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

Proceeding	77501020
Applicant	DV International, Inc.
Correspondence Address	DANIEL M PAULY PAULY DEVRIES SMITH & DEFFNER LLC 45 SOUTH SEVENTH STREET PLAZA VII, SUITE 3000 MINNEAPOLIS, MN 55402 UNITED STATES dpauly@pdsdlaw.com
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Filer's Name	DANIEL M. PAULY
Filer's e-mail	dpauly@pdsdlaw.com, docketing@pdsdlaw.com
Signature	/Daniel M. Pauly/
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Applicant: DV International, Inc.
Application No.: 77/501,020
Filed: 2008-06-17
Examining Atty: Shaila Settles
Law Office: 114
Mark: ORGANIZED GOES BEYOND ORDINARY
Docket: 766.0060UST1

APPLICANT'S BRIEF ON APPEAL

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

I. PROCEDURAL BACKGROUND

On March 25, 2010 the Examining Attorney issued a final office action refusing applicants submission of a specimen. Applicants have timely filed an appeal.

II. ISSUE ON APPEAL

Whether the specimen refusal was appropriate.

III. ARGUMENT

The test for an acceptable website specimen, "just as any other specimen, is simply that it must in some way evince that the mark is 'associated' with the goods and serves as an indicator of source." *In re Michael Sones*, 93 USPQ2d 1118 (Fed. Cir. 2009). Applicants acknowledge that the specimen submitted in this application does not satisfy the requirement in TMEP Section 904.03(j) that there be a direct way to purchase the goods by way of the display. Applicants assert that no such requirement exists under a proper interpretation of the statute. The requirement that there be a direct way to purchase the goods comes out of a three required criteria for specimens constituting a catalog associated with the goods expressed in *Lands' End, Inc. v. Manbeck*, 797 F. Supp. 511 (E.D. Va. 1992), and first applied to websites in *In re Dell*, 71 USPQ2d 1725 (TTAB 2004).

In contrast, in *Sones*, the Federal Circuit rejected the TTAB's interpretation of *Lands' End*, noting that even the *Lands' End* decision did not apply the three-part test as an absolute requirement. The court found that *Lands' End* required a combination of factors to determine "whether the customer had 'the opportunity to look to the Displayed mark as a means of identifying and distinguishing the source of goods.'" Additionally, the Federal Circuit found no foundation for the TTAB's bright-line rule in the trademark statute or policy. Citing the Lanham Act, the court held that the statute does not impose particular requirements for how an applicant demonstrates source or origin, instead simply requiring that the mark be *associated* with the goods.

Finally, the court declined to follow the rigid three-part *Lands' End* test cited in the TMEP. The court noted that while the TMEP is instructive, it "is not established law." Moreover, the court reasoned that the TMEP's three-part test was enumerated in § 904.03(h) for "Catalogs," whereas the separate section for "Electronic Displays" contained no such three-part test.

According to the Federal Circuit, the proper test for a website-based specimen of use was identical to the test for any other specimen—namely, that the specimen "must in some way evince that the mark is 'associated' with the goods and services as an indicator of source."

IV. CONCLUSION

In the present case, the Applicant believes the mark has been properly associated with the goods as an indicator of source, and is therefore proper, and respectfully requests that the rejection of the specimen be withdrawn.

Respectfully submitted

/Daniel M. Pauly/

Registration No. 40,123
Pauly, DeVries Smith & Deffner, LLC
45 South Seventh Street
Minneapolis, MN 55419