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

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

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APPLICANT'S REPLY TO EXAMINING ATTORNEY'S APPEAL BRIEF

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This Reply Brief is in response to the new, not yet set forth arguments found in the Examining Attorney's Appeal Brief e-mailed October 9, 2008. Previously set forth arguments were addressed in Applicant's Opening Brief filed August 19, 2008 which are hereby incorporated by reference.

REMARKS

Examiner's section II advises that registration is refused because the proposed sound mark appears to not function as a trademark to identify and distinguish applicant's goods from those of others and to indicate source and this section relies in part on incomplete evidence regarding Applicant's radio advertisements. Applicant respectfully requests reconsideration of the refusal based on this incomplete evidence and responds as follows.

The Radio Advertisements do Serve to Inform Customers that

Applicant's Sound is a Source Indicator.

In Examiner's Appeal Brief, Examiner states "that these [radio] advertisements do not serve to inform consumers that the sound is intended in any way as a source indicator." However, in making these statements the Examiner did not rely on complete information. The Examiner's Appeal Brief includes correct reference to lines read by the celebrities but does not include the tagline at the end of each celebrity reading. In this tagline, an unidentified voice states "brought to you by the AmberWatch Foundation." See Exhibit H to Applicant's Request for Reconsideration filed June 12, 2008 and incorporated by reference into Applicant's August 19, 2008 Appeal Brief. The celebrity reading together with this tagline gives a more complete version of what is actually heard by the consumer and demonstrates that the advertisements do serve to inform consumers that the sound is a source indicator.

As previously stated, the AmberWatch Foundation is a non-profit foundation closely associated with the Applicant. Applicant's founders specifically began AmberWatch Foundation to educate the public not only about child abduction but also about how Applicant's products security devices may be used to protect children. A portion of Applicant's proceeds are donated

to AmberWatch Foundation to further their purpose of educating children in national programs such as the BeSafe Program. Due to the closeness of the two entities, Applicant and the AmberWatch Foundation have not yet entered into a formal license agreement but are currently both parties to a Memorandum of Understanding which sets forth this intent to enter into a future license agreement and/or transfer of assets as well as outlines proper quality controls. Additionally, there is an oral agreement between the two close knit entities regarding the foundation's current use of Applicant's mark and Applicant closely monitors such use.

AmberWatch Foundation's use of Applicant's mark in the radio advertisement properly inures to the benefit of Applicant. As stated in common law and codified by the Lanham Act § 5, "Where a registered mark or mark sought to be registered is or may be used legitimately by related companies, such use shall inure to the benefit of the registrant or applicant for registration." 15 U.S.C.A. § 1055; *see also* J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* ("McCarthy"), § 18:45.50, 18:52 (West 2008). Thus, all uses of Applicant's mark by AmberWatch Foundation – whether it be in these radio announcements or in their educational programs – inure to the benefit of Applicant.

These radio advertisements, as well as Applicant's and AmberWatch Foundation's other uses of Applicant's mark,¹ are proper evidence that Applicant's sound mark functions as a trademark. For example, in the radio advertisement, the AmberWatch Foundation is clearly named and thus the advertisement serves to identify and distinguish Applicant's products from others and shows that all goods bearing the sound mark come from a single source. Through such advertisement and other media coverage, the sound mark has formed a separate commercial impression. This separate commercial impression distinguishes Applicant's products from the hundreds of other products on the market.

Therefore, the Examiner's reliance on the radio advertisement evidence to show that the sound is not a source indicator is misguided. The complete radio advertisement demonstrates that the ad does serve to inform customers that the sound is a source indicator. Because Applicant's sound mark fulfills all the functions of a trademark and creates a separate

¹ See Applicant's August 19, 2008 Appeal Brief which includes an extensive list of such advertisements and media coverage.

commercial impression, Applicant asserts that the mark is not functional and requests that the mark be allowed to register.

CONCLUSION

In view of the foregoing remarks and the remarks found in Applicant's August 19, 2008 Appeal Brief, Applicant respectfully requests that this mark be allowed to proceed to registration.

Respectfully submitted,


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