFICE ACTION, PLEASE CONTACT THE ASSIGNED EXAMINING ATTORNEY SPECIFIED ABOVE.

Print: Nov 22, 2005

75288139

DESIGN MARK

Serial Number
75288139

Status
SECTION 8 & 15-ACCEPTED AND ACKNOWLEDGED

Word Mark
O2 FACTOR

Standard Character Mark
No

Registration Number
2169405

Date Registered
1998/08/30

Type of Mark
TRADEMARK

Register
PRINCIPAL

Mark Drawing Code
(S) WORDS, LETTERS, AND/OR NUMBERS IN STYLIZED FORM

Owner
BIO-ENERGY SYSTEMS, INC. CORPORATION MONTANA 157 North Meridian, Suite
105 Kalispell MONTANA 59901

Goods/Services
Class Status -- ACTIVE. IC 005. US 006 018 044 046 051 052. G & S:
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Examining Attorney
SARAI, BALDEV

Attorney of Record
ANTOINETTE M. TEASE

O₂ FACTOR

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Option

exact acronym

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Acronym	Meaning
O2	Object Oriented
O2	Oxygen



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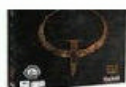
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