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

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Applicant	Ron Jon Surf Shop of Fla., Inc.
Applied for Mark	THE STOKED
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Applicant: Ron Jon Surf Shop of Fla., Inc.

Application Serial No. 77/411,069

Mark: **THE STOKED**

Filing Date: March 3, 2008

Classes: 18, 25 and 35 (only classes appealed)

Examining Attorney: Wendy B. Goodman  
Law Office: 109

Trademark Trial and Appeal Board  
U.S. Patent and Trademark Office  
P.O. Box 1451 Alexandria, VA 22313-1451

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## I. HISTORY OF THE CASE

### A. The Mark and Goods and Services in the Trademark Application

1. On March 3, 2008, Applicant filed its intent to use Trademark Application Serial No. 77/411069 for the mark **THE STOKED** in Classes 6, 9, 18, 25, 35 and 41.

2. Originally the goods in all of the classes were unrestricted as to trade channels. It was always Applicant's intention to sell its goods solely in its own museums, which are the services covered in Class 41. Applicant subsequently limited its descriptions of all of its goods and its services in Class 35 by limiting their channels of trade.

Applicant's descriptions of its goods and services for the three classes at issue in this Appeal now read as follows (underlining and boldfacing for emphasis):

Beach bags, tote bags, back packs, cinch sacks, ruck sacks, and book bags **for sale at the owner's museum stores which are devoted to the board sports industry, both in the museum itself and online**, in International Class 18;

Men's, women's and children's clothing and sportswear namely, sweatshirts, sweat pants, sweat shorts, shirts, bathing suits, dresses, blouses, skirts, beach cover-ups, sandals, socks, headbands, caps, hats, visors, wet suits, jackets and ponchos **for sale at the owner's museum stores which are devoted to the board sports industry, both in the museum itself and online**, in International Class 25;

Retail gift shop services and on-line retail gift shop services provided at **the owner's board sports museum stores**, featuring clothing and accessories; beach and surf gear; sporting and recreational goods, equipment and accessories; toys and games; household goods; stationery products, greeting cards, postcards, note cards, books and publications, posters, calendars, planners, journals; and novelty and souvenir items and gifts, in International Class 35;

3. This Appeal applies only to the goods in Classes 18 and 25 and the services in Class 35 since there are no outstanding refusals as to those goods in Classes 6 and 9 nor to the museum services in Class 41.

## B. The Refusals

1. On January 26, 2008, a first refusal of registration was made under Section 2 (d) of the Trademark Act claiming a likelihood of confusion with Registration No.

2,822,704 for the mark **STOKED** in Class 25 for clothing owned by Tim Winged, dba Stoked Sportswear and Registration No. 3,331,656, also for the mark **STOKED** in Class 3 for cosmetics owned by a different registrant, Revelations Perfume and Cosmetics, Inc. In that office action, prior pending application, Serial No. 78/917548, also for the mark **STOKED**, filed on behalf of the same owner as Registration No, 3, 331,656 covering goods in Classes 3, 14 and 18 was noted.

2. The application was suspended on October 30, 2008 based on the outcome of the prior pending application S.N. 78/917548 in Classes 3, 14, and 18.

3. On June 17, 2009, after lifting the suspension she had implemented based on prior pending application No. 78/917548, the Examining Attorney issued a section 2(d) refusal based on U.S. Trademark Registration No. 3, 545,367, which had matured into a registration from the prior pending Serial No. 78/917548. In this second refusal, the Examining Attorney also maintained the Section 2 (d) refusals based on Registration Nos. 2,822,704 (clothing) and 3,331,656 (cosmetics).

4. In her final office action dated February 28, 2010, the Examining Attorney withdrew the Section 2(d) refusal based on Registration No. 3,331,656 (for cosmetics), but maintained the refusals based on Registration Nos. 2,822,704 (Class 25- clothing) and 3, 545,367 (Classes 3, 14 and 18)..

5. Thereafter on August 27, 2010, Applicant simultaneously filed a Request for Reconsideration and a Notice of Appeal to the Trademark Trial and Appeal Board.

Applicant had attempted to contact the Examining Attorney by phone in an attempt to resolve this matter before filing the Reconsideration and the Appeal. However, the Examining Attorney did not return the phone call, leaving Applicant no option but to file both the Reconsideration and the Appeal. In the Reconsideration, Applicant limited its trade channels to goods “for sale through Applicant's museum stores, both in the museum itself and online.”

6. The Request for Reconsideration was denied on October 13, 2010. However, the Examining Attorney did withdraw her refusals under Section 2(d) of the Trademark Act as to Applicant’s goods in Classes 6 and 9.

7. Applicant filed a Request for Remand with the Trademark Trial and Appeal Board on January 13, 2011 so that it could supplement the record and make an additional limitation to its identifications of goods in Classes 18 and 25 and its specifications of services in class 35. This limitation was to further limit Applicant’s goods and services to make it clear that Applicant’s museum is to be “devoted to the board sports industry.” The Board granted the Remand on January 19, 2011 when the case was returned to the Examining Attorney.

8. On October 30, 2011, the Examining Attorney denied the Reconsideration, maintaining the Section 2 (d) refusals as to Classes 18, 25, and 35 and this Appeal was thereafter resumed.

## **II. THE ISSUES**

Is Applicant’s mark **THE STOKED** covering various types of bags and sacks in Class 18, clothing in Class 25 and retail gift shop services in Class 35, all of which have been limited for sale at the owner’s museum stores which are devoted to the board sports industry, likely to cause confusion with 2 different registrations, owned by 2 different

parties, both for the mark **STOKED**?

Under Section 2(d) of the Trademark Act, The Examining Attorney has cited 2 registered marks for the word **STOKED** owned by two different parties as a bar to the registration of Applicant's mark, **THE STOKED** . U.S. Trademark Registration No. 2,822,074 for the mark **STOKED** is owned by Tim Winged, dba Stoked Sportswear for clothing and U.S. Trademark Registration 3,545,367, also for the mark **STOKED**, is owned by Revelations Perfume and Cosmetics, Inc. for lipstick cases and holders (Class 3); ankle bracelets, bracelets, charms, chokers, earrings, identification bracelets, jewelry chains, necklaces, pendants, rings, watches (Class 14) ; and all-purpose carrying bags, backpacks, beach bags, change purses, clutch purses, daypacks, duffel bags, evening handbags, fanny packs, handbags, key cases, make-up bags sold empty, multi-purpose purses, overnight bags and cases, pocketbooks, purses, rucksacks, satchels, shoulder bags, tote bags, waist packs. Applicant points out to the Board the specimens of record used to support the Class 18 goods in U.S. Registration No. 3, 545,367, a copy of which is attached hereto for the Board's reference as Exhibit A.. That specimen, to which apparently the USPTO did not object, does not show the mark **STOKED** by itself for the Class 18 goods, but rather shows the phrase (including the parentheses) **“Stoked about life.”** This information is not intended to be a collateral attack on the registration. Rather, it is intended to demonstrate to the Board how the cited Registrant's mark is used in connection with the Class 18 goods.

### **III. ARGUMENT**

There is no likelihood of confusion between the cited marks and Applicant's mark due to the differences between the marks and the different trade channels in which the respective products and services are offered.

The determination of whether likelihood of confusion exists under Section 2(d) of the Trademark Act is based upon an analysis of all of the probative facts in evidence that are relevant to the thirteen factors delineated in the decision of *In re E. I. Du Pont DeNemours & Co.*, 177 USPQ 563,567 (CCPA 1973). “[N]ot all of the *Du Pont* factors are relevant or of similar weight in every case.” Some factors may be given more or less weight, and any one of the factors may control a particular case. *Du Pont*, 476, F.2d at 1361-62, 177 USPQ at 567. Those *DuPont* factors relevant to the particular facts of this case are discussed below, concentrating on the marks at issue and the channels of trade.

#### **A. THE MARKS ARE NOT THE SAME**

Applicant's mark **THE STOKED** is not the same mark as the two cited marks for the different mark **STOKED**. While there may be a tendency to disregard the article “THE” in Applicant's mark, to do so would be inappropriate. This is exactly what the Examining Attorney did in her refusal of February 28, 2010 stating “The only difference between these two marks is the article THE which has no trademark significance whatsoever and does nothing to obviate the potential for confusion.”

Marks are to be viewed in their entirety, not dissected into pieces for purposes of finding likelihood of confusion. *See, Franklin Mint Corp. v. Master Mfg Co.* 667 F.2d 1005, 1007 (CCPA 1981); *In re Hearst Corp.*, 25 USPQ2d 1238 (Fed. Cir. 1992) [**VARGAS** and **VARGA GIRL**, both for calendars, held not confusingly similar]. No

feature of a mark is to be ignored simply because it may be considered less dominant. *In re Electrolyte Laboratories, Inc.* 929 F.2d 645, 647 (Fed. Cir. 1990) [**K+** and **K+EFF** not likely to be confused]. Applicant's mark, **THE STOKED**, when viewed as a whole, is distinctive and denotes origin in Applicant.

In this particular case, use of the word “THE” in Applicant’s mark does serve to distinguish it from these other “Stoked” marks. Use of the article “THE” in front of the word “STOKED” creates a memorable trademark. It is memorable because it is a unique way to use the term “Stoked”, which is an adjective or perhaps even a verb. In any circumstance, the ordinary use of the word “stoked” is not as a noun. By placing the word “THE” preceding the word ‘STOKED’, the mark becomes a noun and is therefore transformed to a name which is memorable in that it is an unusual combination of a grammatical article and a grammatical adjective or verb. For example, using the adjective “HAPPY” alone for a day care center may not be memorable, but if the day care center were known as “THE HAPPY”, an unusual way to combine these terms, the mark would be memorable and leave a lasting impression. Customers of the day care center would be able to distinguish this mark from other similar marks used in day care centers such as HAPPY DAYS, HAPPY FEET, HAPPY KIDS or even just plain HAPPY because the combination of THE with HAPPY leaves a lasting impression.

The use of the article “THE” as the first word of Applicant’s mark is not analogous to use of the article “THE” in front of a second word which is a noun. For example, use of the mark **BARN** for pet products, would be confusingly similar to use of the mark THE BARN for pet products because it is customary and proper grammatical usage to use an article in front of a noun. In other words, the mark THE BARN is neither

memorable nor distinguishable from the mark BARN because they convey the same commercial impression and are likely only to be remembered as the same mark. On the other hand, Applicant's combination mark **THE STOKED** does leave a lasting and differing commercial impression from the mark **STOKED** alone, particularly in light of the context in which Applicant's mark will be used.

**B. MEANING OF WORD STOKED IN THE RELEVANT INDUSTRY IS SIGNIFICANT**

The word "Stoked" is frequently used as all or part of a trademark, as shown by the trademark registrations (Exhibits B through E attached hereto) and examples of use (Exhibits G through O) attached hereto as The origin of the word "stoked", in fact, comes from the surfing industry. In surfing terminology the term "stoked" means "condition of being amped, wound up or just full of enthusiasm. For example, a surfing phrase would be: *"I'm stoked. I just got tubed. !"* See, *Riptionary* found online at <http://www.riptionary.com> on September 12, 2008. (Exhibit P attached hereto). See also the attached article found at <http://www.word-detective.com/070599.html> from *The Word Detective* dated 7/5/99 discussing the origin of the slang term "stoked" from the surfing industry [attached hereto as Exhibit Q].

In the context of applicant's goods and services, namely those devoted to the board sports industry (of which surfing is a large part), the mark **THE STOKED** is a suggestive term which serves to further distinguish it from the cited marks. In determining likelihood of confusion, each case must be decided on the basis of all relevant factors, including the goods or services upon which they are used and the marketing environment in which consumers normally encounter them. *In re Bigelow*,

*Inc.*, 199 USPQ 38, 40 (TTAB 1978). Ultimately, in the "practicalities of the commercial world", purchasers will not be confused as to the source of the respective parties' goods and services which are different in nature. *In re Massey-Ferguson, Inc.*, 222 USPQ 367, 368 (TTAB 1983).

Applicant's descriptions of its goods and services have been limited to sales in its own museum, a museum which is devoted to surfing and other the board sports. Accordingly, the significance of the term "stoked" will be meaningful to those customers Applicant anticipates will patronize its museum, namely surfing aficionados and other board sports enthusiasts. By associating this unique phraseology **THE STOKED** with its board sports museum services and products, Applicant will avoid any likelihood of confusion with any other "Stoked" trademark registered or in use by others, whether such mark is used in the board sports industry or elsewhere.

### **C. STOKED IS A WEAK TRADEMARK ENTITLED TO A LIMITED SCOPE OF PROTECTION**

The word "stoked" is a relatively weak mark because of its frequency of use by others. *See, e.g., Citigroup Inc. v. Capital City Bank Group, Inc.*, 637 F.3d 1344, 1356, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011).

In the Examining Attorney's Office Action of June 17, 2009, page 4, the Examiner unequivocally states that clothing among other items is closely related to lipsticks, jewelry and class 18 goods such as tote bags and the like. If that is the case, then why did the USPTO permit both Registration Nos. 3,331,656, and "3, 545,367 for the mark **STOKED** by Revelations Cosmetics to register over the prior existing Registration No. 2,822,704 for **STOKED** for clothing?

The Examining Attorney herself has pointed out that "stoked" is a term that now

is commonly used. Therefore, the consumer is used to seeing this term and should be able to discern that a product using the trademark **STOKED** does not emanate from the same source as a product using the different and unique trademark **THE STOKED**. As evidence that the term **STOKED** is weak, one only has to look at the 3 trademark registrations that were cited by the Examining Attorney during the prosecution of this application.. The two cited and identical marks are owned by different parties. Yet, these two identical marks, owned by two different parties for what the Examining Attorney herself has characterized as overlapping and related goods co-exist on the Principal Register at the USPTO. With a lengthy list of registrations as exhibits, the Examining Attorney pointed out in her office action of June 17, 2009 that clothing and accessories such as tote bags and are considered by the USPTO to be goods emanating from a single source. Under these circumstances, there should be room for Applicant's different and memorable mark to co-exist as well with no likelihood of confusion, especially in light of its restricted museum channel of trade.

The registrations that Applicant has made of record demonstrate that the adjective/verb "stoked" is often used as part of a trademark, establishing the weakness of the term, especially in sporting- related registrations and clothing-related registrations. Third-party registrations may be considered in the same manner as a dictionary to show a possible meaning or significance in a particular trade. *Tektronix, Inc. v. Daktronics, Inc.*, 187 USPQ 588, 592 (TTAB 1975). For sports-related marks, there is a registration for **STOKED SKATEBOARDS** (skateboarding is one of the board sports) [See Exhibit E attached hereto] and **GET STOKED**, a pending application covering operation of an outdoor recreational sports camp offering instruction in board sports such as skiing,

snowboarding , surfing, skateboarding and the like, making this application also relevant to this point. This **GET STOKED** pending application has been suspended awaiting the issuance of an underlying foreign registration, at which point it would move forward for publication. [See Exhibit F attached hereto]. Applicant's mark is also a sports-related mark because its museum and the products therein will be associated with board sports. The museum will operate under the trademark **THE STOKED** and through its museum stores it will sell its products branded with **THE STOKED** trademark. There are also third-party clothing-related registrations such as **WAY STOKED** [Exhibit C attached hereto] and **FOREVER STOKED** [Exhibit B attached hereto]. Contrary to the Examining Attorney's assertions, these latter two registrations, consisting of two words which the Examining Attorney refers to as "compound word marks" (see page 4 of March 13 Office Action, last full paragraph) convey similar commercial impressions, both of them being used as adjectives. The next compound word mark registration **STOKED RACING** covers custom design of t-shirts and other items of apparel. [Exhibit D attached hereto] It, too, is relevant because it is a clothing-related mark that includes the word "stoked". These marks/registrations demonstrate that the word "stoked" is registered by various parties for related products and services, thus confirming that consumers have become conditioned to recognize that different trademarks containing the word "stoked" originate from different sources. As additional evidence that consumers are conditioned to seeing the word "Stoked" used in relation to sports-related or clothing-related products, Applicant has made of record screenshots taken from web pages found in a Google search conducted on September 12, 2011, for "stoked products." This evidence is shown in Exhibits G-O. None of these products, namely

- windsurfing boards and kiteboards --  
<http://storeint.stoked-publications.com/index.php/signature-boards-1.html> [Exhibit M]
- sports shoes--  
<http://www.zappos.com/skechers-kids-luminator-s-lights-stoked-lace-toddler-youth> [Exhibit K]
- hoodies --  
<http://stokereport.spreadshirt.com/men-s-stoked-hoodie-A5137846>  
AND  
<http://www.extremeoutdoorsupply.com/roxy-stoked-hoodie.html>  
[Exhibits H and I]
- bathing suits --  
<http://www.zappos.com/roxy-stoked-string-bikini>  
[Exhibit G]
- bicycles --  
<http://www.huffybicycles.com/Products/Product.aspx?pid=124%7C1%7C1> [Exhibit O]
- sunglasses --  
[http://www.tommybahama.com/TBG/Big\\_and\\_Tall/Accessories/Sunglasses/PRD\\_TB535SP/Stoked+Rider+Sunglasses.jsp?utm\\_source=googlebase&utm\\_medium=pfeed&utm\\_campaign=gb&cm\\_mmc=googleps\\_\\_-BigandTallAccessoriesSunglasses\\_\\_-Tommy%20Bahama%20Stoked%20Rider%20Sunglasses%20Mens-\\_-T](http://www.tommybahama.com/TBG/Big_and_Tall/Accessories/Sunglasses/PRD_TB535SP/Stoked+Rider+Sunglasses.jsp?utm_source=googlebase&utm_medium=pfeed&utm_campaign=gb&cm_mmc=googleps__-BigandTallAccessoriesSunglasses__-Tommy%20Bahama%20Stoked%20Rider%20Sunglasses%20Mens-_-T)  
[Exhibit L]
- t-shirts and other goods --  
<https://co.clickandpledge.com/advanced/default.aspx?wid=40656> [Exhibit J]
- board sports computer game --  
[http://shopper.cnet.com/xbox-360-games/stoked-big-air-edition/4014-11457\\_9-33772960.html](http://shopper.cnet.com/xbox-360-games/stoked-big-air-edition/4014-11457_9-33772960.html)  
[Exhibit N]

appear to originate with the two different owners of the cited registrations, thereby demonstrating that consumers are used to seeing “stoked” marks from different owners

and thereby confirming the weakness of the cited registrations and their entitlement to only a narrow scope of protection. *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 1373-74, 73 USPQ2d 1689, 1693 (Fed. Cir. 2005).

Even when goods covered by the marks are closely related or identical, it is well settled that if marks contain similar or identical elements and yet are distinguishable, there is no likelihood of confusion. This rule applies even if the common term is considered to be the dominant term in the marks. *General Mills Inc. v. Kellogg Co.*, 824 F.2d 622 (8th Cir. 1987); *In re Valu Home Centers, Inc.*, 6 USPQ2d 1317 (TTAB 1988) [no likelihood of confusion between **VALU HOME CENTERS and Design** (Home Centers disclaimed) and **HOME VALUE**].

There is precedent at the TTAB to allow registration of identical marks (not the case here) in the clothing class where those marks have different meanings ascribed to them based on either the product or their marketing environments. A case on point is *In re Sydel Lingerie Co., Inc.*, 197 USPQ 629 (TTAB 1977) where the TTAB held that despite the fact that identical marks were used on clothing products, no likelihood of confusion was found due to the different connotations of the marks. In that case, the Board held that **BOTTOMS UP** for ladies' and children's underwear was not confusingly similar to **BOTTOMS UP** for men's suits, coats and trousers based in part on the different connotations of the marks in connection with the respective goods. In the case of the men's clothing, the phrase would be associated with "drink up", while in the case of the women's clothing, it had a more direct connotation. *In re Sears, Roebuck and Co.*, 2 USPQ2d 1312 (TTAB 1987) found no likelihood of confusion between the

identical mark **CROSSOVER** for bras and ladies sportswear. There the Board noted that the mark **CROSSOVER** for bras was suggestive of the construction of the bra, but had no similar meaning for sportswear. Yet another clothing decision, *In re British Bulldog, Ltd.*, 224 USPQ 854 (TTAB 1984) found no likelihood of confusion when the identical mark **PLAYERS** was used for men's underwear and shoes. **PLAYERS** for shoes was found to suggest outdoor activities, while **PLAYERS** for underwear was found to have a more "indoor" activity implication.

In the case at hand, the trademarks are different and do have different connotations, as well as different marketing environments. Applicant's mark is a coined noun, referring to a person or thing and the cited registrant's marks are adjectives, referring to an emotion. Thus, given the differences between the marks, this is an even more compelling reason that registration of Applicant's mark should be permitted.

On June 17, 2009 after lifting the suspension she had implemented based on prior pending application No. 78/917548, the Examining Attorney issued a refusal based on U.S.. Trademark Registration No. 3, 545,367, which had matured into a registration from the prior pending Serial No. 78/917548. In issuing that refusal, the EA stated that "The overriding concern is not only to prevent buyer confusion as to the source of the goods and/or services, but to protect the registrant from adverse commercial impact due to use of a similar mark by a newcomer", citing *In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1690 (Fed. Cir.1993). Under the circumstances, the Examining Attorney's position is not justifiable. Refusing registration to Applicant under Section 2 (d) of the Trademark Act, cannot protect the cited registrants' marks from adverse commercial impact. The registrants' marks have already been impacted by the various

third party uses and registrations Applicant has noted. The limitations of the trade channels Applicant has provided in its descriptions of its goods and services obviate any likelihood of confusion as to the source of Applicant's products and services and negate any alleged adverse commercial impact upon the two cited registrant's marks..

Moreover, as the owner of the U.S. Registration No. 2,822,704 presumably raised no objection to the registrations of Revelations for the identical mark **STOKED**, and since the TTAB is not inclined "to second guess the conclusions of those most familiar with the marketplace" regarding the question of likelihood of confusion, *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1786 (TTAB 1993) and case cited therein, the TTAB is urged to reverse the Section 2(d) refusals.

#### **D. THE CHANNELS OF TRADE ARE DIFFERENT**

Applicant's mark will be used in conjunction with its own museum devoted to surfing and other board sports. The goods set forth in the application are to be offered and sold exclusively in this museum which will maintain its own retail sales.

Accordingly, Applicant has limited its descriptions of goods and its services in Class 35 to these museum trade channels. Applicant's trade channels are entirely different than those of the two cited registrant's marks, a significant factor which should obviate any alleged likelihood of confusion.

In her office action of October 12, 2010, when the Examining Attorney denied Applicant's reconsideration request, she attached internet evidence that she alleged

"demonstrates that it is common for the retail store of a museum to sell goods other than promotional items for the museum, itself. (emphasis added). See attached web pages from the online stores of The Phillips Collection, The Museum of Modern Art, The Art Institute of Chicago, The Museum of Fine Arts, Boston and The Field Museum. In each case, the museum sells jewelry, clothing and a variety of bags that are not

promoting the particular museum.(emphasis added). In fact, in most cases, these goods are manufactured by third parties and sold by the museum stores.”

In its Request for Remand, Applicant further limited the descriptions of its goods and its Class 35 services to sales in its own museums devoted to board sports. In other words, Applicant has limited the sales of its products bearing **THE STOKED** trademark to its own museum which will also use the same trademark **THE STOKED**. Obviously, Applicant’s products branded with the mark **THE STOKED** are intended to be promotional items for the museum itself. The fact that third parties may manufacture these products or that other items may be sold in the museum is irrelevant to this Appeal.. Applicant will be doing the purchasing of its own goods for its museum and will carefully control the use of its brand **THE STOKED** in its museum.

Applicant has not disputed that the types of products it intends to sell in its museum store are some of the same types of products that may be sold elsewhere. Common sense dictates, for example, that clothing is most often sold in retail stores. The myriad examples the Examining Attorney attached to her last office action issued after the Remand to her by the TTAB illustrate that some items like umbrellas, jewelry or CDs sold in museums such as the Smithsonian are also sold through retailers such as Amazon (which sells almost everything under the sun) or Target or Wal-Mart (both big box stores that also sell a whole host of products). What the Examiner’s exhibits fail to prove is that the channels of trade through which Applicant will offer its goods and services, namely its own museum stores, are the same trade channels as those utilized by retail stores. As established below, in fact, museum store trade channels are separate and distinct from normal retail trade channels.

“It has long been held that the mere fact that two different items can be found in a supermarket, department store, drugstore or mass merchandiser store is not a sufficient basis for a finding that the goods are related.” Morgan Creek Prods., Inc. v. Foria Int’l, Inc., 91 USPQ2d 1134, 1142 (TTAB 2009) By similar analogy, simply because some products are sold in retail stores or through “big box retailers” or ubiquitous online retailers such as Amazon does prove that sales of those same products through museums constitutes the same or normal channels of trade for those products.

An important distinction that can be drawn from the exhibits attached by the Examining Attorney to her action of October 30, 2011, however, is the fact that not a single one of the products sold in the museums stores as well as in online stores such as Amazon bore the trademark of the museum itself. The exhibits attached by the Examining Attorney show that a particular DVD or an umbrella or a piece of jewelry sold in a museum store was also available online, for example at Amazon, under a third’s party’s trademark or no trademark at all. To quote the Examining Attorney: “For instance, The Smithsonian Store sells a Rawlings® leather wallet that is manufactured by and sold by Rawlings®, as well. The Smithsonian Store sells a Tiffany lamp inspired umbrella which can also be purchased from Walmart®. The Museum of Modern Art sells a “Tord Boontje” charm necklace; as does a seller on Amazon.” In the case at hand, Applicant’s own products sold under its own brand **THE STOKED** will be sold in its own museum also branded as **THE STOKED**. Purchasers in Applicant’s museums will make those purchases to enhance their museum experience and to possess some memento from the museum as a reminder of their museum visit. A purchaser of a wallet or a Tiffany style umbrella, whether at the Smithsonian Museum or at Amazon, purchases that

wallet or that umbrella because he or she wishes to own that wallet, or in the case of the umbrella., a particular design, not because he or she wishes to memorialize their experience from their visit to the museum.

The evidence in this case clearly establishes that museum trade channels are not normal channels of trade for retail goods. Applicant has repeatedly pointed out that museum stores operate in their own distinct trade channels. Evidence supporting that museum stores operate in distinct trade channels is attached hereto as Exhibits R-1 and R-2 from the Museum Store Association and is entitled “How are museum stores different from regular retail stores?” and is found at the Museum Store Association’s website located at: [http://www.museumdistrict.com/events/museumstores\\_faq.cfm](http://www.museumdistrict.com/events/museumstores_faq.cfm)

The Museum Store Association is an association of approximately 1650 cultural institutions that operate their own retail operations. The Association’s website points out three (3) important ways museum stores differ from typical retail operations:

1. The on premises stores play a vital role in supporting the institutions’ missions. The products sold by these institutions serve as mementos and educational materials directly related to the museum patron’s visit and experience at the museum.
2. Profits derived from purchases made at these cultural institutions’ stores provide financial support to the further enhance the mission of the institution.
3. Customers shop at the museum because of their interest in the museum. To the customer, shopping at the museum stores, which usually operate within the museum itself, or on the museum grounds, serves as an extension of the museum experience.

Any alleged likelihood of confusion has been obviated by Applicant when it restricted its channels of trade for the sale of its **THE STOKED** branded products exclusively to its own museum stores operating under the identical and unique mark **THE STOKED**. Because Applicant’s mark will be used in conjunction with its museum

devoted to surfing and other board sports, and the goods set forth in the application are now limited to sales through its actual and online museum store, any alleged likelihood of confusion has been obviated by these restricted channels of trade.

The channels of trade for Applicant's products and services are unrelated to the channels of trade for the registrants' products which are presumed to be the normal (emphasis added) commercial channels for those goods. Since the registrants' descriptions of goods are unrestricted as to their channels of trade or classes of purchasers, then it is presumed that the registrant's goods move in all normal (emphasis added) channels of trade and are sold to the usual consumers of such goods. *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). The usual trade channels for the registrants' goods will be typical retail stores, not museum stores, and the usual consumers will be those retail store customers, not patrons of museums.

Patrons or potential customers of Applicant's museum searching online for its **THE STOKED** products will be searching for the museum. Should these potential customers come across either of the cited registrant's **STOKED** products, they would not be confused as the source of the products because they would not be associated with Applicant's museum. Conversely, customers of either registrant seeking their **STOKED** products online, if they came across Applicant's **THE STOKED** products, would also not be misled as to the source of these products because they would be directed to Applicant's website for its museum. At Applicant's museum website, the association between **THE STOKED** museum and **THE STOKED** products sold therein would be readily apparent so that there is no likelihood of confusion as to source.

When there are different trade channels, even though the products and services are somewhat related and the marks are identical, no likelihood of confusion has been found. *See, e.g., In re Shipp*, 4 USPQ 2d 1174 (TTAB 1987) [**PURITAN** for laundry and dry cleaning services not likely to cause confusion with **PURITAN** for commercial dry cleaning machine filter sold to dry cleaning professionals]; *Local Trademarks, Inc. v. Handy Boys, Inc.*, 16 USQ2d 1156 (TTAB 1990) [**LITTLE PLUMBER** liquid drain opener for consumers not likely to cause confusion with opposer's **LITTLE PLUMBER** for advertising agency services for professional plumbing contractors due to the different channels of sale]; *Estee Lauder, Inc. V. The Gap, Inc.*, 42 USPQ2d 1228 (2d. Cir. 1997) is another case on point where no likelihood of confusion was found when plaintiff sold its personal care products through prestige retail stores while defendant sold its less expensive competing personal care products in its own stores. Given Applicant's different trade channels and its non-identical trademark to that of the two cited registrants' mark, no likelihood of confusion exists.

#### **IV. CONCLUSION**

It is well settled that in determining likelihood of confusion, each case must be decided on the basis of all relevant factors, including the marks and the goods as well as the marketing environment in which consumers normally encounter them. *Du Pont, supra*. Because of the different nature of the purchasers involved and the different trade channels in which the marks are utilized, there is no likelihood of confusion between Applicant's unique mark **THE STOKED** and that of the two cited **STOKED** marks owned by two different registrants.

Based on the foregoing arguments and evidence and taking into consideration, the

differences between the cited marks, the weakness of the marks at issue, the connotation of Applicant's mark in connection with its goods and services, as well as the different trade channels and customers, Applicant respectfully requests this Board to reverse the two Section 2 (d) refusals, find no likelihood of confusion, and send this mark forward for publication in all classes covered by the application..

Respectfully submitted,

ATTORNEY FOR APPLICANT

/lnk/

---

Lisa N. Kaufman  
Law Office of Lisa N. Kaufman, P.A.  
2807 Poinciana Circle  
Cooper City, FL 33026  
Phone: (954)534-9419  
LNKTM@hotmail.com

Date: February 3, 2012

Enclosures

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

Applicant: Ron Jon Surf Shop of Fla., Inc.

Application Serial No. 77/411,069

Mark: **THE STOKED**

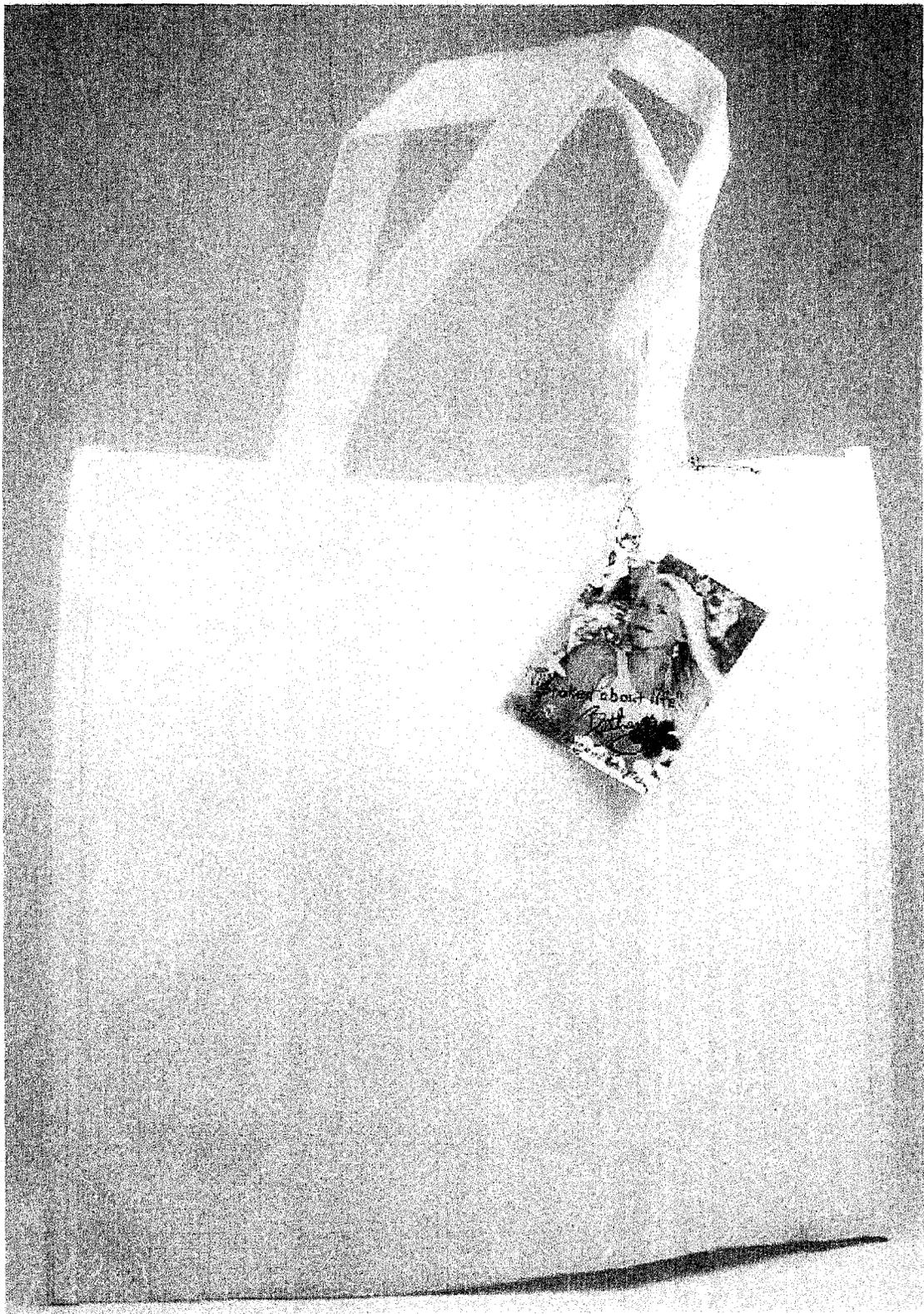
Filing Date: March 3, 2008

Classes: 18, 25 and 35 (only classes appealed)

Examining Attorney: Wendy B. Goodman  
Law Office: 109

Trademark Trial and Appeal Board  
U.S. Patent and Trademark Office  
P.O. Box 1451 Alexandria, VA 22313-1451

**EXHIBITS A-F TO APPEAL BRIEF ATTACHED\***  
\*(All Exhibits previously provided in record of the case)



**EXHIBIT A**  
Appeal Brief- **THE STOKED**  
Application Serial No. 77/411,069

# United States of America

United States Patent and Trademark Office

## FOREVER STOKED

**Reg. No. 3,682,624** CHARLES LEE CLINGMAN (UNITED STATES INDIVIDUAL)  
Registered Sep. 15, 2009 PO BOX 6480  
LOS OSOS, CA 93412 AND

**Int. Cls.: 16 and 25** CHRIS EDWARD PEDERSEN (UNITED STATES INDIVIDUAL)  
PO BOX 6480  
LOS OSOS, CA 93412

TRADEMARK  
PRINCIPAL REGISTER

FOR: PRINTED ART REPRODUCTIONS, IN CLASS 16 (U.S. CLS. 2, 5, 22, 23, 29, 37, 38 AND 50).

FIRST USE 10-14-1999; IN COMMERCE 10-26-1999.

FOR: WEARABLE GARMENTS AND CLOTHING, NAMELY, SHIRTS, IN CLASS 25 (U.S. CLS. 22 AND 39).

FIRST USE 10-14-1999; IN COMMERCE 10-26-1999.

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

SER. NO. 77-669,580, FILED 2-12-2009.

NICHOLAS COLEMAN, EXAMINING ATTORNEY



*David J. Kappas*

Director of the United States Patent and Trademark Office

Appeal Brief  
Application No. 77/411,069

**EXHIBIT B**  
Appeal Brief- **THE STOKED**  
Application Serial No. 77/411,069

# United States of America

United States Patent and Trademark Office

# Way Stoked

**Reg. No. 3,836,244**

LOPEZ, DAVID ARMANDO (UNITED STATES INDIVIDUAL)  
1332 DOMINGO PLACE  
OXNARD, CA 93030

**Registered Aug. 17, 2010**

**Int. Cl.: 25**

FOR: T-SHIRTS, SWEATSHIRTS AND HATS, IN CLASS 25 (U.S. CLS. 22 AND 39).

**TRADEMARK**

FIRST USE 12-1-1993; IN COMMERCE 12-1-1993.

**PRINCIPAL REGISTER**

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

SN 78-369,850, FILED 2-18-2004.

PAUL MORENO, EXAMINING ATTORNEY



*David J. Kappas*

Director of the United States Patent and Trademark Office

**EXHIBIT C**  
Appeal Brief- **THE STOKED**  
Application Serial No. 77/411,069

# United States of America

United States Patent and Trademark Office

## Stoked Racing

**Reg. No. 3,871,189**

**Registered Nov. 2, 2010**

**Int. Cl.: 42**

**SERVICE MARK**

**PRINCIPAL REGISTER**

WILLIAMSON, RENEE L (ILLINOIS SOLE PROPRIETORSHIP), DBA STOKED RACING,  
2333 CINCINNATI AVENUE  
SPRINGFIELD, IL 62702

FOR: CUSTOM DESIGN OF TSHIRTS, SWEATSHIRTS, USED CLOTHING, PANTS, SHORTS,  
SWIMWEAR, UNDERCLOTHING, ADULT, YOUTH, AND INFANT APPAREL BASED ON  
PERSONAL SELECTIONS MADE BY THE CUSTOMER, IN CLASS 42 (U.S. CLS. 100 AND  
101).

FIRST USE 11-1-2008; IN COMMERCE 11-1-2008.

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PAR-  
TICULAR FONT, STYLE, SIZE, OR COLOR.

SN 77-738,678, FILED 5-16-2009.

STEVEN R. FINE, EXAMINING ATTORNEY



*David J. Kypas*

Director of the United States Patent and Trademark Office

### EXHIBIT D

Appeal Brief- **THE STOKED**

Application Serial No. 77/411,069

**Int. Cl.: 28**

**Prior U.S. Cls.: 22, 23, 38 and 50**

**United States Patent and Trademark Office**

**Reg. No. 3,619,197**

**Registered May 12, 2009**

**TRADEMARK  
PRINCIPAL REGISTER**

**STOKED SKATEBOARDS**

RAJEWSKI, DAVID (UNITED STATES INDIVIDUAL)  
19815 HAMILTON AVENUE  
TORRANCE, CA 90502

FOR: BALL BEARINGS FOR SKATEBOARDS; NUTS AND BOLTS FOR SKATEBOARDS; SKATEBOARD DECKS; SKATEBOARD GRIP TAPES; SKATEBOARD RAILS; SKATEBOARD RISER PADS; SKATEBOARD TRUCKS; SKATEBOARD WHEELS; SKATEBOARDS, IN CLASS 28 (U.S. CLS. 22, 23, 38 AND 50).

FIRST USE 4-0-2007; IN COMMERCE 4-0-2007.

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "SKATEBOARDS", APART FROM THE MARK AS SHOWN.

SER. NO. 77-586,073, FILED 10-6-2008.

ROBIN CHOSID, EXAMINING ATTORNEY

**EXHIBIT E**  
Appeal Brief- **THE STOKED**  
Application Serial No. 77/411,069



United States Patent and Trademark Office

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# GET STOKED

<b>Word Mark</b>	GET STOKED
<b>Goods and Services</b>	IC 039. US 100 105. G & S: travel guide and tour guide services
	IC 041. US 100 101 107. G & S: operation of an outdoor recreational sport camp; instruction in the field of snowboarding, skiing, mountain biking, bmx biking, surfing, kite surfing, wind surfing and skateboarding
<b>Standard Characters Claimed</b>	
<b>Mark Drawing Code</b>	(4) STANDARD CHARACTER MARK
<b>Serial Number</b>	77625057
<b>Filing Date</b>	December 2, 2008
<b>Current Filing Basis</b>	1B;44D
<b>Original Filing Basis</b>	1B;44D
<b>Owner</b>	(APPLICANT) Camp of Champions Inc. CORPORATION CANADA 8629 Drifter Way Whistler CANADA V0N1B8
<b>Attorney of Record</b>	Tanya M. Reitzel
<b>Priority Date</b>	November 14, 2008
<b>Type of Mark</b>	SERVICE MARK

**EXHIBIT F**  
 Appeal Brief- **THE STOKED**  
 Application Serial No. 77/411,069

Register PRINCIPAL  
Live/Dead Indicator LIVE

TESS HOME NEW USER STRUCTURED FREE FORM Browse Dict SEARCH OG TOP HELP PREV LIST CURR LIST  
NEXT LIST FIRST DOC PREV DOC NEXT DOC LAST DOC

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**EXHIBIT F (Part 2)**  
Appeal Brief- **THE STOKED**  
Application Serial No. 77/411,069

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

Applicant: Ron Jon Surf Shop of Fla., Inc.

Application Serial No. 77/411,069

Mark: **THE STOKED**

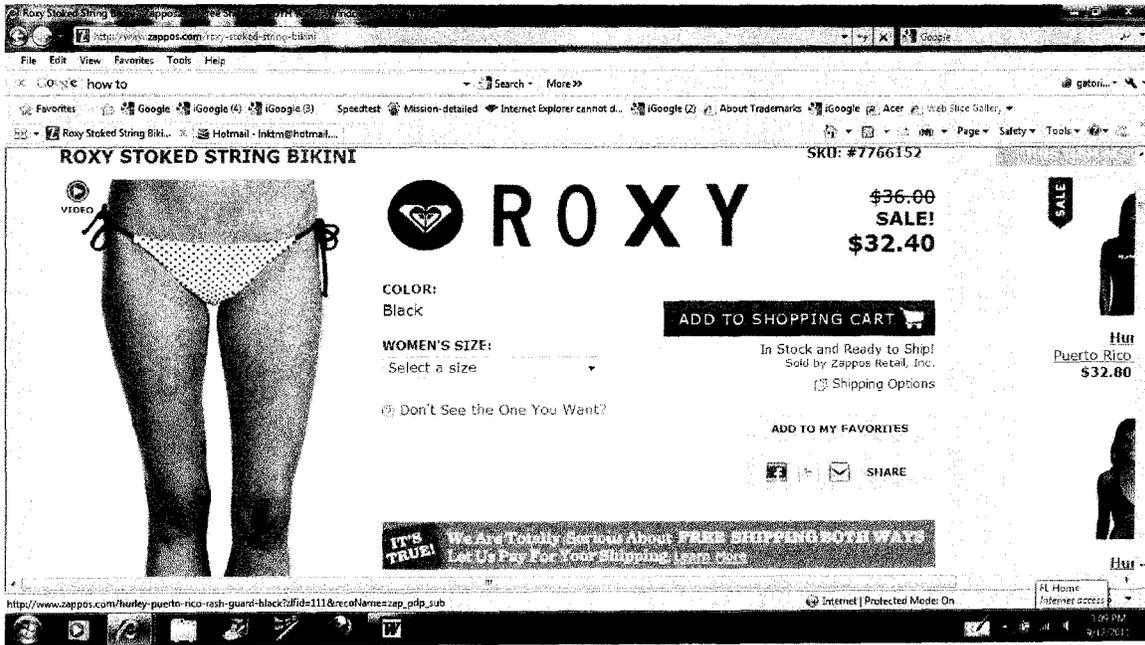
Filing Date: March 3, 2008

Classes: 18, 25 and 35 (only classes appealed)

Examining Attorney: Wendy B. Goodman  
Law Office: 109

Trademark Trial and Appeal Board  
U.S. Patent and Trademark Office  
P.O. Box 1451 Alexandria, VA 22313-1451

**EXHIBITS G-R TO APPEAL BRIEF ATTACHED\***  
\*(All Exhibits previously provided in record of the case)



**EXHIBIT G**  
Appeal Brief- **THE STOKED**  
Application Serial No. 77/411,069

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### Roxy Stoked Hoodie

[Email to a Friend](#)

[Be the first to review this product](#)

Availability: **In stock**

**\$42.99**



Double click on above image to view full picture

### Quick Overview

**Size/Color \***

We hope your stoked, because Stoked is the ne this hoodie is one the hottest items we have. It's blend french terry. 26 inches long. Imported.

**\*NO RUSH SHIPPING**

[Add to Wishlist](#) | [Add to Compare](#)

**EXHIBIT H**  
Appeal Brief- **THE STOKED**  
Application Serial No. 77/411,069

-- Please Select --

\* Required Fields

**\$42.99**

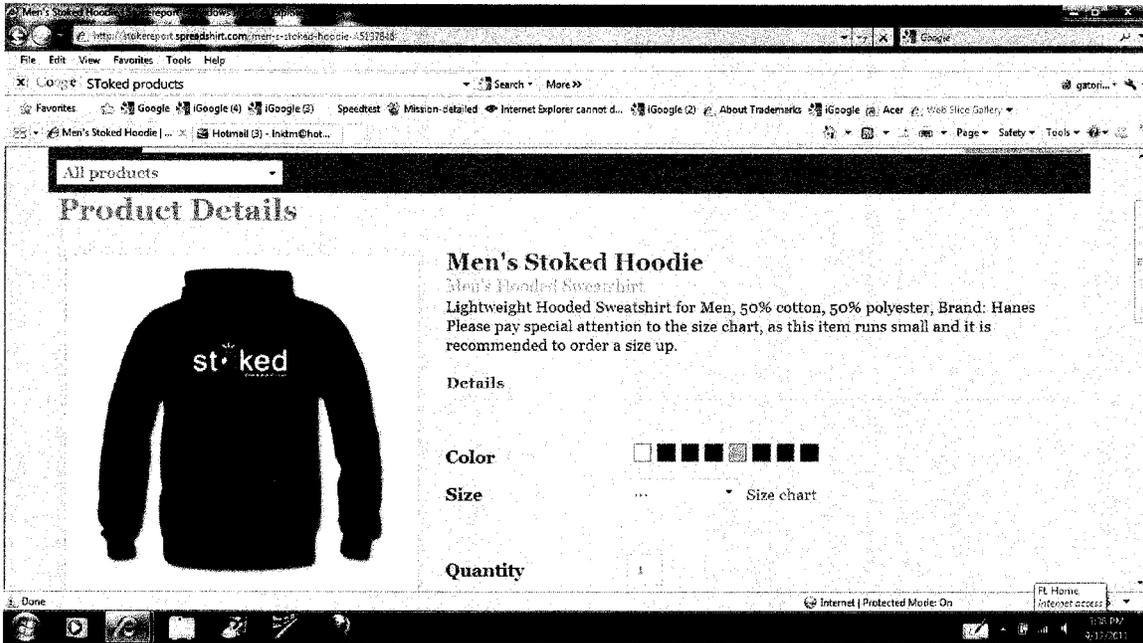
Qty:  Add

[Product Description](#)   [Product Tags](#)   [Product's Review](#)

### Product Description

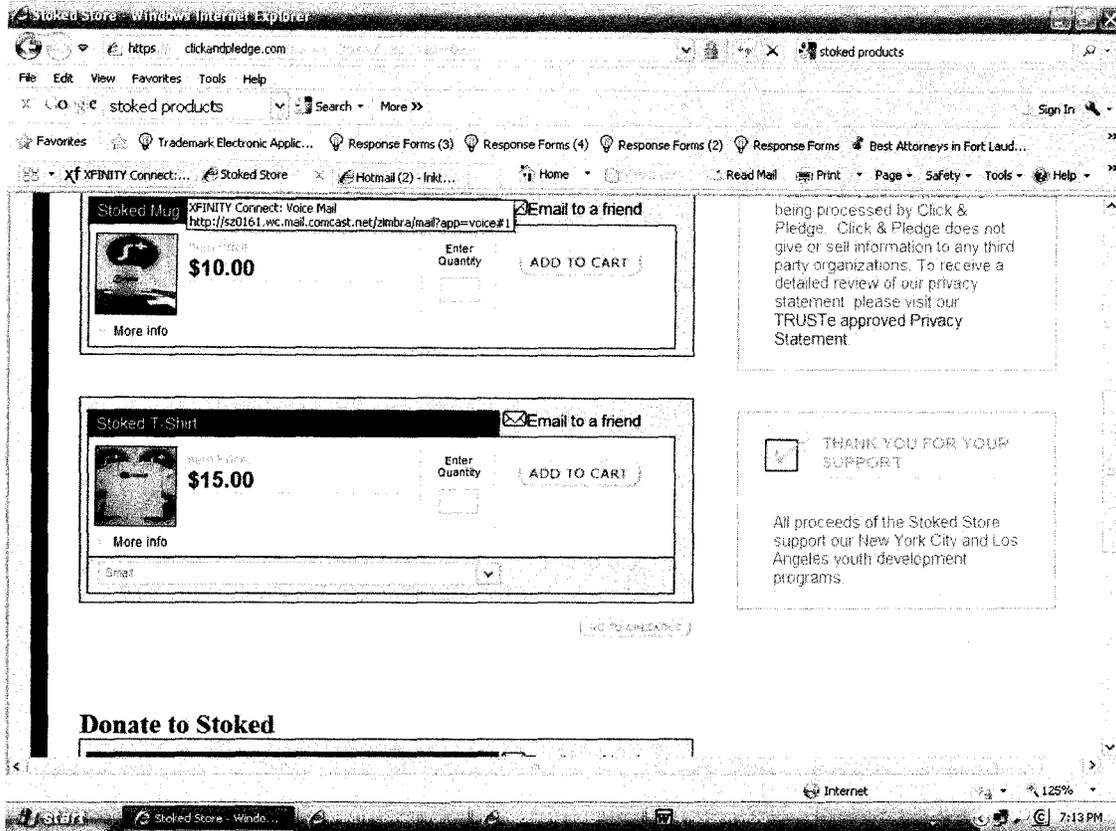
We hope your stoked, because Stoked is the new black and this hoodie is one the hottest items we have. It's made of french terry. 26 inches long. Imported.

http://stokereport.spreadshirt.com/men-s-stoked-hoodie-A5137846



**EXHIBIT I**  
Appeal Brief- **THE STOKED**  
Application Serial No. 77/411,069

https://co.clickandpledge.com/advanced/default.aspx?wid=40656



**EXHIBIT J**  
Appeal Brief- **THE STOKED**  
Application Serial No. 77/411,069

[SKECHERS KIDS Luminator - S Lights - Stoked \(Toddler/Youth\)](#)  
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**SKECHERS KIDS LUMINATOR - S LIGHTS - STOKED (TODDLER/YOUTH)**      SKU: #7794946



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**SKECHERS Luminator - S 1 (Toddler) \$50**

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http://www.zappos.com/brands      Internet | Protected Mode: On

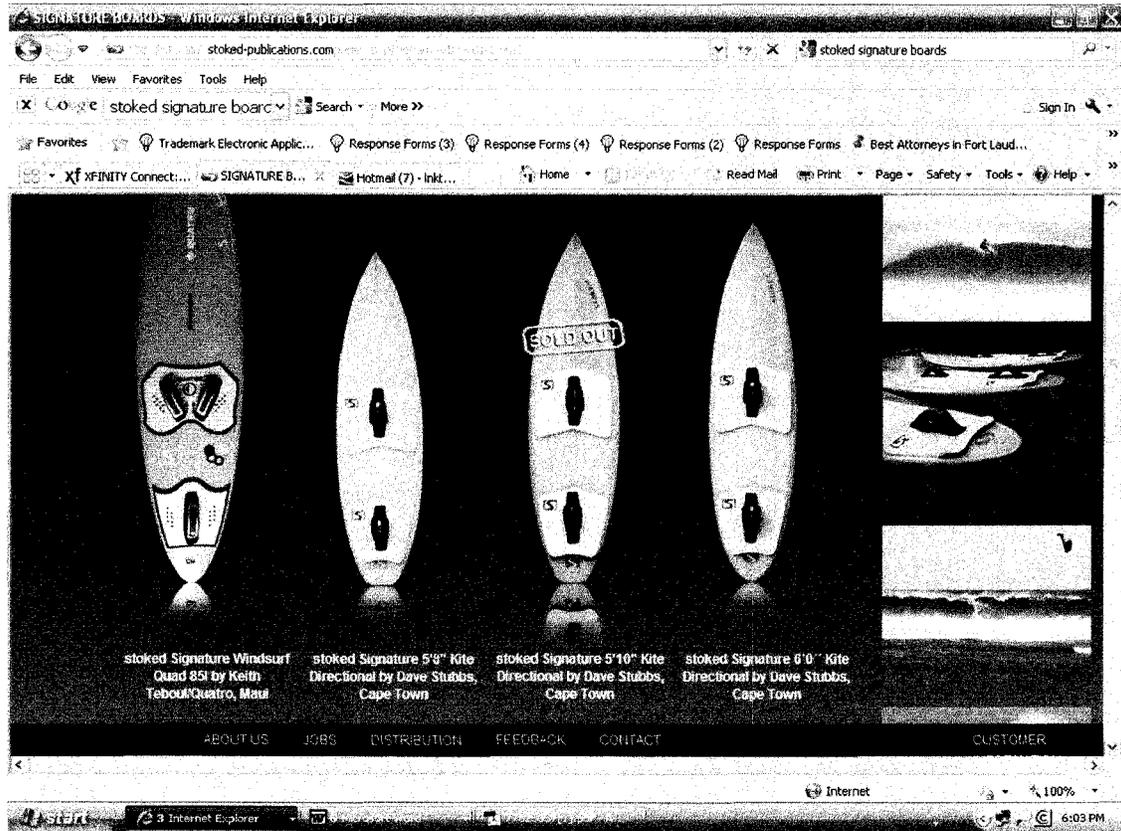
**EXHIBIT K**  
 Appeal Brief- **THE STOKED**  
 Application Serial No. 77/411,069

http://www.tommybahama.com/TBG/Big\_and\_Tall/Accessories/Sunglasses/PRD\_TB535  
SP/Stoked+Rider+Sunglasses.jsp?utm\_source=googlebase&utm\_medium=pfeed&utm\_c  
ampaign=gb&cm\_mmc=googleps-\_-BigandTallAccessoriesSunglasses-\_-  
Tommy%20Bahama%20Stoked%20Rider%20Sunglasses%20Mens-\_-T

The screenshot shows the Tommy Bahama website in Internet Explorer. The browser's address bar displays the URL: [http://www.tommybahama.com/TBG/Big\\_and\\_Tall/Accessories/Sunglasses/PRD\\_TB535SP/Stoked+Rider+Sunglasses.jsp?utm\\_source=googlebase&utm\\_medium=pfeed&utm\\_campaign=gb&cm\\_mmc=googleps-\\_-BigandTallAccessoriesSunglasses-\\_-Tommy%20Bahama%20Stoked%20Rider%20Sunglasses%20Mens-\\_-T](http://www.tommybahama.com/TBG/Big_and_Tall/Accessories/Sunglasses/PRD_TB535SP/Stoked+Rider+Sunglasses.jsp?utm_source=googlebase&utm_medium=pfeed&utm_campaign=gb&cm_mmc=googleps-_-BigandTallAccessoriesSunglasses-_-Tommy%20Bahama%20Stoked%20Rider%20Sunglasses%20Mens-_-T). The website header features the Tommy Bahama logo and the slogan "MAKE LIFE ONE LONG WEEKEND™". A navigation menu includes categories like MEN, BIG & TALL, WOMEN, SWIM, HOME DÉCOR, STORES & RESTAURANTS, and LIVE THE LIFE. The main content area displays the "Stoked Rider Sunglasses (= TB535SP)" for \$124.00. A message states, "We wish we'd made more, but this product is SOLD OUT. These versatile shades are styled for any sunny day. The polarized lenses reduce reflections, perfect for when..." with a "READ MORE" link. A "YOU MIGHT ALSO LIKE" section recommends "Major Flipstop Cargo Shorts" and "Palm Springs nubuck sneakers". The browser's status bar at the bottom shows the time as 6:14 PM.

**EXHIBIT L**  
Appeal Brief- **THE STOKED**  
Application Serial No. 77/411,069

<http://storeint.stoked-publications.com/index.php/signature-boards-1.html>



**EXHIBIT M**  
Appeal Brief- **THE STOKED**  
Application Serial No. 77/411,069

Stoked: Big Air Edition...  
 http://shop.cnet.com/...  
 Edit View Favorites Tools Help  
 Stoked products Search More  
 Stoked: Big Air Edition... Hotmail (3) - inkim@hot...



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amazon.com.	☆☆☆☆☆ See store profile	In stock Get free shipping on orders over \$25.	Enter zip code to get total price. Price	<b>\$14.81</b> SHOP NOW

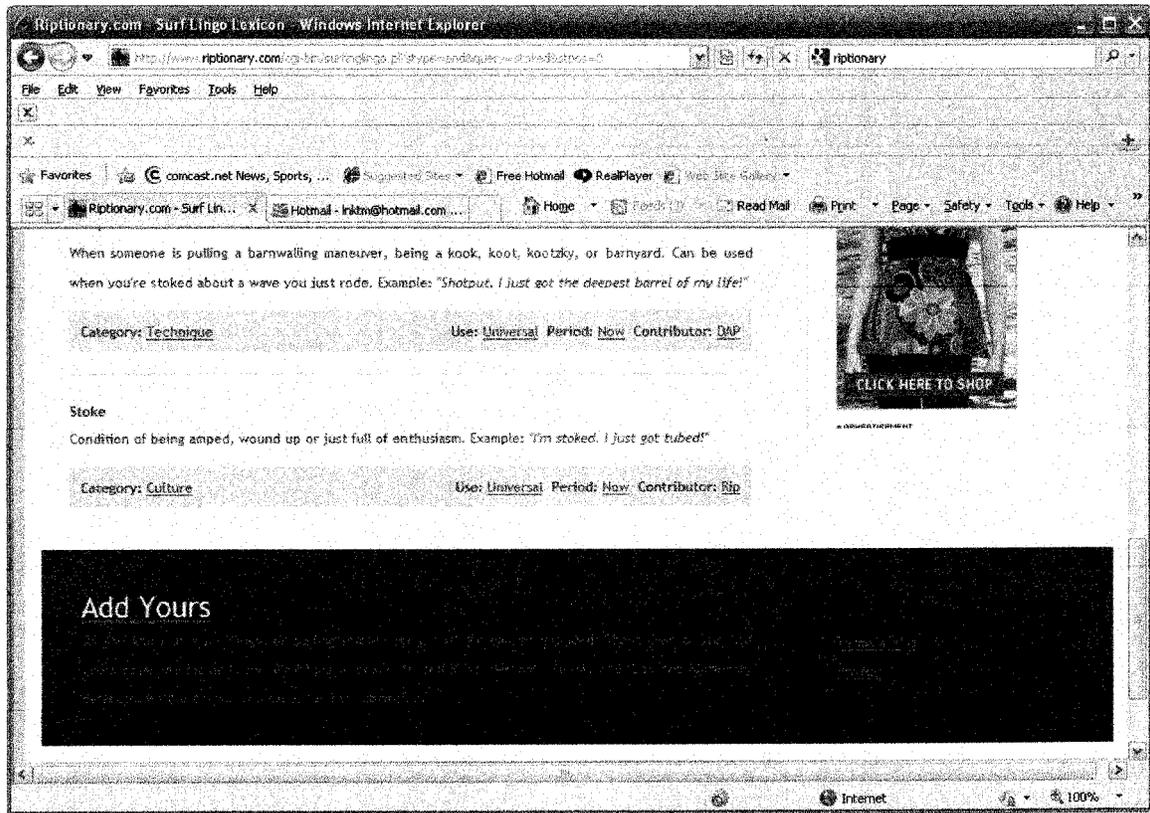
shopper.com  
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 3:43 PM 9/2/2011

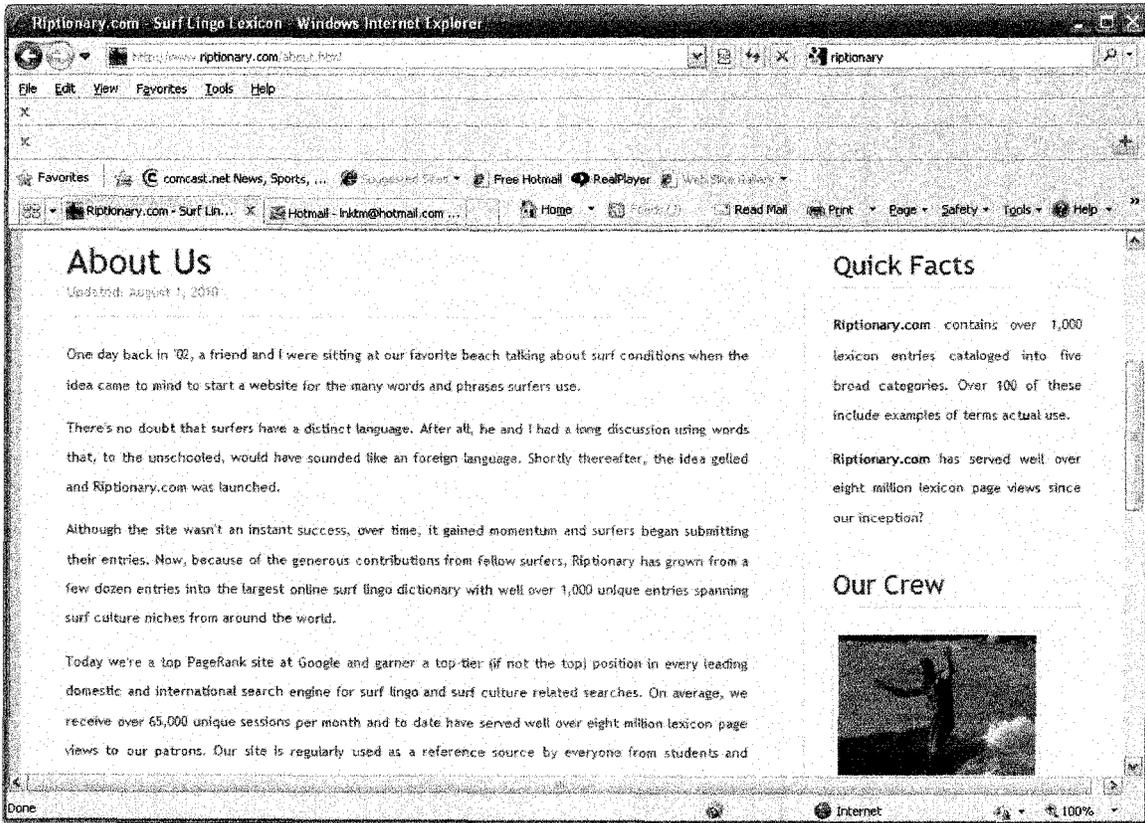
**EXHIBIT N**  
 Appeal Brief- **THE STOKED**  
 Application Serial No. 77/411,069



**EXHIBIT O**  
Appeal Brief- **THE STOKED**  
Application Serial No. 77/411,069



**EXHIBIT P**  
Appeal Brief- **THE STOKED**  
Application Serial No. 77/411,069



**EXHIBIT P (part 2)**  
Appeal Brief- **THE STOKED**  
Application Serial No. 77/411,069

<http://www.word-detective.com/070599.html>

Surf's up, doood.

Dear Word Detective: I'm writing an essay on the origin of popular slang terms. I've been trying to discover the origin of a fairly recent one, "stoked," meaning "excited." A person might say, "I'm so stoked about the party this weekend." I'd be grateful for any suggestions. -- Jennifer, via the internet.

I've been hearing people in their teens and early twenties using "stoked" fairly frequently lately, and it always gives me the creepy feeling that I've wandered into a rerun of the old "Mod Squad" TV show. "Stoked" began in the early 1960's as California surfer slang meaning "excited" (most likely by a large and "groovy" wave, I suppose), and by the latter half of the decade had moved into the sort of mainstream youth slang heard in landlocked places like Des Moines.

At least it supposedly did. I have no doubt that surfers used the term, but I don't think I'd count it as genuine "youth slang" of the period. I was a certifiable youth during the late 1960's, complete with long hair and bad attitude, and I would no more have used a dorky term like "stoked" than I would have gone to a Monkees "concert." Terms such as "stoked" ("groovy" was another one) were widely considered "plastic" (phony) and more likely to turn up on "Dragnet" or in teen exploitation movies than in real life.

In any case, since today's youth are apparently deaf to such aesthetic distinctions and determined to use the term, I should explain "stoked." It's simply a figurative use of the verb "stoke," meaning to feed fuel (wood, coal, etc.) into a furnace, usually by hand, and comes from the Dutch word "stoken," which means "to feed a fire." The literal use of "stoke" first appeared in English around 1683, and a figurative use of "stoke" to meaning "to shovel food into one's mouth" was in use by about 1882.

---

**From the Website THE WORD DETECTIVE "About the Word Detective"**

## **About TWD**

The Word Detective on the Web is the online version of The Word Detective, a newspaper column answering readers' questions about words and language. The Word Detective is written by Evan Morris and appears in finer newspapers in the U.S., Mexico and Japan.

**EXHIBIT Q**  
Appeal Brief- **THE STOKED**  
Application Serial No. 77/411,069

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## Frequently Asked Questions About Museum Stores

Developed by [MSA](#), (303) 504-9223

### How many museum stores are there in the United States?

Approximately 1,650 institutions belong to MSA, all of which either have a store or are in the process of creating a retail operation.

### What is the size of the industry in dollars/sales?

We know from a 2006 financial survey conducted by a third-party company that MSA member stores range in net sales from less than \$5,000 to more than \$12.5 million with median net sales of \$179,800 and mean net sales of \$548,221.

### How are museum stores different from regular retail stores?

Stores in cultural institutions are different from typical retail operations in several ways:

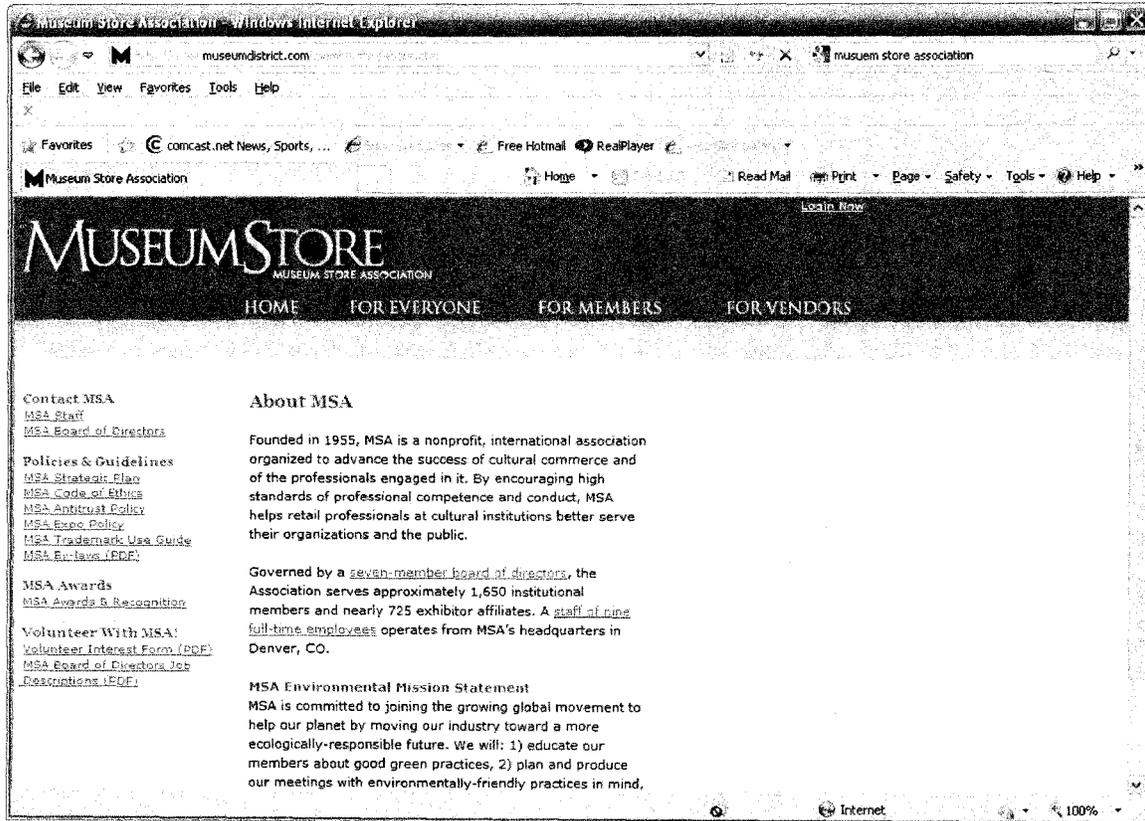
- These retail operations play a vital role in supporting the institution's educational mission. They offer products that provide visitors with mementos and educational materials directly related to their cultural experience.
- Purchases made at these stores provide important financial support for the institution. The "profits" made by these stores go back to the cultural institution, not a company or individual's pocket.
- Unlike a typical "mall" experience, shopping at cultural institutions is an extension of the unique museum experience. Most stores operate within the museum building or on the institution's grounds rather than in a shopping district or mall. Most customers shop there because of their interest in the cultural institution.

### How "profitable" are stores in cultural institutions? How much do they contribute to their institutions?

Museum store profitability can vary widely depending on museum visitation, store location, product mix, what the museum charges back to the store (such as rent, utilities, phone), paid staff versus volunteer staff and several other factors. Typically museum stores return all of their excess revenue to the institution. The amount that any given store contributes to its institution varies widely, but can be as much as one-third of the institution's operating budget.

### How long have museum stores been around? Has the

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