

ESTTA Tracking number: **ESTTA346791**

Filing date: **05/11/2010**

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

Petition for Cancellation

Notice is hereby given that the following party requests to cancel indicated registration.

Petitioner Information

Name	Robert E Randall Jr		
Entity	Individual	Citizenship	UNITED STATES
Address	2727 Klamath Drive Rocklin, CA 95765 UNITED STATES		

Attorney information	Susan L. Spann Llewellyn Spann, Attorneys at Law 5530 Birdcage Street Suite 210 Citrus Heights, CA 95610 UNITED STATES SSpann@ls4law.com Phone:9169669036		
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Registration Subject to Cancellation

Registration No	2044364	Registration date	03/11/1997
Registrant	HOLLYWOOD MEDIA CORP. 2255 GLADES ROAD BOCA RATON, FL 33431 UNITED STATES		

Goods/Services Subject to Cancellation

<p>Class 016. First Use: 1995/11/00 First Use In Commerce: 1995/11/00 All goods and services in the class are cancelled, namely: comic books, [trading cards, trading card albums,] books, relating to comic book characters and/or fictional narratives, animation cels, [bookmarks,] graphic novels, magazines relating to comic book characters, [posters, calendars, maps, greeting cards, postcards, play stamps, rubber ink stamps, playing cards, paper pennants, sticker albums, stickers, decals, bumper stickers, stationery, notebooks, bond paper, art and craft paper, pencils, pens, ungraduated school rulers, check book covers, address books, activity books, coloring books, composition books, instruction manuals and guidebooks relating to comic book characters,] paper book covers[art prints, paper shopping bags, wrapping paper and plastic decals for use as temporary tattoos]</p>

Grounds for Cancellation

Abandonment	Trademark Act section 14
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Related Proceedings	Petitioner has applied for registration of their word mark, "ZANDER," (Serial # 77794164). The Office refused registration on the basis of likelihood of confusion with the Xander mark, which does not appear to be in active use in commerce. A non-final office action was e-mailed on May 5, 2010.
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Attachments	Exhibit 1 (Office Action).pdf (11 pages)(81272 bytes)
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	Exhibit 2 (Tekno Comix).pdf (2 pages)(26759 bytes) Exhibit 3 (NewKadia).pdf (4 pages)(232688 bytes) Exhibit 4 (Xander Novel).pdf (10 pages)(401497 bytes) Exhibit 5 (Xander ILU).pdf (6 pages)(152085 bytes) Exhibit 7 (page 15 Xander).pdf (2 pages)(76359 bytes) 10E11 Statement of Grounds.pdf (4 pages)(20934 bytes)
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Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Signature	/Susan L. Spann/
Name	Susan L. Spann
Date	05/11/2010

Document Description: **Offc Action Outgoing**

Mail / Create Date: **05-May-2010**

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To: Randall, Robert E., Jr. (SSpann@LS4Law.com)
Subject: U.S. TRADEMARK APPLICATION NO. 77794164 - ZANDER - Randall
Sent: 5/5/2010 10:18:26 AM
Sent As: ECOM107@USPTO.GOV

- Attachments:** [Attachment - 1](#)
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UNITED STATES PATENT AND TRADEMARK OFFICE

SERIAL NO: 77/794164

MARK: ZANDER

77794164

CORRESPONDENT ADDRESS:
 SUSAN L. SPANN
 LLEWELLYN SPANN, ATTORNEYS AT
 LAW
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 CITRUS HEIGHTS, CA 95610-7698

RESPOND TO THIS ACTION:
<http://www.uspto.gov/teas/eTEASpageD.htm>
GENERAL TRADEMARK INFORMATION:
<http://www.uspto.gov/main/trademarks.htm>

APPLICANT: Randall, Robert E., Jr.

CORRESPONDENT'S REFERENCE/DOCKET NO:
 Randall
CORRESPONDENT E-MAIL ADDRESS:
 SSpann@LS4Law.com

OFFICE ACTION

TO AVOID ABANDONMENT, THE OFFICE MUST RECEIVE A PROPER RESPONSE TO THIS OFFICE ACTION WITHIN 6 MONTHS OF THE ISSUE/MAILING DATE.

ISSUE/MAILING DATE: 5/5/2010

TEAS PLUS APPLICANTS MUST SUBMIT DOCUMENTS ELECTRONICALLY OR SUBMIT FEE: Applicants who filed their application online using the reduced-fee TEAS Plus application must continue to submit certain documents online using TEAS, including responses to Office actions. For a complete list of these documents, see TMEP §819.02(b). In addition, such applicants must accept correspondence from the Office via e-mail throughout the examination process and must maintain a valid e-mail address. 37 C.F.R. §2.23(a)(2); TMEP §§819, 819.02(a). TEAS Plus applicants who do not meet these requirements must submit an additional fee of \$50 per international class of goods and/or services. 37 C.F.R. §2.6(a)(1)(iv); TMEP §819.04. Responding by telephone to authorize an examiner's amendment will not incur this additional fee.

This Office action is in response to applicant's communication filed on 4/12/10.

The assigned examining attorney has reviewed the referenced application and the applicant's response and has determined the following.

In the first office action the application was refused registration based on a prior registration under Section 2(d). In response, applicant submitted arguments against the refusal, as well as amended the identification of goods to narrow or limit the goods.

After further review of the application, it has been determined that applicant's identification of goods as originally filed is unacceptable. Therefore, the examiner must now issue this new non-final action to resolve the problems with the identification of goods.

Regarding the Section 2(d) refusal, applicant's arguments against the refusal have been considered but found unpersuasive. The examiner issues herewith a continuation of the Section 2(d) refusal, followed by the requirement for amendment to the identification of goods.

Section 2(d) - Likelihood of Confusion Refusal

The Section 2(d) refusal is **continued and maintained**.

Registration is refused because Applicant's mark "ZANDER" for "*Books in the field of general adult fiction, general children's fiction, general children's nonfiction and general adult nonfiction, including without limitation history, military history, photography, aerial photography, pets and pet care and a variety of other subjects, but not including comic books, graphic novels, or works based on comic books or graphic novels; Calendars; Children's books, but not including comic books, graphic novels, or works based on comic books or graphic novels; Coffee table books featuring photography and photographic or digital images; Non-fiction books on a variety of topics; Printed calendars; Publications, namely, digital and electronic books in the fields of general fiction and non-fiction on a variety of topics but not including comic books, graphic novels, or works based on comic books or graphic novels; Series of fiction and non-fiction books on a variety of topics but not including comic books, graphic novels, or works based on comic books or graphic novels; Series of fiction and non-fiction books on a variety of topics but not including comic books, graphic novels, or works based on comic books or graphic novels; Series of fiction works, namely, novels and books but not including comic books, graphic novels, or works based on comic books or graphic novels; Story books, but not including comic books, graphic novels, or works based on comic books or graphic novels*" and "*Book and review publishing; Book publishing; Publication of books, but not including comic books, graphic novels, or works based on comic books or graphic novels; Publication of texts, books, magazines and other printed matter, but not including comic books, graphic novels, or works based on comic books or graphic novels; Publication of books, e-books, calendars and other printed and downloadable digital or electronic publications and related materials, but not including comic books, graphic novels, or works based on comic books or graphic novels*" so resembles the mark "XANDER" for "*comic books, books, relating to comic book characters and/or fictional narratives, animation cels, graphic novels, magazines relating to comic book characters, paper book covers*" in U.S. Registration No. 2044364 as to be likely to cause confusion, to cause mistake, or to deceive. Trademark Act Section 2(d), 15 U.S.C. §1052(d); TMEP §§1207.01 *et seq.* See the registration enclosed with the first office action.

Trademark Act Section 2(d) bars registration of an applied-for mark that so resembles a registered mark that it is likely that a potential consumer would be confused or mistaken or deceived as to the source of the

goods and/or services of the applicant and registrant. *See* 15 U.S.C. §1052(d). The court in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973) listed the principal factors to be considered when determining whether there is a likelihood of confusion under Section 2(d). *See* TMEP §1207.01. However, not all of the factors are necessarily relevant or of equal weight, and any one factor may be dominant in a given case, depending upon the evidence of record. *In re Majestic Distilling Co.*, 315 F.3d 1311, 1315, 65 USPQ2d 1201, 1204 (Fed. Cir. 2003); *see In re E. I. du Pont*, 476 F.2d at 1361-62, 177 USPQ at 567.

In this case, the following factors are the most relevant: similarity of the marks, similarity of the goods and/or services, and similarity of trade channels of the goods and/or services. *See In re Opus One, Inc.*, 60 USPQ2d 1812 (TTAB 2001); *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593 (TTAB 1999); *In re Azteca Rest. Enters., Inc.*, 50 USPQ2d 1209 (TTAB 1999); TMEP §§1207.01 *et seq.*

Comparison of the Marks

In a likelihood of confusion determination, the marks are compared for similarities in their appearance, sound, meaning or connotation and commercial impression. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973); TMEP §1207.01(b). Similarity in any one of these elements may be sufficient to find a likelihood of confusion. *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988); *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1043 (TTAB 1987); *see* TMEP §1207.01(b).

When the applicant's mark is compared to a registered mark, "the points of similarity are of greater importance than the points of difference." *Esso Standard Oil Co. v. Sun Oil Co.*, 229 F.2d 37, 108 USPQ 161 (D.C. Cir.), *cert. denied*, 351 U.S. 973, 109 USPQ 517 (1956). TMEP §1207.01(b).

The applicant's mark is "ZANDER". The registered mark is "XANDER". The marks are essentially phonetic equivalents and thus sound similar. Furthermore, there is no correct pronunciation of a mark because it is impossible to predict how the public will pronounce a particular mark. *In re Great Lakes Canning, Inc.*, 227 USPQ 483, 484 (TTAB 1985); TMEP §1207.01(b)(iv); *see In re Energy Telecomm. & Elec. Ass'n*, 222 USPQ 350, 351 (TTAB 1983). The marks in question could clearly be pronounced the same; such similarity in sound alone may be sufficient to support a finding of likelihood of confusion. *See RE/MAX of Am., Inc. v. Realty Mart, Inc.*, 207 USPQ 960, 964 (TTAB 1980); *Molenaar, Inc. v. Happy Toys Inc.*, 188 USPQ 469, 471 (TTAB 1975); TMEP §1207.01(b)(iv).

Applicant's Arguments

Applicant submitted a variety of arguments with regard to the similarity of the marks. It is applicant's position that the "X" in registrant's mark would be pronounced differently than the "Z" in applicant's mark, i.e. "X-ander" as in "X-ray". Applicant refers to the "most famous comic book character" Dr. Xavier from the X-men series in support of its belief that consumers would pronounce "Xander" with the emphasis on the "X".

The examiner respectfully disagrees. As noted above, "XANDER" and "ZANDER" can be, and usually are, pronounced the same, both beginning with a "Z" sound. As noted in the attached websites, "XANDER" is of Greek origin, is short for Alexander, and is pronounced "ZAN-der". [See attached pages from www.thinkbabynames.com](http://www.thinkbabynames.com), www.babynamewizard.com, and www.behindthename.com. Material obtained from the Internet is generally accepted as competent evidence in examination and ex parte proceedings. TBMP §1208.03; TMEP §710.01(b).

Applicant also submitted arguments directed toward how the marks are used in commerce, with applicant's mark "ZANDER" being the name of its publishing company and used in a standard publishing font and

stylization, and registrant's mark in a different style and font and used exclusively as the name of a character in an out-of-print comic book and title of a comic book series and single novel and combined with the wording "in Lost Universe". Applicant believes that the "constant identification of the XANDER Mark" with "in Lost Universe" reduces the likelihood of confusion because consumers will associate the mark with the fictional character and book series. This usage, combined with their radically different font and stylizations, render "XANDER" and "ZANDER" very different, according to applicant.

Again, the examiner disagrees. The registrant's mark as it appears in the registration is "XANDER", in standard characters. Applicant's mark is "ZANDER", also in standard characters. As noted above, and supported by the attached representative sample of name-origin websites, "XANDER" is pronounced as "ZANDER". Regardless of how registrant uses its mark and who "XANDER" is in the fictional world of comic books, applicant's "ZANDER" mark is phonetically identical to "XANDER". Thus, consumers recalling applicant's books and publications by its "ZANDER" name are likely to be confused as to the source of registrant's "XANDER" books and publications.

The question is not whether people will confuse the marks, but whether the marks will confuse people into believing that the goods and/or services they identify come from the same source. *In re West Point-Pepperell, Inc.*, 468 F.2d 200, 201, 175 USPQ 558, 558-59 (C.C.P.A. 1972); TMEP §1207.01(b). For that reason, the test of likelihood of confusion is not whether the marks can be distinguished when subjected to a side-by-side comparison. The question is whether the marks create the same overall impression. *See Recot, Inc. v. M.C. Becton*, 214 F.3d 1322, 1329-30, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000); *Visual Info. Inst., Inc. v. Vicon Indus. Inc.*, 209 USPQ 179, 189 (TTAB 1980). The focus is on the recollection of the average purchaser who normally retains a general rather than specific impression of trademarks. *Chemetron Corp. v. Morris Coupling & Clamp Co.*, 203 USPQ 537, 540-41 (TTAB 1979); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975); TMEP §1207.01(b).

Comparison of the Goods and/or Services

The goods and/or services of the parties need not be identical or directly competitive to find a likelihood of confusion. *See Safety-Kleen Corp. v. Dresser Indus., Inc.*, 518 F.2d 1399, 1404, 186 USPQ 476, 480 (C.C.P.A. 1975); TMEP §1207.01(a)(i). Rather, it is sufficient that the goods and/or services are related in some manner and/or the conditions surrounding their marketing are such that they would be encountered by the same purchasers under circumstances that would give rise to the mistaken belief that the goods and/or services come from a common source. *In re Total Quality Group, Inc.*, 51 USPQ2d 1474, 1476 (TTAB 1999); TMEP §1207.01(a)(i); *see, e.g., On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 1086-87, 56 USPQ2d 1471, 1475-76 (Fed. Cir. 2000); *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 1566-68, 223 USPQ 1289, 1290 (Fed. Cir. 1984).

Likelihood of confusion is determined on the basis of the goods or services as they are identified in the application and the registration. *Canadian Imperial Bank of Commerce v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987); *Paula Payne Products Co. v. Johnson Publishing Co., Inc.*, 473 F.2d 901, 177 USPQ 76 (C.C.P.A. 1973).

The applicant's goods consist of a variety of adult and children's fiction and non-fiction books and printed publications on a wide variety of subjects, including "without limitation history, military history, photography, aerial photography, pets and pet care and a variety of other subjects". The application also covers a variety of publication services of books and printed publications, including "book and review publishing" and "book publishing". Applicant, in its response of 4/12/10, added the wording "*but not including comic books, graphic novels, or works based on comic books or graphic novels*" to a number of its goods in an attempt to avoid the Section 2(d) refusal.

The registrant's goods are "comic books, books, relating to comic book characters and/or fictional narratives, animation cels, graphic novels, magazines relating to comic book characters, paper book covers".

In this case, applicant's identification of goods is so broad that it essentially covers all books in all forms and on every conceivable topic and subject matter. Specifically, applicant's identification of goods comprises printed fiction and non-fiction books, digital and electronic books, coffee table books, novels and storybooks, all for adults and children, and all unlimited in the subjects covered. Nearly every book and publication listed in the identification includes the wording "including without limitation" before a long list of subjects ranging from "history" to "pet care", and followed by the wording "a variety of other subjects". In effect, applicant's identification of goods covers all books on all subjects.

In its response of 4/12/10, applicant added the wording "*but not including comic books, graphic novels, or works based on comic books or graphic novels*" to its identification of goods and services in order to distinguish its goods from those of the registrant. This limitation, while acceptable, does nothing to differentiate applicant's goods and services from the registrant's. As noted above, applicant's identification of goods is so broad that, even with the exclusion of "comic books, graphic novels and works based on comic books or graphic novels", applicant's goods are similar in subject matter and type to those of registrant. For instance, registrant's "graphic novels" are fictional books for both adults and children. These novels could be in the form of children's books, and they could be in the form of coffee table books or story books.

Furthermore, registrant's comic books and graphic novels would be sold in book stores with other books and novels, including applicant's adult and children's books about military history and pet care. These printed publications would all travel in the identical channels of trade and would all be read by the same average book-reading consumer. In this regard, the examiner attaches internet evidence demonstrating the retail sale of comic books and out-of-print publications at www.barnesandnoble.com and www.borders.com. This evidence demonstrates that registrant's goods are commonly sold in the same retail establishments as the adult and children's fiction and non-fiction books. See attached. Material obtained from the Internet is generally accepted as competent evidence in examination and ex parte proceedings. See *Fram Trak Indus. v. WireTracks LLC*, 77 USPQ2d 2000, 2006 (TTAB 2006) (Internet evidence accepted by the Board to show relatedness of goods); TBMP §1208.03; TMEP §710.01(b).

Regarding applicant's publishing services, applicant provides "book and review publishing" and "book publishing" without limitation. These services involve the publication of books on all topics, for adults and children and in any format. Thus, applicant's services could include the publishing of comic books and graphic novels, identical to the goods of registrant. Even with the limitation set forth in the remainder of applicant's services, the services are still in conflict with registrant's goods as the fact that the goods or services of the parties differ is not controlling in determining likelihood of confusion. The issue is not likelihood of confusion between particular goods, but likelihood of confusion as to the source of those goods. *In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993); TMEP §1207.01; see *Safety-Kleen Corp. v. Dresser Indus., Inc.*, 518 F.2d 1399, 1404, 186 USPQ 476, 480 (C.C.P.A. 1975). In this case, consumers are likely to be confused as to the source of the book publication services and printed publications with nearly the identical trademark.

In further support of the relatedness of the goods and services of applicant and registrant, attached are copies of printouts from the USPTO X-Search database, which show third-party registrations of marks used in connection with the same or similar goods and/or services as those of applicant and registrant in this case. These printouts have probative value to the extent that they serve to suggest that the goods and/or services

listed therein, namely applicant's books and publications and publication services and registrant's comic books and graphic novels, are of a kind that may emanate from a single source. *In re Infinity Broad. Corp. of Dallas*, 60 USPQ2d 1214, 1217-18 (TTAB 2001); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988); TMEP §1207.01(d)(iii).

Applicant's Arguments

Applicant submitted a variety of arguments in support of its position that the goods and services are unrelated. First, applicant argued that the goods travel in different channels of trade, with applicant's goods being "new and currently published products" and registrant's being "out-of-print merchandise". The examiner disagrees. As applicant is aware, book stores, both online and brick and mortar, feature old and new books. As the goods are identified in the application and registration, they are clearly the type of publications, e.g. graphic novels, non-fiction books, that would be sold together in the same stores and purchased by the same book-reading consumer.

Applicant also argued that the printed publications offered by applicant and registrant are not purchased on an impulse basis. It is applicant's position that consumers will spend significant time in researching registrant's out-of-print comic books and graphic novels and, therefore, consumer confusion will not be likely. The examiner disagrees. As noted above, as the goods are listed in the application and registration, they are books and printed publications on similar, and possibly, identical subjects and topics. Thus, they are likely to travel in the identical channels of trade and reach the same consumers. While registrant's comic books may currently be out of print, these books still appear to be available for retail purchase, as demonstrated in the evidence attached to applicant's response (e.g. Pages 9 – 15, evidence attached to applicant's Response). It appears that registrant's books can easily be purchased online and at a nominal price. For example, on Page 12, of applicant's evidence attached to its Response, a "Very Fine" copy of "Xander in Lost Universe #1 can be purchased for \$1.26 at NewKadia.com.

The risk of likelihood of confusion is increased for inexpensive products that are purchased on impulse. Therefore, in a likelihood of confusion determination, purchasers of such products are held to a lesser standard of purchasing care. *Recot, Inc. v. M.C. Becton*, 214 F.3d 1322, 1329, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000); *Specialty Brands, Inc. v. Coffee Bean Distribs., Inc.*, 748 F.2d 669, 672, 223 USPQ 1281, 1282 (Fed. Cir. 1984).

With regard to applicant's statement regarding actual confusion, the test under Trademark Act Section 2(d) is whether there is a likelihood of confusion. It is unnecessary to show actual confusion in establishing likelihood of confusion. TMEP §1207.01(d)(ii); e.g., *Weiss Assocs. Inc. v. HRL Assocs. Inc.*, 902 F.2d 1546, 1549, 14 USPQ2d 1840, 1842-43 (Fed. Cir. 1990). The Trademark Trial and Appeal Board stated as follows:

[A]pplicant's assertion that it is unaware of any actual confusion occurring as a result of the contemporaneous use of the marks of applicant and registrant is of little probative value in an ex parte proceeding such as this where we have no evidence pertaining to the nature and extent of the use by applicant and registrant (and thus cannot ascertain whether there has been ample opportunity for confusion to arise, if it were going to); and the registrant has no chance to be heard from (at least in the absence of a consent agreement, which applicant has not submitted in this case).

In re Kangaroos U.S.A., 223 USPQ 1025, 1026-27 (TTAB 1984).

Finally, applicant argues that the registration owner has abandoned its trademark and/or service mark.

However, a trademark or service mark registration on the Principal Register is prima facie evidence of the validity of the registration and the registrant's exclusive right to use the mark in commerce in connection with the specified goods and/or services. *See* 15 U.S.C. §1057(b); TMEP §1207.01(d)(iv).

Evidence that constitutes a collateral attack on a cited registration, such as statements about a registrant's nonuse of its mark, is not relevant to a likelihood of confusion determination in ex parte examination. *See In re Dixie Rests.*, 105 F.3d 1405, 1408, 41 USPQ2d 1531, 1534-35 (Fed. Cir. 1997); *In re Peebles Inc.*, 23 USPQ2d 1795, 1797 n.5 (TTAB 1992); TMEP §1207.01(d)(iv). Such evidence may, however, be pertinent to a formal proceeding before the Trademark Trial and Appeal Board to cancel the cited registration.

The presumption under Trademark Act Section 7(b), 15 U.S.C. §1057(b), is that the registrant is the owner of the mark and that use of the mark extends to all goods and/or services identified in the registration. The presumption also implies that the registrant operates in all normal channels of trade and reaches all classes of purchasers of the identified goods and/or services. *In re Melville Corp.*, 18 USPQ2d 1386, 1389 (TTAB 1991); *McDonald's Corp. v. McKinley*, 13 USPQ2d 1895, 1899 (TTAB 1989); *RE/MAX of Am., Inc. v. Realty Mart, Inc.*, 207 USPQ 960, 964-65 (TTAB 1980); *see* TMEP §1207.01(a)(iii).

Conclusion

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. *See In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993). Therefore, any doubt regarding a likelihood of confusion determination is resolved in favor of the registrant. TMEP §1207.01(d)(i); *see Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1265, 62 USPQ2d 1001, 1003 (Fed. Cir. 2002); *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 464-65, 6 USPQ2d 1025, 1025 (Fed. Cir. 1988).

Finally, the Examining Attorney is not bound by past decisions of the Trademark Examining Operation. *In re Shapely, Inc.*, 231 USPQ 72, 75 (TTAB 1986).

Accordingly, registration is refused.

Although the Examining Attorney has refused registration, applicant may respond to the refusal to register by submitting evidence and arguments in support of registration.

If the applicant chooses to respond to the refusal to register, the applicant must also respond to the following.

Identification of Goods

The identification of goods is unacceptable because some of the goods are indefinite and misclassified and require clarification. *See* TMEP §1402.01. Specifically, first, applicant must amend the identification to clarify that the "fiction books" are apart of a "series". Second, "digital and electronic books" are classified in Class 41 as a service, unless they are downloadable publications. Applicant must clarify whether these books are downloadable or not and classify accordingly. Applicant must amend the identification to specify the common commercial name of the goods. If there is no common commercial name, applicant must describe the product and its intended uses. *See id.*

For the applicant's convenience, the Examining Attorney has highlighted suggested amendments and problem areas in bold type below.

The applicant may adopt the following identifications, if accurate:

“Books, namely, **a series of** general adult fiction **books**, general children's fiction **books**, general children's nonfiction **books** and general adult nonfiction **books, all on topics** including without limitation history, military history, photography, aerial photography, pets and pet care and a variety of other subjects, but not including comic books, graphic novels, or works based on comic books or graphic novels; Calendars; Children's books, but not including comic books, graphic novels, or works based on comic books or graphic novels; Coffee table books featuring photography and photographic or digital images; Non-fiction books on a variety of topics; Printed calendars; Publications, namely, **downloadable** digital and electronic books in the fields of general fiction and non-fiction on a variety of topics but not including comic books, graphic novels, or works based on comic books or graphic novels [**if “downloadable” these goods are in Class 9, otherwise, providing “digital and electronic books” is a service in Class 41, applicant may simply transfer this service to Class 41**]; Series of fiction and non-fiction books on a variety of topics but not including comic books, graphic novels, or works based on comic books or graphic novels; **Series of fiction and non-fiction books on a variety of topics but not including comic books, graphic novels, or works based on comic books or graphic novels [delete this duplicate entry that is the same as the preceding goods]**; Series of fiction works, namely, novels and books but not including comic books, graphic novels, or works based on comic books or graphic novels; Story books, but not including comic books, graphic novels, or works based on comic books or graphic novels,” in International Class 16.

“**Providing on-line** publications, namely, digital and electronic books **in the nature of a series of** general fiction **books** and non-fiction **books** on a variety of topics but not including comic books, graphic novels, or works based on comic books or graphic novels,” in International Class 41 [**applicant may transfer or add this service to Class 41**].

Identifications of goods and/or services can be amended only to clarify or limit the goods and/or services; adding to or broadening the scope of the goods and/or services is not permitted. 37 C.F.R. §2.71(a); *see* TMEP §§1402.06 *et seq.*, 1402.07. Therefore, applicant may not amend the identification to include goods and/or services that are not within the scope of the goods and/or services set forth in the present identification.

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Tekno Comix

From Wikipedia, the free encyclopedia

Tekno Comix was an American publishing company that produced comic books from 1995 to 1997.

Contents

- 1 History
- 2 Titles
- 3 Notes
- 4 References

Tekno Comix	
Parent company	Big Entertainment
Status	Defunct, 1997
Founded	1995
Founder	Laurie Silvers Mitchell Rubenstein
Country of origin	United States
Headquarters location	Boca Raton, Florida
Publication types	Comic books

History

The company was founded by Laurie Silvers and Mitchell Rubenstein as a division of their publicly traded company, Big Entertainment. Tekno Comix publications featured characters and situations created by celebrity authors and others,^[1] but were primarily scripted and illustrated by freelance comics creators.

The Tekno Comix brand was discontinued in 1997, though books featuring the same characters continued were published with Big Entertainment branding for the rest of that year. Big Entertainment continues as Hollywood Media Corp, which controls Tekno Comix intellectual property.^[2]

Titles

- Gene Roddenberry's *Lost Universe* (later renamed *Xander in Lost Universe*)
- Isaac Asimov's *I-Bots*
- John Jakes' *Mullkon Empire* (six-issue limited series)
- Leonard Nimoy's *Primortals*
- Mickey Spillane's *Mike Danger*
- Neil Gaiman's *Lady Justice*
- Neil Gaiman's *Mr. Hero the Newmatic Man*
- Neil Gaiman's *Phage: Shadow Death* (six-issue limited series)
- Neil Gaiman's *Teknophage*
- Neil Gaiman's *Wheel of Worlds* (two one-shots)
- Tad Williams' *Mirror World*
- *Tekno Files* (a one-shot)
- *Neuro Jack* (a one-shot)

Notes

1. ^ "Newswatch: Miscellaneous News: Big Entertainment Hires Gaiman, Nimoy, Spillane, and Others," *The Comics*

Journal #167 (April 1994), p. 30.

- [^] Hollywood Media Corp. (NASDAQ: HOLL) - Corporate Profile at Hollywood.com (http://www.hollywood.com/about_us/info/id/468707)

References

- Tekno Comix (<http://comicbookdb.com/publisher.php?ID=198>) at the Comic Book DB

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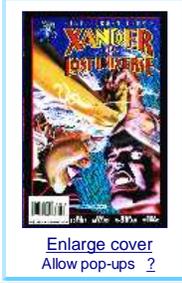
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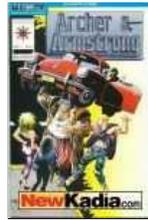
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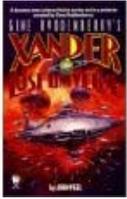
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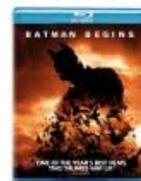
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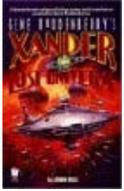
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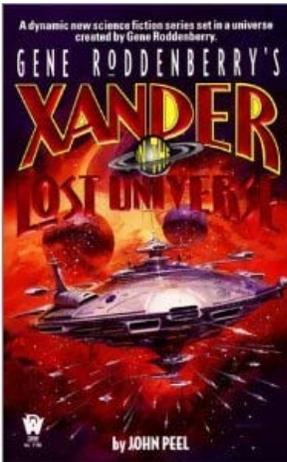
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of Trademark Registration No. 2044364

For the mark: "XANDER"

Date Registered: March 11, 1997

Robert E. Randall, Jr.

v.

Big Entertainment, Inc., a Florida Corporation

PETITION TO CANCEL

Petitioner Robert E. Randall, Jr., 2727 Klamath Drive, Rocklin, California 95765 makes the following petition to the United States Patent and Trademark Office, before the Trademark Trial and Appeal Board:

To the best of Petitioner's knowledge, the name and address of the current owners of the registration of the mark in registration number 2044364 ("XANDER Mark") are: Big Entertainment, Inc., 2255 Glades Road, Suite 237 W., Boca Raton, Florida 33431 and/or Hollywood Media Corp., 2255 Glades Road, Suite 237 W., Boca Raton, Florida 33431.

Petitioner believes he will be damaged by the above-identified registration and has standing to bring this Petition for Cancellation ("Petition") because the existence of the XANDER Mark has already resulted in two Office actions refusing registration of Petitioner's mark, ZANDER (Serial Number 77794164), ("ZANDER" Mark) (See Exhibit 1) and Petitioner has a reasonable belief that if the Office does not cancel the registration of the XANDER Mark Petitioner will be unable to register the ZANDER Mark. These facts constitute sufficient standing under TBMP § 309.3(b).

The grounds for cancellation of the XANDER mark (registration number 2044364) are as follows:

1. As demonstrated in paragraphs 2-9 below, the XANDER Mark has not been actively used in commerce in more than three years. A prima facie case of abandonment can be established "by showing proof of nonuse for three consecutive years." 15 U.S.C. §1127, *On-Line Careline, Inc. v. Am. Online Inc.*, 229 F.3d 1080,1087 (Fed. Cir. 2000). Establishing a prima facie case "eliminates the challenger's burden to establish the intent element of abandonment as an initial part of [his] case," creating a

rebuttable presumption that the trademark owner has abandoned the mark without intent to resume use. *Id.* See also *CUMULUS MEDIA v. Clear Channel Communications*, 304 F. 3d 1167, 1177 (11th Circuit 2002).

2. The XANDER Mark was originally registered as a property of Tekno Comics, a short-lived comic book company that existed from 1995 to 1997. See *Exhibit 2*; see also online at http://en.Wikipedia.org/wiki/Tekno_Comix. The current owner of the XANDER Mark registration is the apparent legal successor in interest to Tekno Comics, and acquired the intellectual property rights of Tekno Comics, including without limitation the XANDER Mark, when it acquired the defunct comic book company in 1997. See *Exhibit 2*.

3. During its short existence, Tekno Comics used the XANDER Mark in association with a series of comic books designed and written by Gene Roddenberry, originally titled “Lost Universe” and later retitled “Xander in Lost Universe” (collectively, the “Xander Series”). The Xander Series contained only eight (8) issues, all of which were published between November 1995 and July 1996. The comic book retailer NewKadia.com specifically identifies the series’ publication dates as: “First Issue #1 – November 1995, Last #8 – July 1996. See *Exhibit 3*; see also online at: http://www.newkadia.com/?Gene_Roddenberrys_Xander_in_Lost_Universe_Comic-Books=1559. Petitioner’s research reveals no other use of the XANDER Mark in association with comic books or graphic novels after July 1996, a period of fourteen (14) years.

4. Petitioner’s research also revealed a paperback novel, titled *Gene Roddenberry’s Xander in Lost Universe* (“Xander Novel”), published in 2001. See *Exhibit 4*. The novel was written by John Peel and appears to be a licensed novel based upon the Tekno Comics Xander Series. The novel was not published by either Tekno Comics or the current owner of the registration, but the evidence suggests and Petitioners reasonably believe that the novel represents a “use in commerce” licensed or approved by the predecessor-in-interest to the current owner of the registration of the XANDER Mark. This 2001 publication appears to be the final use of the XANDER Mark in commerce. Petitioner has been unable to find any use of the XANDER Mark by its owners or licensed third parties more recently than 2001, which means that the XANDER Mark has not been used in commerce for at least nine (9) years.

5. Petitioner was unable to discover any use of the XANDER Mark in connection with book covers or any of the goods and services listed in the registration aside from the Xander Series and the Xander Novel. A Google search for “Xander in Lost Universe” returns only references to sellers offering used copies of the 1995-1996

Xander Series and a reference to the Xander Novel. *See Exhibit 5.* The only current offerings of the Xander Series or the Xander novel are made by private third parties and resellers of used and rare comic books. *See, generally, Petitioner's Exhibits and attached evidence.*

6. The XANDER Mark does not appear to be used in any official marketing or advertising. Petitioner has been unable to locate any official marketing or advertising of goods and services bearing the XANDER Mark or any other use of the XANDER Mark in commerce since the 2001 Xander Novel. The first ten pages of a Google search for "Xander" do not contain even a single reference to the XANDER Mark. *See Exhibit 6.* In fact, the first reference to "Xander (comic book character)" appears at page 15, but even this reference does not refer to the XANDER Mark. The reference links to a comic book published in 2007 by Dark Horse Comics as part of the *Buffy the Vampire Slayer* Series, featuring an entirely different character, also named "Xander." *See Exhibit 7.*

7. Petitioner's attorney contacted legal counsel for the holder of the XANDER Mark requesting information about the current status and use of the mark, to confirm that the XANDER Mark is inactive as the evidence suggests, but received no direct response from the mark holder. Counsel for the XANDER Mark holder indicated that he had forwarded the request for information to his client, but no response was received by Petitioner.

8. The XANDER Mark does not appear to have been used for any purposes in at least the past three (3) years and more likely the last 8-9 years. Petitioners could find no evidence of its use in commerce by the mark holder or licensed third parties since publication of the 2001 novel, which does not appear to have been reprinted or published after the end of 2001. Failure to actively use or market the XANDER Mark in commerce between 2001 (or, at the latest, 2002) and 2010 constitutes more than the three-year period necessary to establish a prima facie case for abandonment justifying cancellation of a mark by the Office.

9. Based on this statement and the attached Exhibits, all of which are hereby incorporated by reference as if fully set forth herein, Petitioner believes that the XANDER Mark has been abandoned and requests that the Office cancel the XANDER Mark's registration.

Evidence has been attached to this statement in the nature of:

Exhibit 1: An office action dated May 5, 2010, refusing registration of Petitioners' Zander Mark

Exhibit 2: A .pdf printout of the Wikipedia entry for Tekno Comix

Exhibit 3: The Newkadia comics listings for "Xander in Lost Universe"

Exhibit 4: Screen captures of the Amazon.com listings for the novel titled *Gene Roddenberry's Xander in Lost Universe*, offered for sale in used condition by a third-party reseller.

Exhibit 5: The first page of a Google Search for "Xander in Lost Universe"

Exhibit 6: The first ten pages of a Google search for "Xander"

Exhibit 7: Page 15 of a Google search for "Xander"