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

Proceeding	85852665
Applicant	Zeos Global LLC
Applied for Mark	ZEOS
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THE TRADEMARK TRIAL AND APPEAL BOARD**

Applicant/Appellant: Zeos Global LLC

Serial No: 85852665

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Mark: Zeos

Law Office: 101

Examining Attorney: Andrew Rhim

EX PARTE APPEAL

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Applicant, Zeos Global LLC, by Counsel, hereby respectfully appeals the Examining Attorney's refusal to register the mark ZEOS in standard characters.

DESCRIPTION OF THE RECORD

I. PROSECUTION HISTORY

The Zeos application was initially refused on June 3, 2013 in a Non-final Office Action. Applicant filed a Response to the Office Action on November 27, 2013. Application was again refused on December 16, 2013 in another Non-final Office Action. Applicant filed a Response to the Office Action on June 16, 2014. The Zeos application was again refused in a July 2, 2014 Non-final Office Action. Applicant filed a response on December 30, 2014. The application was

again refused in a Non-final Office Action on January 27, 2015. Applicant filed a Response to the Office Action on May 27, 2015. The application was again refused in a Non-final Office Action on June 18, 2015. Applicant filed their last response on December 18, 2015. This was refused in a Final Office Action on January 8, 2016

This final refusal was based on the Examining Attorney's conclusion that Applicant's Zeos mark was confusingly similar to the Registrant's ZEO! mark under the Trademark Act Section 2(d). Also made final was a required clarification of the identification of goods as well as a specimen refusal. These have been addressed with an amended application removing the word "powered" from "powered computer monitors, powered speakers and powered audio speakers" and removing "active and passive monitor speakers" from "active monitor speakers, passive monitor speakers" as well as changing the application to an intent to use under Subsection 1(b), therefor will not be addressed in this brief. Applicant's Notice of Appeal was timely filed on July 7, 2016.

II. EXAMINING ATTORNEY'S EVIDENCE

The Examining Attorney contends in the January 8, 2016 Final Office Action that Applicant's ZEOS mark for "Consumer electronics, namely, computers, tablet computers, laptop computers ... Audio equipment, namely, audio speakers, sound cards, loudspeakers, computer monitors, reference computer monitors, powered computer monitors, active loudspeakers, powered speakers ... active audio speakers, powered audio speakers, integrated amplifiers; sub woofers, multi-application audio speakers ... computer audio speakers ... active monitor

speakers, passive monitor speakers” is likely to confuse under the Lanham Act Section 2(d), 15 U.S.C. § 1052(2), with Registration No. 3327587 ZEO! for Color Inkjet Label Printers.

III. APPLICANT’S EVIDENCE

In response to the Examining Attorney’s Non-final Office Action issued on January 27, 2015, Applicant timely filed an answer asserting that a comparison of Applicant’s ZEOS mark and Registrant’s ZEO! mark shows that the marks are not similar and therefor not likely to confuse. Applicant further asserts that the marks create distinct commercial impressions from each other and highlighted the distinction between the Applicant’s and Registrant’s goods. Applicant argued that clients purchasing products produced by both the Applicant and Registrant are highly sophisticated and therefor unlikely to be confused between Applicant’s Zeos mark for consumer electronics and Registrant’s ZEO! mark for Color Inkjet Label Printers.

ARGUMENTS

I. LEGAL STANDARD

A determination of a likelihood of confusion under Section 2(d) of the Lanham act is based on an analysis of all of the facts in evidence to the factors set out in *In re E.I. du Pont DeNemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (CCPA 1973). However, Not all of the factors are necessarily relevant or of equal weight in each case. *Id.* at 567.

Mere similarity between the marks does not alone create a likelihood of confusion. The question is whether the similarities are likely to cause confusion. See e.g., *Brennan’s Inc. v. Brennan’s Rest, L.L.C.*, 360 F.3d 125, 133, 69 U.S.P.Q.2d 1939, 1944 (2d Cir. 2004).

Additionally, identical or similar marks that are used for the same broad category of goods or services do not alone cause a likelihood of confusion unless those goods and services are sufficiently similar. See e.g., *Dynamic Research Corp. v. Langenau Mfg. Co.*, 704 F.2d 1575, 1576, 217 U.S.P.Q. 649, 649-50 (Fed. Cir. 1983) (no likelihood of confusion between two “DRC” marks both used for goods in the metal fabrication industry).

The sophistication of consumers is a significant factor in a likelihood of confusion analysis. “The sophistication and expertise of the usual purchaser can preclude any likelihood of confusion among them stemming from the similarity of trade names” *Perini Corp. v. Perini Construction Inc.*, 915 F.2d 121, 127 (4th Cir. 1990). Circumstances suggesting care in purchasing tend to minimize the likelihood of confusion. When only sophisticated purchasers exercising great care would purchase the relevant goods, there would be no likelihood of confusion nearly because of the similarity between the marks. *In re Homeland Vinyl Prods., Inc.*, 81 U.S.P.Q.2d 1378, 1380, 1383 (TTAB 2006).

II. ANALYSIS

The following *DuPont* factors are highly relevant to this application:

- (1) The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression;
- (2) The similarity or dissimilarity and nature of the goods as described in the applications or registration or in connection with which a prior mark is in use;

- (3) The similarity or dissimilarity of established and likely-to-continue trade channels;
- (4) The conditions under which and buyers to white sales are made, i.e., ‘impulse’ vs. careful, sophisticated purchasing;
- (5) The absence of actual confusion as between the marks and the length of time in which the marks have co-existed without actual confusion occurring.

In re E.I. du Pont DeNemours & Co., 476 F.2d 1357, 1361, 177 USPQ 563, 567 (CCPA 1973)

In this case, a comparison of both the Registrant’s ZEO! mark and the Applicant’s ZEOS mark are dissimilar in the critical aspect of appearance, sound, connotation and overall commercial impression. Additionally, while both the applicant and registrant offer goods in the same broad category, the offered goods are very different. Given the nature of the goods at issue, the price point of these goods and the expected lifespan of the goods, purchasers of either Applicant’s or Registrant’s goods are likely to make a well-researched and informed decision when deciding to purchase consumer electronics and are therefor unlikely to make an impulse buying decision.

1. THE APPLICANT’S ZEOS MARK AND REGISTRANT’S ZEO! MARK CREATES A DIFFERENT OVERALL COMMERCIAL IMPRESSION

Applicant’s ZEOS Mark is different than Registrant’s ZEO! mark. The examining attorney concluded that Applicant’s and Registrant’s marks are substantially similar because “both marks contain the identical root word, ZEO, and the addition of the letter “S” or plural

form of Applicant's mark does not distinguish it from the cited mark." The relevant *DuPont* factor requires the examination of "the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression" *Id. at 567*. Further, each mark must be viewed as a whole, and each case will turn on its own facts. See T.M.E.P. § 1207.01(b). It is respectfully submitted that a comparison of the marks in their entireties show that the marks are distinctly dissimilar.

The point of comparison for standard character marks are appearance, sound, meaning and commercial impression. *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 1371, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005). Similarity of the marks in one respect – sight, sound, or meaning – will not automatically result in a determination that confusion is likely even if the goods are identical or closely related; rather, taking into account all of the relevant facts of a particular case, similarity as to one factor alone may be sufficient to support a holding that the marks are confusingly similar. See *In re Thor Tech, Inc.*, 90 U.S.P.Q.2d 1634, 1635 (TTAB 2009); *In re White Swan Ltd.*, 8 U.S.P.Q.2d 1534, 1535 (TTAB 1988).

Registrant's mark consists of the word Zeo with an exclamation point while the Applicant's mark is the word Zeos with no added punctuation. Both of these marks share three letters but the mere fact that the Applicant mark and Registrant mark share this element does not compel a conclusion of a likely confusion. See *Gen. Mills, Inc. v. Kellogg Co.*, 824 F.2d 622, 627, 3 U.S.P.Q.2d 1442, 1445 (8th Cir. 1987) ("The use of identical, even dominant, words in common does not automatically mean that two marks are similar"). While the differences here seem small, just one letter and a punctuation, they radically alter the overall impression of the mark, especially aurally.

Both ZEO! and ZEOS are two syllable words but the pronunciation of the second syllable is distinctly different. ZEO! is pronounced like the prefix neo while ZEOS' second syllable is pronounced similarly to the first syllable in the word oscillate. The addition of the exclamation point further differentiates the marks. An exclamation point is usually used to indicate strong feelings or high volume. In speaking, both of these tend to increase the speaking speed and volume. One does not leisurely yell "watch out!" to another in danger. Exclamation points also tend to change the emphasis of the word they are modifying. Zeo, sans exclamation point, would have a light emphasis on the first syllable. With the exclamation point this becomes a hard emphasis on the latter syllable. ZEOS retains the emphasis on the first syllable. The sound of both marks is distinctly different.

Turning to the meaning, both marks consist of fanciful words. Neither Zeo nor Zeos are words in English, or any other language as far as I can find. The Examining Attorney determined that Zeos is the plural of the word Zeo. While the majority of English words follow the rule that adds an 's' to create a plural, it is not a universal rule. As both words are fanciful, it is difficult to apply existing plural rules to them. Zeos is not the plural of Zeo. It is a distinct word.

Upon application of the traditional "sight, sound and meaning" test encompassed by the mark similarity factor of the *DuPont* test, the commercial impression of the two marks at issue is significantly different and their factor weights heavily in favor of the Applicant.

2. DISTINCTION BETWEEN APPLICANT'S AND REGISTRANT'S GOODS AND SERVICES

Applicant's ZEOS mark is not sought for use for the same goods as Registrant's ZEO! Mark. The Applicant provides a variety of consumer electronics and audio products from

computers to smart phones to monitors. The Applicant does not provide printers. The Registrant's only products are label printers. The Examining Attorney suggests that because there are companies that sell both printers and other consumer electronics, sometimes under the same label, the Applicant's and Registrant's goods are related. Given the ubiquity of both brick and mortar superstores and online retailers such as Amazon that sell a multitude of products, this argument, taken to its logical conclusion, would create a likelihood of confusion problem between two marks in almost any area of consumer product. One can buy everything from consumer electronics to food on Amazon and Big Box retailer's home brands use the same label for a disparate variety of products. Simply because they can be sold by the same company does not automatically make them similar.

The issue of relatedness of goods and services is a question of consumer expectations. A broad general market category, such as electronic sound products, is generally not a reliable test for relatedness of product. *Bose V. QSC Audio*, 293 F.3d 1367, 1376, 63 U.S.P.Q.2d 1303, 1310 (Fed. Cir. 2002). "Goods and services are not necessarily related ... simply because they coexist in the same broad industry" *UMC Indus., Inc. v. UMC Elecs. Co.*, 207 U.S.P.Q. 861, 879 (T.T.A.B. 1980).

The actual goods of the Applicant and Registrant, while both belonging to the same broad "consumer electronics" industry, vary significantly. The Applicant's products are general consumer electronics and audio while the Registrant's products are specialized printers used only for label printing. A consumer looking to purchase consumer electronics and audio equipment will have very different expectations than a consumer looking to purchase a label printer. The Examining Attorney has offered no evidence of goods similarity other than indicating that

Applicant's and Registrant's goods co-exist in the same broad marked industry and are sometimes sold by the same companies. As this has been held to be insufficient in previous cases, this factor strongly favors applicant.

3. THE SOPHISTICATION OF PURCHASERS.

Circumstances suggesting care in purchasing may tend to minimize the likelihood of confusion. See, e.g., *In re N.A.D., Inc.*, 754 F.2d 996, 999-1000, 224 U.S.P.Q. 969, 971 (Fed. Cir. 1985) (concluding that, because only sophisticated purchasers exercising great care would purchase the relevant goods, there would be no likelihood of confusion merely because of the similarity between the marks NARCO and NARKOMED); *In re Homeland Vinyl Prods., Inc.*, 81 USPQ2d 1378, 1380, 1383 (T.T.A.B. 2006).

In the instant case, Applicant provides a variety of consumer electronics while the Registrant provides specialized printers for the printing of labels. These are products that generally have a three to four and sometimes even five digit price tag and have an extended intended use period. These are not products that consumers purchase on a whim. The average consumer of these products will spend considerable effort researching the available options in their price range. See *Weiss Assocs., Inc. v. HRL Assocs., Inc.*, 902 F.2d 1546, 1548, 14 U.S.P.Q. 2d 1840, 1841 (Ferd. Cir. 1990)

The examining attorney argues that sophistication in a particular field does not equate to sophistication or knowledge of trademarks or are immune to source confusion. This is certainly true, but given the price point and expected lifespan of consumer electronics, the average

consumer would have a heightened sophistication and in that effort would be able to easily distinguish between Zeos and Zeo!.

As such, consumers exercise sufficient care in the purchase of the respective goods or services that clearly would minimize any potential for a likelihood of confusion as between the respective trademarks. This *DuPont* factor also favors the Applicant.

4. ABSENCE OF ACTUAL CONFUSION

Finally, there is no evidence of record indicating that there has been actual confusion in the marketplace as between Applicant's goods and the registrant's goods.

The absence of any instances of actual confusion is a meaningful factor where the record indicates that, for a significant period of time, an applicant's sales and advertising activities have been so appreciable and continuous that, if confusion were likely to happen, any actual incidents thereof would be expected to have occurred and would have come to the attention of one or all affected trademark owners. See *Gillette Canada Inc. v. Ranir Corp.*, 23 U.S.P.Q.2d 1768, 1774 (TTAB 1992).

While the Examining Attorney is correct that, in an Ex Parte proceeding such as this, the lack of actual confusion is of little probative value, viewed holistically with the other relevant factors it still strengthens the Applicant's assertion that there is no likelihood of confusion. This *DuPont* factor favors the Applicant.

CONCLUSION

The relevant *DuPont* factors all weight strongly in favor of a finding that Applicant's ZEOS Mark does not create a likelihood of confusion with the Registrant's ZEO! Mark because:

(1) Applicant's ZEOS Mark and Registrant's ZEO! mark create different overall commercial impressions; (2) Applicant and Registrant offer different goods; (3) Applicant and Registrant each enjoy cautious, sophisticated clients who are unlikely to be confused by similar marks in their industry; and (4) there is no evidence of actual confusion between Applicant's ZEOS mark and Registrant's ZEO! mark.

Therefore, in light of the above, Applicant respectfully requests that the Board grant this Ex Parte Appeal and allow for the registration of the ZEOS mark

Respectfully submitted, this 6th of September 2016

/Travis Dahlgren Wilson/

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