

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

In re Application of :	ZOLO TECHNOLOGIES, INC.	}	Mark: ZOLO TECHNOLOGIES
Serial No.:	76/035,119		International Class 009
Filed:	APRIL 26, 2000		Trademark Atty.: KELLY A. CHOE
			Law Office 113

REPLY BRIEF FOR APPELLANT



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37 CFR 1.8

CERTIFICATE OF MAILING

I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail in an envelope addressed to:
Assistant Commissioner for Patents, Washington, D.C. 20231 on May 7, 2002

Signature:
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ARGUMENT

Appellant reiterates all arguments set forth in its previously submitted appeal brief. In addition, Appellant replies to the Examining attorney's appeal brief as follows.

The Examining attorney argues that, "an applicant will not be heard on matters that constitute a collateral attacks on the cited registration, . . . that seek to show that the registrant only sells its goods in certain trade channels." The cited cases, however, do not stand for this proposition. Rather, these cases state that non-use of registered products, or other defects in a registration can not be collaterally attacked in an appeal, and the proper course of action is a petition for cancellation. In *In re Dixie Restaurants*, 105 F.3d, 1405, 41 USPSQ 2d 1531 (Fed. Cir. 1997), appellant argued that the registered mark was not used for restaurant services, although restaurant services were part of the registration. Similarly, in *Cosmetically Yours, Inc. v. Clairol, Inc.*, 424 F.2d 1385, 1387, 165 USPQ 515 (CCPA 1970), the appellant argued that the opposer no longer used a registered mark. Finally, in *In re Pollio Dairy Products Corp.*, 8 USPQ2d 2012, 2014-2015 (TTAB 1988), appellant argued that "specimens filed for renewal show that registrant no longer sells fat (shortening)" although these goods appeared in the registration. In each case, these arguments were treated as collateral attacks on the registration itself, and the registrations were considered valid.

Appellant's statement that the respective goods are sold in limited trade channels can not be construed as a collateral attack on the registration. Rather, this statement is a reflection that the specified goods are presumed to be sold to usual customers and through all of the normal

outlets for such goods. See *Knorr-Nahrmittel Akg. v. Havland International, Inc.*, 206 USPQ 827, 835 (TTAB 1980). Registrant's goods, optical fiber cable, is normally and usually sold to service providers, and specifically, outside plant engineers of the service providers. Appellant's goods are normally and usually sold to subsystem vendors, and in some cases to service providers, and specifically to facility engineers of the service providers.

The Examining attorneys misconstrues Appellants arguments at page 12-13 of the Examining Attorney's Appeal Brief. It is true that Appellant indicated that in limited cases, Appellant's goods and Registrant's goods may be sold to service providers; however, in this case, Appellant's goods are marketed to facility engineers, while Registrant's goods are directed to outside plant engineers (see Brief for Appellant at 12, 14).

It is well settled that the likelihood of confusion must be shown to exist not in an industry, as the Examining attorney is attempting to argue, or even within a purchasing institution, but in a customer or purchaser. It is error to deny registration simply because the two parties sell some of their goods in some of the same fields, without determining who are the "relevant persons" within each corporate customer. *Elec. Design & Sales, Inc. v. Elec. Data Sys. Corp.*, 954 F.2d 713, 717, 21 U.S.P.Q.2d 1388, 1391 (Fed. Cir. 1992), *reh'g denied* 1992 U.S. App. LEXIS 1505 (Fed. Cir. Feb. 4, 1992), *reh'g en banc denied*, 1992 U.S. App. LEXIS 2473 (Fed. Cir. Feb. 20, 1992); *Astra Pharmaceutical Prods., Inc. v. Beckman Instruments, Inc.*, 718 F.2d 1201, 1205-1207, 220 U.S.P.Q. 786, 790-91 (1st Cir. 1983). When market realities are considered, Appellant's and Registrant's goods are sold to distinct purchasers, further negating any possibility of a likelihood of confusion.

For the foregoing reasons, and for the reasons of record in the Brief for Appellant, Applicant submits that the refusal by the Examining Attorney to register the Applicant's mark should be reversed.

Respectfully submitted,



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