

ECCENTRIC TRADE-MARKS

SMELLS AND BELLS GROOVES AND MOVES

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INTRODUCTION.

The internationalization of trade and the advent of the Internet have resulted in the adoption by traders and service providers of a wide variety of distinguishing symbols in association with wares and services in the international market place. Recently, the panoply of word and design marks which form the central core of most Trade-mark Registers around the world, have been joined by a series of more eccentric distinguishing symbols in the form of sounds, fragrances and animated

or moving images. The registration of such marks in a number of countries, as well as in the European Union, raises the issue of whether Canada can, in the long run, deny the registrability of such marks, in view of its treaty obligations, not to mention the practical exigencies which we face as a trading nation.

The primary issues which arise concerning these marks both here in Canada and in other countries relate to whether these atypical distinguishing symbols are trade-marks as defined in statute and jurisprudence, whether such marks are capable of being “used” within the meaning of that word as defined in most trade-mark statutes and how these marks are to be represented on the Trademark Register, in order to permit searching and examination. In the Canadian context, the issues raised fall into two categories: (1) the legislative issue as to whether such marks, even if they do in fact distinguish the wares and services of one party from those of others, fall within the definition of a trade-mark under Canadian legislation, and, (2) whether from a practical point of view such marks are capable of being used as trade-marks given the definition of “use” in section 4 of the *Trade-Marks Act*.

This paper will explore these issues within the Canadian context. It will also explore how those same issues have been addressed in jurisdictions where atypical marks have been registered. Representative lists of some of the atypical trade-marks registered or applied for in the United States are attached as Schedules to this paper for purposes of illustration.

THE REGISTRATION OF ATYPICAL MARKS IN OTHER JURISDICTIONS.

Sound marks.

Distinctive sound marks have now been registered in a number of countries, including a single registration in Canada. We will examine how the United States, deals with such marks, as well as referring to marks registered in a number of European countries and Australia.

In the United States, section 45 of the *Lanham Act* indicates that a mark may include “ any word, name, symbol or device, or any combination thereof... used by a person, or which a person has an intention to use in order to identify his or her goods...from those manufactured and sold by others and to indicate the source of the goods.”¹ This formulation has been held to include any form of atypical symbols, such as colour, smell or sound as long as they convey a message to the consumer. The way that such a mark is filed in the U.S. is described in the section 1301.02(d) of the Trademark Manual of Examination Procedure (TMEP):

“A sound mark identifies and distinguishes services through audio rather than visual means. Examples include : (1) a series of tones or musical notes with or without words , and (2) a word or words accompanied by music. The requirement for a drawing does not apply to sound marks... but in such a case the application must contain an adequate description of the mark”² On application, an applicant may submit either a score or audiocassettes. ³

There is a substantial range of sound marks registered in the United States, including the Pillsbury Giggle (Registration No. 2692077), a “ringing cash register sound” owned by EasyTel Corporation(Registration No. 2685358), a “Loon Cry” , owned by G. & S. Lottery Services, (Registration No. 260115), the “blowing kiss” (Registration No.2524758), the YAHOO Yodel (Registration No. 2442140) the Tarzan Yell (Registration No. 2210506), the Howling Wolf cry owned by Anheuser Busch (Registration No. 2207874), the NBC Chimes (Registration No. 523616) and the famous MGM Lion Roar (Registration No. 1393550.)

A list of some of the registered and applied for trade marks for sound marks in the U.S, is attached as Schedule A to this paper. As can be noted, sound marks cover a wide range of wares and services, from pastry to sporting equipment; from entertainment and computer and INTERNET services to construction and financial services.

The necessity for accurate searching in reference to these marks, has resulted in descriptions of the trade-marks which go from the simple description of a sound which would be immediately familiar to anyone, such as : “the impact sound of a tennis ball on a tennis racket”⁴ or “ the sound of a childlike human giggle”⁵, to elaborate descriptions featuring musical notation, tempo and time signatures.

The registration of sound marks are also commonplace in other jurisdictions. In Europe, the Office For Harmonization in the International Market (OHIM) specifically accepts that a trade-mark may include a sound mark.⁶ Most European countries have registered such marks as national marks. For example, Germany has registered a number of jingles by AT&T, Deutsche Telekom and Nokia. In the UK, trademark registrations have been obtained for the “sound of a barking dog” in association with paints and varnishes by ICI, and the “sound of speaking clock” registered by British Telecom , as well as an advertising jingle owned by Reckitt Coleman.

In Australia, Pacific Dunlop Limited has registered a sound which imitates a spring reverberating on metal for use in association with floor coverings and underlay. (Registration No. 738848). McCain Foods (Aust) Ltd registered a “Ping” sound in the context of the slogan “ Ah! McCain (PING) You’ve done it again ”, in association with frozen foods (Registration No. 75907).

As is clear, a number of countries have accepted the potential of sound to act as a distinguishing symbol in the commercial context and thus the possibility of the registration and use of sounds as trade-marks. However, providing an adequate description of the “sound” on the register page, in order to permit searching, can pose a challenge. For example, the following description, which is far from being the most complex description of record, appears in reference to a sound mark registered in the United States in association with telecommunications services:

“ The mark is a sound mark consisting of three musical notes - Treble notes B-Flat one octave above middle C, followed by an F, and then to an E-Flat note above middle C. The tones are synthesized portamento feature slightly sliding the notes into and towards each other, with a slight addition of delay and reverb throughout.”⁷

Animation trade marks.

The jurisdiction in which most registrations for “moving” or “animation” trade marks have been obtained is the United States. However the registration of such marks requires that distinctiveness be established prior to registration. It is also necessary to provide a clear description of the trade-mark for examination purposes. It is also essential to establish that the sequence is a single trade-mark and not two or more views, otherwise the application will run afoul of the provisions of sections 1 and 45 of the *Lanham Act*, on the ground that the application seeks registration of more than one trade mark. ⁸

The animation marks, like the sound marks registered in the United States cover a very wide range of wares and services, such as pharmaceutical preparations, medical apparatus and instruments, as well as computer software, entertainment services, telecommunications services, advertising services and even postal services. A listing of some of the animation marks currently registered or applied for in the U. S is attached as Schedule B to this paper.

The registered marks include the Netscape planetary and meteorites mark (Registration No. 2,077,148), an animated sequence of a dot moving counterclockwise into the letter C (Registration No. 2,587,561), and a pair of stylized eyes moving horizontally back and forth (Registration No. 2,490,649). Each of the registrations and applications contain quite detailed descriptions of the animated sequences which are claimed as distinctive elements.

The only other animation mark which we were able to find in a jurisdiction other than the United States is a registration in Denmark for the word VENDLET and a “ pair of waving feet”, in association with “hospital beds” and owned by H.C. Equipment ApS. The mark can be seen at www.vendlet.dk .

Fragrance marks.

The registrability of fragrance marks, in the jurisdictions in which such marks are accepted as trade-marks often turns on the issues of functionality. The United States registers such marks only where the scent is used in a non-functional way. In other words, scents such as perfumes would be regarded as functional and are unregistrable⁹. Provided the scent is not functional, it may be registered on the Principal Register or on the Supplemental Register¹⁰. In practice, however, since the decision of the U.S. Supreme Court in *Qualifex Co. v. Jacobson Products Co.*¹¹ which imposed a requirement to establish secondary meaning, olfactory marks have usually been registered on the Supplemental Register. One mark which was registered on the principal Register was Registration No. 1 639 128 for a mark described as “a high impact, fresh floral scent reminiscent of plumeria blossoms” for use in association with thread and yarn. In 1997, this registration was cancelled for failure to provide evidence of use under Section 8¹². There is also a Principal Register recordal for a “cherry scent” for use in association with synthetic lubricants, for high

performance racing and recreational vehicles.¹³ There are also two registrations on the Supplemental Register, covering fruit scents used in association with cutting oils and lubricants and cleaning products¹⁴.

However registrations for “scent” marks are far less frequent than sound marks, because of the strong requirement for establishing “secondary meaning”. It has further been held that the quality and amount of evidence required to establish that a scent or fragrance acts as a trademark is substantial¹⁵.

In Europe, OHIM has recognized that olfactory marks are registrable. However, given the specific reference in its enabling statute to the necessity of graphic representation for community trademarks, OHIM has grappled with the difficulty of defining “scents” in graphic terms. In 1999, the issue arose as to whether a trade-mark defined as the “scent of fresh cut grass” could be registered in association with tennis rackets. The application was originally refused on the grounds that the words “scent of fresh-cut grass” was not an adequate graphic representation as required under Article 4 of the Community Trademark Regulation¹⁶. However on appeal, the Board of Appeal held that “fresh cup grass” is a scent which would be recognized by the average person, and that the description was therefore adequate to sustain registration.¹⁷

In 2001, OHIM again had occasion to address the issue of the graphic representation of a fragrance in reference to the scent of raspberries in association with a motor oil. While the Office held that the mark was not registrable, since distinctiveness had not been established, it did consider that the wording “the smell of raspberries” qualified as adequate graphical representation to sustain CTM protection.¹⁸ However the European Court of Justice has adopted a more

conservative approach. In a case involving a mark described as “ a fruity balsamic scent with delicate hints of cinnamon”, and in which the Applicant had provided a chemical formula, the Advocate General of the Court held that olfactory marks cannot be registered until an adequate means of graphic representation is found for such marks¹⁹.

One jurisdiction in which scent marks seem to be very welcome is Australia, which amended its Trade-marks Act in 1995 to specifically include sounds, tastes and scents within the definition of a trademark. An example of a “scent” mark which has been registered in Australia is a mark owned by Unicorn Products Limited for a trade mark which is defined as “ the strong smell of beer “ The mark is used on “flights for darts” and is registered under Registration No. 70019. The said trade mark is also registered in the UK, under Registration No. 2000234. Another “scent” mark which has been registered in the UK is Registration No.2001416 for a mark described as “ a floral fragrance/smell re roses applied to tyres”.

However, although such marks have been registered in a number of jurisdictions, they are relatively rare since any application for a scent mark must still include an exact verbal description of the “scent”. This is a relatively simple process when dealing with easily identified scents such as fruit fragrances like lemon or strawberries. However the task is somewhat more difficult when dealing with complex or compound scents. A description which includes terminology like “a hint of and a soupçon of” is not sufficiently precise for clear identification.

In short, the registration of scent marks tends to founder on the necessity of precise graphic representation required in order to ensure accurate search capabilities, where there is no recognizable olfactory descriptive scale. In this regard, there is apparently a recent technological

breakthrough in computer-generated scent recognition technology. Since many trade-mark searches are now done on the computer in any event, it may ultimately be possible to file applications in which the description corresponds to this new “nose-technology”²⁰

ATYPICAL MARKS IN CANADA.

For the moment, no scent or moving image marks have been registered in Canada, nor do there seem to be any applications of record. One “sound” mark has been registered, namely Registration No. 359,318 owned by Capital Records, and used in association with “phonograph records, audio and video tapes and cassettes and motion picture film as well as professional electronic and engineering services. The register page bears a music stave with a series of 11 notes, covering 4 octaves. There are also a number of pending applications for “sound” marks. A list of these trade-marks is attached to this paper as Schedule C. However the Trade-Marks Office is presently of the view that the mark owned by Capital Records was registered in error, and that the “sound” marks which are currently pending before the Office are not registrable, since they are not visual symbols. The Office is also of the view that “scent” marks are unregistrable, since they are incapable of visual representation. The Office has adopted this interpretation concerning “sound” and “scent” trade-marks, on the basis of the decision of Pinard J. in *Playboy Enterprises Inc. v. Germain (No. 1)*²¹. However, it is arguable that the Office’s interpretation is unduly restrictive. In his decision Pinard J. did not state that only visual elements qualify as trade-marks, he merely stated that a mark must be capable of visual representation and that the use of a purely verbal description does not constitute trade-mark use within the meaning of the *Trade-marks Act*.²² In addition, the issue before the Court in that case, was not registrability or the definition of a trade mark, but rather whether the use of the trade-mark over the telephone constituted use in association with wares.

In reference to “animation” marks, the Office considers such marks to be unregistrable, because the multiplicity of images within an animated sequence is not one trade-mark but several and is therefore in contravention of section 30 of the Act.

The questions which arise, in view of the registration of atypical marks in other jurisdictions, is whether Canadian legislation, in fact bars the registration of such marks and whether the strict position adopted by the Office potentially places Canada in breach of its treaty obligations.

To place these issues in their proper international context, it is useful to now consider them in relation to the definition of trade-marks and the approach to trade-mark registrability and protection mandated by the treaties to which Canada is an adherent.

Trade-marks and the treaties.

There are three major treaties to which Canada has adhered which specifically affect the law of trade-marks, they are the *Paris Convention*, the *North American Free Trade Agreement*, (hereinafter *NAFTA*) and the *Trade Related Aspects of Intellectual Property Rights* or *TRIPPS* Agreement. They are important since the *Trade-marks Act* is deemed to be in compliance with these treaties and because they set out Canada’s multilateral obligations for the protection of the trade-marks registered in other countries of the Union.

What is a trade-mark ?

On the issue of what constitutes a trade-mark, both *TRIPPS* and *NAFTA* refer to the concept of a “sign” and the fundamental issue of “distinctiveness”. The *Paris Convention* does not contain a specific definition of a trade-mark . The *TRIPPS Agreement* defines a trademark as “any sign or

combination of signs, capable of distinguishing the goods and services of one undertaking from those of other undertakings”²³. *NAFTA* defines a trademark as “ any sign or any combination of signs capable of distinguishing the goods and services of one person from those of another”²⁴ These definitions are obviously broad enough to encompass scent, sound or animation marks. However the treaties do provide that a Party may require that, to be registrable, a mark be visually perceptible.²⁵ It is interesting to note that article 4 of the Community Trademark Regulation which governs CTM registrability defines a trade mark in the following terms:

“A community trade mark may consist of any sign capable of being represented graphically, particularly words, including personal names, designs, letters, numerals, the shape of goods or their packaging, provided that such signs are capable of distinguishing the goods or services one undertaking from those of other undertakings.”²⁶

The Office for Harmonization in the Internal Market (OHIM) has accepted both sound and scent marks for registration in the European Community pursuant to Article 4, provided that such marks can be represented in graphic form.

Canadian legislation, which is deemed to be in compliance with both *TRIPPS* and *NAFTA* defines a trade-mark as: “a mark that is used by a person for the purpose of distinguishing or so as to distinguish wares or services, manufactured, sold, leased, hired, or performed by him from those manufactured, sold, leased, hired or performed by others”²⁷. The French rendering of the definition uses the word “*marque*”. The issue is thus whether the word “mark/*marque*” means a purely visual symbol or simply one which can be expressed in visual terms.

The definition of the word “mark” in Webster’s Dictionary is very broad and includes:

- 1) visible trace or impression on a surface, line or dot or distinctive feature produced by drawing, colouring, stamping, etc.,
- 2) a sign, symbol or indication specifically a printed or written sign or stroke,
- 3) a brand, label, seal, tag, etc., put on the article to show the owner, maker, etc.,
- 4) a sign or indication of some quality or character.²⁸

The Oxford Dictionary defines the word “mark” as “ a sign or indication”.²⁹ The word “sign” is defined in the same dictionary, as: “a signal conveying information or instruction”.³⁰

There is thus nothing in the wording of the definition of a trade-mark in the *Trade-marks Act* that would necessarily preclude the registrability of scents, sounds or animated images as trade-marks. The position adopted by the Office is not based on legislative provisions, but rather purely on the interpretation of one judicial pronouncement in a case which did not address issues of registrability or what constitutes a trade-mark. If any given atypical mark distinguishes, in fact, the wares and services of its owner from those of others, then it is a trade-mark pursuant to the Act and should be treated as such. The issue of trademark use is more troublesome.

Are atypical marks capable of being used as trade-marks in Canada?

The provisions of section 4 of the Act with its requirement that the mark be associated with the wares at the time of transfer in possession of the wares³¹, may indeed raise some difficulties in reference to atypical marks, particularly with sound and fragrance marks. For example, when purchasing a videotape of a film produced by MGM, one would not hear the “lion’s roar” at the cash register. However, the wares or the packaging could bear the sound image of the roar. When purchasing a scented product the fragrance might not be perceptible, until the product is in use.

There is less problem in association with services where a sound or a fragrance can more easily accompany the services as they are advertised or performed. However, these difficulties are not insuperable. For example, in the case of scents, one could use a “scratch and sniff” card attached to the wares. Alternatively section 4 of the Act could be interpreted more broadly to include a distinctive scent which is released as the wares are used. The scent would thus be inherently present within the wares at the time of the transfer in the possession of the wares, but would be perceptively present only when the wares were in use. Similarly in the case of a sound mark, provided the sound was perceptible on use of the wares, it could still be considered to be “associated” with the wares, as required by the provisions of the Act. After all, there are instances in which products are packaged at the time of sale in such a way that the trade-mark is not visible, even though it may be imprinted on the wares. We have no difficulty under those circumstances in recognizing that the trade-mark is in use. Why must it necessarily be different, simply because the nature of the mark is novel?

In the case of a mark constituted by a moving image, the animated image can be used during the course of the advertisement or performance of the services. For example in at least one decision, the Federal Court of Canada has held that the use of an animated image of the element “007” in the opening credits of a motion picture constituted use of that trade mark³² in association with entertainment services. In order to establish use in association with wares, a small holograph of the image could be used on the wrapping or packaging or on the wares themselves to sustain use. These are simply suggestions. The issue of use, like all other factual issues must be regarded flexibly and creatively and should not be used as a device to limit registrability.

Use is not a prerequisite to registrability.

As indicated previously, the issue of use should not be regarded as central to the issue of registrability. The Act does not require use of the trade-mark in Canada prior to registration. A mark may be registered on the basis of “making known” or “use and registration abroad”³³. The issue of “use” is a factual question which will have an impact on whether the registration can ultimately be maintained, but should not preclude the possibility of registration, simply because the mark is not amenable to use in the usual way. The saving provisions in section 4 that the mark may “in some other manner be associated with the wares and services” can be interpreted generously to permit inclusion of these marks on the Register. In addition, given that such marks have been registered in other countries, Canada’s treaty obligations come into play.

Does Canada have an obligation to permit registration of atypical trade-marks registered abroad?

There is an issue as to whether atypical marks must be regarded as registrable in Canada, in view of this country’s obligations, under the *Paris Convention*. Article 6quinquies of the Convention states as follows:

“Every trade-mark duly registered in the country of origin shall be accepted for filing and protected as is in the other countries of the Union subject to the reservations indicated in this article. Such countries may before proceeding to file registration, require the production of the Certificate of Registration in the country of origin issued by the competent authority. No authentication shall be required for this certificate.”³⁴

The only reservation set out in the article is that the conditions for the filing and registration of trade-marks shall be determined in each country of the Union by its domestic legislation³⁵.

Article 6 quinquies goes on to indicate that trade-marks covered under this article may be neither denied registration nor invalidated except in three specific cases:

a) Where they are such as to infringe rights acquired by third parties in the country where protection is claimed,

b) Where they are devoid of distinctive character or consist exclusively of signs of indication which may serve to designate the kind, quality, quantity, intended purpose, place of origin of the goods or have become customary or;

c) where they are contrary to morality and public order or such as to deceive the public³⁶.

In reference to this latter provision, it is further stated that a mark may not be considered “contrary to public order” for the sole reason that it does not conform to a provision of the legislation on marks except if such provision itself relates to public order³⁷.

There is nothing in Canadian legislation which necessarily requires that a mark be a “visual” symbol in order to be registrable. As such this country’s treaty obligations would seem to mandate the registration of such marks on the basis of use and registration in another country of the Union, if not on any other basis.

Conclusion.

In addition to its existing treaty obligations, it is also in Canada’s interests as a trading nation to be in step with its major trading partners. The evolution of technology has resulted in far greater scope for the creation of distinctive albeit atypical symbols. If such symbols fall within the definition of a trade-mark, that is, if they distinguish the wares and services of one party from those of others, then they should be given the full range of protection available to any other trade-mark. The advances in technology which have spawned the creation of atypical trade-marks, can also be used to facilitate their recognition and description for purposes of searching and registration. There is

no reason, given the fact that most searches are now conducted online, that we cannot devise a classification system for “ sounds” and “scents” akin to the *Vienna Classification* of figurative elements.

The purpose of our legislation is to recognize and protect existing rights, not to preclude such protection on technical grounds. The exigencies of our active participation in the international marketplace requires no less.

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ENDNOTES.

1. *Lanham Act* (15 USC), section 45.
2. *TMEP*, section 1301.02(d).
3. 37 C.F.R. section 2.58(b).
4. USPTO, Trademark Application No. 78182342.
5. USPTO, Trademark Registration No. 2692077.
6. OHIM website, FQAQ, 1.7, <http://www.ohmi.eu.int/en/mark/marque/faq/faq01.htm>.
7. USPTO, Trademark Registration No. 2573581
8. *Lanham Act*, (15 USC) sections 1 and 45; *TMEP*, Article 1202.14
9. *TMEP*, Article 1202.13.
10. *Ibid*.
11. 514 U.S. 159 (1995)
12. USPTO, Trademark Registration No. 1,639,128.
13. USPTO, Trademark Registration No. 2,463,004
14. USPTO, Trademark Registrations, Nos. 2,568,512, and 2,644,707

15. *In re Owens-Corning Fibreglass Corp.*, 774 F.2d 1116, 227.
16. *Council Regulation*, No. 40/94 of 20.12.1993, Article 4.
17. *Vernootschap Onder Firma Senta Aromatic Marketing's Application*, Feb 11, 1999, case R156/1998-2
18. *Myles Ltd. Application*, December 5, 2001, case R711/1999-3
19. *Ralf Sieckmann v. Deutsches Patentund Marknamt*. November 5, 2001, case C273/00.
20. *Now you can smell it -Online*, *News in Science*, www.abc.net, April 18, 2001.
21. *Playboy Enterprises Inc. v. Germain (No.1)* (1987), 16 CPR (3d) 517 at 522 (FCTD)
22. *Ibid.*
23. *TRIPPS*, Article 15.
24. *NAFTA*, Article 1708(1)
25. *TRIPPS*, Article 15; *NAFTA*, Article 1708(1)
26. *Council Regulation No 40/94* of 20.12.1993, Article 4.
27. Section 2, *Trade-marks Act*, RSC 1985, C-T13 as amended.
28. *Webster's Random House Unabridged Dictionary*, Second Edition, New York Random House, 1998).
29. *Concise Oxford English Dictionary*, 10th Edition, (Oxford: Oxford University Press , 2002), p. 872
30. *Ibid.* p.1334
31. *Trade-marks Act*, section 4(1).
32. *Danjaq,S.A v. Zervas*, (1997) 75 C.P.R. (3d) 295 at 300 (FCTD)
33. *Trademarks Act*, section 30(c) and (d).
34. *Paris Convention Treaty* [Stockholm Revision July 14, 1967], Article 6quinquies A(1)
35. *Ibid.* Article 6(1)
36. *Ibid.* Article 6quinquies B(1),(2),(3).

37. Ibid.

Schedule "A"

SOUND MARKS REGISTERED AND APPLIED FOR IN THE U.S.

Registered Sound Marks

| <i>Trade-mark</i> | <i>Registration No.</i> | <i>Owner</i> | <i>Description of Mark</i> | <i>Wares/Services</i> |
|-------------------|-------------------------|--|---|--|
| Sound Mark | 2433852 | Hisamitsu Pharmaceutical Co., Inc. | The mark consists of the word "HISAMITSU" sung over the sound of four musical tones, E, A, E and F sharp. The first three notes being quarter notes and the final note being a tied quarter and half note | Medicated transdermal patches, plasters, pads, gels and sprays |

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|------------|---------|--|--|--|
| Sound Mark | 3685338 | Easy Tel Corporation Nevada | The mark is the sound of a ringing cash register | Notification service that funds have been deposited into recipient's account |
| Sound Mark | 2337719 | America Online, Inc. | The mark consists of the sound of a human voice speaking "HELLO AND WELCOME TO MOVIEFONE". | Telephone movie directory services and promoting the services of the movie industry, Providing multiple-user access to proprietary computer network and a computer information network, Providing movie schedule and location information by means of interactive telephone and prerecorded messages |
| Sound Mark | 2607415 | American Family of Assurance Company of Columbus | The mark consists of the sound of a duck quacking the word "AFLAC". | Insurance underwriting services in the fields of dental, health, life, cancer, hospital intensive care, accident and disability, hospital indemnity. |

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|------------|---------|--|--|---|
| Sound Mark | 2600195 | Minnesota State Lottery Agency STATE AGENCY MINNESOTA | The mark is the sound of a wild loon provided in one or more short bursts, at the end of an oral presentation advertising the lottery services on radio or television | Lottery Services |
| Sound Mark | 2573581 | SureWest Communications CORPORATION CALIFORNIA | The mark is a Sound Mark consisting of three musical notes - Treble notes B-Flat on octave above middle C. The tones are synthesized using a portamento feature slightly sliding the notes into and towards each other, with a slight addition of delay and reverb throughout. | Telecommunication network design |
| Sound Mark | 2524758 | Heritage Siding & Windows L.L.C. | The mark consists of the sound of a kiss made when, for example, one is "blowing a kiss" to another person, as exemplified in the sound recording included in this Application | Commercial and residential building construction; building repair; installation of siding |

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|------------|---------|--|--|--|
| Sound Mark | 2413729 | NOKIA CORPORATION CORPORATION FINLAND | The mark is a distinctive sound comprised of the following musical notes: e, d, f sharp, g sharp, c sharp, b,d,e,b,a,c sharp, e, a | A wide range of communication equipment; Advertising; Telecommunication services |
| Sound Mark | 2519203 | Pillsbury Company | The mark is the sound of deep, male, human-like voice saying "Ho-Ho-Ho" in even intervals with each "Ho" dropping in pitch | A wide range of canned and frozen vegetables; Frozen rice |
| Sound Mark | 2308503 | Boston Duck Tours, Limited Partnership | The mark comprises the sound of a human voice making quacking noises like a duck. | Conducting sightseeing tours |

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|------------|---------|--|--|---|
| Sound Mark | 2459405 | Deutsche Telekom AG CORPORATION FED REP GERMANY | The sound mark consists of a series of five musical notes written on the Treble clef in the key of C major, comprising a sequence of four joined semiquavers which are the musical three notes CCC and E, followed by a C quarter note | A wide range of telecommunications equipment; Printed matter; Clothing; Games; Advertising services; Insurance brokerage services; Maintenance of telecommunications equipment; A wide range of telecommunications services; Warehouse Storage of Goods; Education services; Computer programming services for others |
| Sound Mark | 2442140 | Yahoo! Inc. | The mark consists of the sound of a human voice yodelling "YAHOO". | Computer services and online computer services |

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|------------|---------|----------------------------|--|---------------------|
| Sound Mark | 2210506 | Edgar Rice Burroughs, Inc. | <p>The mark consists of the sound of the famous Tarzan yell. The mark is a yell consisting of a series of approximately ten sounds, alternating between the chest and falsetto registers of the voice, as follows - 1) a semi-long sound in the chest register, 2) a short sound up an interval of one octave plus a fifth from the preceding sound, 3) a short sound down a Major 3rd from the preceding sound, a short sound up a Major 3rd from the preceding sound, 5) a long sound down one octave plus a Major 3rd from the preceding sound, 6) a short sound up one octave from the preceding sound, 7) a short sound up</p> | Toy action figures. |
|------------|---------|----------------------------|--|---------------------|

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|------------|---------|---|---|---|
| Sound Mark | 2207874 | Anheuser-Busch, Incorporated | The mark consists of the sound of a howling wolf. | Beer |
| Sound Mark | 2000963 | Ginsburg Enterprises Incorporated | The mark consists of the sound, "OOH IT'S SO GOOD". | Entertainment services, namely production of television programs dealing with culinary topics |
| Sound Mark | 1972777 | Grossman, Richard DBA Thunderbolt Production Individual United States | The mark consists of a stylized LIGHTNING BOLT AND A SOUND RECORDING. | Musical sound recordings |
| Sound Mark | 1829616 | U S WEST Communications , Inc. | The mark consists of three harmonically related tones which are played together in a successive manner to produce a unique chime... | Telecommunications voice messaging services |
| Sound Mark | 1746090 | Beacon Broadcasting Corporation | The mark consists of the sound of a thunderclap. | Radio broadcasting services |

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|------------|---------|--------------------------|---|----------------------------------|
| Sound Mark | 1620415 | Teleconnect Company | The mark consists of four harmonically related tones which are summed together in a successive manner to produce a unique chime sound that is used as a prompt tone to the telephone user. | Long distance telephone services |
| Sound Mark | 1590267 | Yet, Inc. Corporation | The mark consists of the sound of "CLOP, CLOP, CLOP - 'MOOO'" | Restaurant services |
| Sound Mark | 1084254 | Fort Worth National Bank | The mark is a sound mark consisting of a musical jingle in the key of A, comprised of eight musical notes, the first five notes being B-flat above middle C (two quarter notes, two eighth notes, and one quarter note), followed by a B-flat quarter note below middle C, a G half note above middle C, and an E-flat half note above middle C | Banking and trust services |

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| Sound Mark | 0916522 | National Broadcasting Company, Inc. | The mark comprises a sequence of chime-like musical notes which are in the key of C and sound the notes G, E, C, the "G" being the one just below middle C, the "E" being the one just above middle C, and the "C" being middle C, thereby to identify Applicant's broadcasting service | Broadcasting of television programs |
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Sound Marks Applied For

| <i>Trade-mark</i> | <i>Serial No.</i> | <i>Owner</i> | <i>Description of Mark</i> | <i>Wares/Services</i> |
|-------------------|-------------------|--|--|--|
| Sound Mark | 78182342 | Head Sport AG CORPORATIO N AUSTRIA | The mark consists of impact sound of a tennis ball on a tennis racket. | Ball game rackets, in particular tennis rackets; balls, in particular tennis balls |

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| Sound Mark | 78196864 | Searle, LLC LIMITED LIABILITY JOINT STOCK COMPANY | The mark consists of the musical note sequence C G F C on a piano, with a drum loop in background, culminating in a "shung" effect | Educational services; Promoting public awareness via an online website on arthritis; Providing medical information via a website on a global computer network focused on arthritis |
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| Sound Mark | 78143571 | Microsoft Corporation Washington | <p>The mark consists of a sound mark comprising a music sequence in the key of D major in 4/4 time, playing the notes in the transcription shown in the drawing filed herewith. A first instrument portion of the sequence starts playing the bass registers. It begins with a low G note for an eight note and adds a D for an eighth and ties both notes to another quarter note. When the bass line gets to the first quarter note (after 1 beat of a rest), the treble clef comes in with a low B and G simultaneously for an eight note and moves to a low D for another eight. Both treble and bass clefs move to a sustained half note an E for the treble clef and a chord with a low D, low A, F and A. A second</p> | Providing information in the fields of entertainment, news, sports, music, movies |
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| Sound Mark | 78143570 | Microsoft Corporation | <p>The mark consists of a sound mark comprising a music sequence in the key of D major in 4/4 time, playing the notes in the transcription shown in the drawing filed herewith. A first instrument portion of the sequence starts playing the bass registers. It begins with a low G note for an eight note and adds a D for an eighth and ties both notes to another quarter note. When the bass line gets to the first quarter note (after 1 beat of a rest), the treble clef comes in with a low B and G simultaneously for an eight note and moves to a low D for another eight. Both treble and bass clefs move to a sustained half note an E for the treble clef and a chord with a low D, low A, F and A. A second</p> | <p>Providing multiple-user access to the Internet; electronic mail services; web messaging</p> |
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| Sound Mark | 78143573 | Microsoft Corporation | <p>.The mark consists of a sound mark comprising a music sequence in the key of D major in 4/4 time, playing the notes in the transcription shown in the drawing filed herewith. A first instrument portion of the sequence starts playing the bass registers. It begins with a low G note for an eight note and adds a D for an eighth and ties both notes to another quarter note. When the bass line gets to the first quarter note (after 1 beat of a rest), the treble clef comes in with a low B and G simultaneously for an eight note and moves to a low D for another eight. Both treble and bass clefs move to a sustained half note an E for the treble clef and a chord with a low D, low A, F and A. A second</p> | <p>Providing customized on-line web pages featuring user-defined information, which includes search engines and on-line web links to other web sites; providing a wide range of computer services</p> |
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| Sound Mark | 76468775 | Mars, Incorporated | The mark consists of the sound of three consecutive popping noises and a whimsical voice that says the word "pop" simultaneously with each of the popping noises and the word POP'ABLES after the third popping noise | Confectionery, namely, candy |
| Sound Mark | 76344794 | New York Stock Exchange, Inc. | The mark consists of the sound of a brass bell tuned to the pitch D, but with an overtone of D-sharp, struck nine times at a brisk tempo, with the final tone allowed to ring until the sound decays naturally. The rhythmic pattern is eight 16 th notes and a quarter note; the total duration, from the striking of the first tone to the end of the decay on the final one, is just over 3 seconds | Conducting a securities exchange and related stock market services |

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| Sound Mark | 76227209 | Visa International Service Association | <p>The mark consists of three main audio and musical elements; it begins with a “whoosh” sound similar to a quick passing jet. This is followed by rising orchestral choir vocals in the key of D major. The sound is then concluded with a very quick ascending five-note scale played in the voice of high-pitched bells: D5, F5, G5, A#5, C6. Underlying the last scale is a base note of D2.</p> | Broad based financial services |
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| Sound Mark | 76189600 | MUSICMATCH, Inc. | <p>The MUSICMATCH startup sound consists of a 4.4 second musical phrase. The time signature of the phrase is 4/4 with an approximate tempo of 80bpm. The phrase starts with a pianissimo string chord whose main keys are C5, F#5 and G5. The chord crescendos to forte in - .8 seconds. Overlying the string chord are synthesised pizzicato 1/8th note triplets beginning at .4 seconds and ending at -1.2 seconds. The sequence of notes is D7, C7, A6, G6. While the bass note is sustained (-1 second marker) the string sound, mentioned previously, changes to an A major chord. Using the same string sound underlying the A major chord is a</p> | <p>Online ordering in the field of music samples and full recordings; online retail; Computer software;. Providing information on music releases</p> |
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| T-RAM | 76450418 | T-RAM, Inc. | The mark comprises the sound of the word "T-RAM" as spoken, and otherwise generated for auditory reception. | A wide range of semiconductor devices, Machines including semiconductor wafer processing equipment |
| IM CHIME | 76332943 | America Online, Inc. | The mark consists of a rapid series of chime-like musical notes written on the treble clef in the key of C major, comprising a progression of the musical notes C, D, F, G, C and the combined notes A and D | Providing multiple-user access to computer networks |

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| Sound Mark | 75545553 | Gebr. Hoffman AG | The mark consists of the configuration of the KLICK-KLACK metal lid for cans. The KLICK-KLACK lid has acquired distinctiveness under section 2(f) of the Trade-mark Act to distinguish origin because of the unique sound when the lid is opened or closed. KLICK to open. KLACK to close. The mark, therefore, consists of the sound created by the non-functional shape of the goods | Metal lids for cans, Non-metal lids for cans. |
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| Sound Mark | 75823257 | Federal Signal Corporation | <p>The mark consists of a unique sound comprising a fundamental sweeping tone that rises quickly, in a period of about 9 seconds, to a frequency of around 1170 Hz and falls slowly, in a period of about 7.5 seconds, to a frequency of around 580 Hz. The fundamental tone remains rich in second and third harmonies through the entire sweep creating a continuous piercing/penetrating siren sound to the observer</p> | Siren. |
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| Sound Mark | 75640795 | Dolby Laboratories Licensing Corporation | The mark is a musical sound consisting of a crescendo and decrescendo played by a rubbed crystal, bass waterphone, bowed piano, and contrabass, during which the chords D flat, G flat, B flat, and A flat, and a D flat note are played by a struck crystal, lasting for a duration of approximately three seconds. | A wide range of integrated circuits; Consultation, inspection and quality control, all relating to making sound recordings; On-line distribution of information and material relating to sound reproduction and recording |
| Sound Mark | 75159055 | Qlicksmart Pty. Ltd. | The mark consists of a sound simulating the click of a latch. | Sharps containers for the disposal of medical waste; containers for scalpel blades and surgical needles |

Schedule "B"

ANIMATION MARKS REGISTERED AND APPLIED FOR IN THE U.S.

Registered Animation Marks

| <i>Trade-mark</i> | <i>Registration No.</i> | <i>Owner</i> | <i>Description of Mark</i> | <i>Wares/Services</i> |
|-------------------|-------------------------|--|---|-----------------------------------|
| N | 2077148 | Netscape Communication s Corporation | The mark consists of an animated sequence of images depicting the silhouette of a portion of a planet with an upper case letter "N" straddling the planet and a series of meteorites passing through the scene, all encompassed within a square frame. The animated sequence is displayed during operation of the software. | A wide range of computer software |

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| :C | 2645188 | Digital:Convergence Corporation | The mark consists of an animated sequence of a dot moving counterclockwise from the centre top and to the centre left of the "C" where the dot then splits into two dots, one above the other. One short tone followed by one musical note accompanies the animated mark, which appears in the colour red | A wide range of advertising services; Computer services |
| :C | 2585761 | Digital:Convergence Corporation | The mark consists of an animated sequence of a dot moving counterclockwise from the centre top and to the centre left of the "C", where the dot then splits into two dots, one above the other. The mark appears in the colour red | A wide range of advertising services; Computer services |

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| <p>FLY LIKE AN EAGLE UNITED STATES POSTAL SERVICE WWW.USPS.C OM</p> | <p>2600363</p> | <p>United States Postal Service</p> | <p>The mark consists of an animated sequence of images in motion - an eagle design followed by a jet trail moving from left to right on a screen.</p> | <p>Sorting, handling and receiving packages, envelopes and letters; A wide range of electronic cash transactions; Transportation and delivery of packages; Printing services</p> |
| <p>W M 1 2 3 4 5</p> | <p>2334502</p> | <p>Wattage Monitor Inc.</p> | <p>The mark consists of an animated sequence of images depicting two electrons moving through the stylized, connected letters "W" and "M". The electrons start in the middle of the letters and one moves towards the left arrow while the other moves toward the right arrow. The numbers "1, 2, 3, 4 and 5" are not part of the mark but serve to show the order of the sequence of images</p> | <p>Providing consumers with on-line information regarding alternative electrical rates for home or commercial use and providing electric service providers with on-line information regarding consumer preferences</p> |

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|---|---------|--|--|---|
| N | 2077148 | Netscape Communication s Corporation | The mark consists of an animated sequence of images depicting the silhouette of a portion of a planet with an upper case letter "N" straddling the planet and a series of meteorites passing through the scene, all encompassed within a square frame. The animated sequence is displayed during operation of the software | A wide range of computer software |
| ANIMATED TREASURES A TREASURE OF FUN AND INVESTMENT "JUST FOR THE KID IN US" | 2109043 | Germana, Richard S. | The mark consists in part of a representation of a treasure chest filled with animation cells. | Retail store and mail order catalogue services featuring animated art from motion pictures, newspapers, magazines and books |

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| Animation Mark | 1339596 | Hanna-Barbera Productions, Inc. | The mark consists of an animated sequence of the star in motion, the end of which is shown in the drawing. The lining shown is a feature of the mark and does not indicate colour. | Entertainment services rendered through the medium of television-namely, animated cartoon programs. |
| Animation Mark | 2490649 | Zixlt Corporation | The mark has motion as a feature of the mark and consists of a pair of stylized eyes that move horizontally back and forth. The drawing consists of four freeze frames showing the mark at various points in its movement, pursuant to 37 C.F.R. 2.52(a)(2)(iv) | A wide range of telecommunications services |

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|--|----------------|---|---|---|
| <p>FLY LIKE AN EAGLE UNITED STATES POSTAL SERVICE WWW.USPS.C OM</p> | <p>2600363</p> | <p>United States Postal Service</p> | <p>The mark consists of an animated sequence of images in motion - an eagle design followed by a jet trail moving from left to right on a screen.</p> | <p>Sorting, handling and receiving packages; Electronic cash Transactions; Electronic transmission of data and documents via computer terminals; Pickup, transportation and delivery of packages, envelopes and documents by various modes of transportation; Printing services</p> |
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| SECTOR 19 | 2591676 | Paris, Cynthia DBA SECTOR19 | The mark consists of a universe in motion with the words "SECTOR19". The applicant wishes to depict color in the drawing of the universe as a pale yellow on the outer rim that gradually darkens and becomes a deeper yellow as it reaches the interior, which then becomes white at the center. The letters "SECTOR 19" are also displayed in yellow | Pre-recorded compact discs, phonograph records, audio and video cassettes, and digital video discs featuring music and spoken word |
| ABREVA | 2492774 | SB Pharmco Puerto Rico Inc. | The mark consists of the stylized word "ABREVA" with a circular design formed from numerous circles surrounding the final A. The word ABREVA appears in white with blue shadowing. The circle designs change in color in a clockwise motion from red to orange and then to yellow | Pharmaceutical preparations, namely, anti-viral preparations for cold sores and fever blisters |

Animation Marks Applied For

| <i>Trade-mark</i> | <i>Application No.</i> | <i>Owner</i> | <i>Description of Mark</i> | <i>Wares/Services</i> |
|-------------------------|------------------------|--------------------|---|---|
| I'M IDEAS'N MIND | 78003277 | Ideas'N Mind, Inc. | The mark consists of a square shape or box with the words "Ideas 'N Mind" below the letters "I" and a lower case "m" with an animated robotic head... An animated light bulb with a dollar spreading inside the square or box. | Advertising the products and services of others via the Internet and other electronic media; Product development services. |
| F1 DIODE LASER | 78052076 | Derma Laser Inc. | The mark consists of an animated design made up of a black disk with a black surface spinning on its long axis and on which appears the text "F1 DIODE LASER" | Medical apparatus and instruments; Software |

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| YELL | 76029708 | Yell Limited English Limited Liability Company | The mark consists of an animated visual sequence depicting a square dot with rounded corners and the letters Y, E, L, and L. After the initial display of the empty square dot with rounded for a few seconds, the letters Y, E, L, and L appear in quick succession inside the square dot, so as to spell the word YELL. The letters are separated by a brief display of the empty square dot. The drawing consists of eight stills that make up the sequence. | Software for accessing the global computer network; Telephone and business directories; Telephone and business directory information services accessed via the Internet; Provision of financial, insurance and banking information via the Internet; Providing information on vehicle repair and maintenance via the Internet; Telecommunications services, Provision of travel information services via the Internet; Entertainment services; Computer services |
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| <p>TARGET HEALTH INC. TARGET E*CRF 1993</p> | <p>75939117</p> | <p>Target Health, Inc.</p> | <p>The mark consists of an animated sequence of images depicting a circular seal on which "TARGET HEALTH INC." and the caduceus design which rotates clockwise so as to be able to read...</p> | <p>Gathering and providing patient records and patient data via a global computer information network.</p> |
| <p>0</p> | <p>78155039</p> | <p>National City Corporation</p> | <p>The mark consists of The number zero. The mark has motion as a feature of the mark and consists of the numeral zero that begins as a whole frame and shrinks into the size of a number on a bank check and grows to a full size frame on the screen</p> | <p>Banking services.</p> |

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| Animation Mark | 75883661 | Automobili Lamborghini Holding S.p. A. | The mark consists of the unique motion in which the door of a vehicle is opened; the doors move parallel to the body of the vehicle but are gradually raised above the vehicle to a parallel position | Automobiles. |
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| <p>DOT NET</p> | <p>75174010</p> | <p>Bellsouth Intellectual Property Corporation</p> | <p>The mark will consist of a red ball with the word "DOT" written across it diagonally in white and, when activated by a click on the computer icon, the "DOT" appears to rotate around the red ball, while the ball drops down on the word "NET" written in black and appears to fatten the word, followed by a bounce of the ball upward, after which the ball bounces back to its original position in the centre and then repeats the bouncing motion. The mark is lined for the colour red in the drawing. The stippling in the drawing (under the red ball) is for shading purposes only</p> | <p>Providing multiple-user access to a global computer information network; Computer software which facilitates searching; Advertising services; Financial information provided by electronic means; Telecommunication services</p> |
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| | 75623461 | Global Vision Network (GVN) Ltd | The mark consists of an animated sequence of a bean character in motion, the end of which is shown in the drawing. The stippling shown is a feature of the mark and does not indicate colour. | Pre-recorded television programmes; Printed matter;. Toys, games and playthings; Meat, fish, poultry and game; meat extracts; Production of television services |
| | 76313536 | American General Corporation | The mark consists of the words "Direct Pay" in staggered progression and "Convenient Payment Program" and (ii) an animated sequence of an arrow in motion, the end of which is shown in the drawing, emanating from an electronic bar scan image. The stippling in the drawing is for shading purposes only. | Electronic funds transfer, accounting and payment services, namely, electronic processing of loan payments and calculation of account balances for customers |

APPENDIX C - SOUND MARKS REGISTERED AND APPLIED FOR IN CANADA

Registered Sound Marks

| Trade-mark | Registration No. | Owner | Description of Mark | Wares/Services |
|-----------------------------|------------------|-----------------------|---------------------|--|
| MUSICAL NOTES DESIGN | 359,318 | Capitol Records, Inc. | n/a | Phonograph records, magnetic tapes, audio and video tapes, audio and video cassettes and motion picture film; pre-recorded audio tapes and phonograph records; professional electronic and engineering services in the field of sound monitoring and duplication for others. |

Sound Marks Applied For

| Trade-mark | Application No. | Owner | Description of Mark | Wares/Services |
|---|-----------------|---------------------|--|---|
| ACOUSTIC LOGO | 1,041,845 | Deutsche Telecom AG | n/a | A wide variety of apparatus and instruments; a wide variety of recording apparatus; a wide variety of printed matter; clothing; games; advertising and business affairs; insurance; financial affairs, monetary affairs; services for construction; telecommunications services; transport and storage of goods; a wide variety of education, instruction and entertainment services; computer programming services; database services; installation, maintenance and repair of equipment for telecommunication; publication of books, etc. |
| Bb-C-Bb-G-F-Eb-C-Eb-D-Eb-F-Bb-G-Eb (SOUND MARK) DESIGN | 1,171,780 | Mister Softee, Inc. | The trade-mark consists of a musical jingle composed of sixteen notes in the of E flat, in the sequence of Eb-C-Bb-G-F-Eb-C-Eb-D-Eb-F-Bb-G-Eb, which is then repeated. | Retail mobile vending machine services through the use of trucks featuring soft ice cream. |

Sound Marks Applied For Cont'd

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| <p>ROARING LION (SOUND ONLY) DESIGN</p> | <p>0,714,314</p> | <p>Metro-Goldwyn- Mayer Lion Corp.</p> | <p>n/a</p> | <p>Motion pictures film and pre-recorded video tapes; motion picture services entertainment services by distribution of motion pictures; entertainment services, namely, production and distribution of motion pictures and providing film and tape entertainment for viewing through the media of television, cinema and other media.</p> |
| <p>SOUND DESIGN</p> | <p>858,570</p> | <p>Intel Corporation A Legal Entity</p> | <p>The trade-mark consists of a five tone audio progression of the notes D FLAT, D FLAT, G, D FLAT and A FLAT.</p> | <p>A wide variety of computer hardware and software.</p> |
| <p>SOUND MARK DESIGN</p> | <p>824,753</p> | <p>Queisser Pharma GMBH & Co.</p> | <p>n/a</p> | <p>Cosmetics, especial skin creams and lotions, deodorants, mouth washes and sprays, preparations for cleaning and conserving teeth and dentures, adhesives for dentures; perfumeries; pharmaceutical and dietary products, especially restoratives, additives for food, preparations of vitamins, minerals, iron, calcium and magnesium, teas, medical preparations for the care of the mouth and teeth, surgical spirit.</p> |

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| SOUND REPRESENTED BY MUSICAL NOTE SEQUENCE DESIGN | 1,000,161 | Irving Oil Limited | n/a | Convenience store services. |
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