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

Proceeding	78519745
Applicant	ZOE International Ministries
Applied for Mark	ZOE
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In the Appeal of: Applicant : ZOE International Ministries, Trademark : ZOE Serial Number : 78/519745 Filing Date : November 18, 2004, Examiner : Ms. Gina Hayes,	Case No.: ESTTA114885 APPLICANT'S APPEAL BRIEF Mark - ZOE

INTRODUCTION

Applicant/Appellant ZOE International Ministries respectfully submits this brief in Appeal of Examiners refusal to register the aforementioned Mark pursuant to 37 CFR 2.141 and 2.142 from the Final Office Action dated July 4, 2006 and from the Notice of Appeal dated December 15, 2006 . Examiner refused registration of this Mark based on Section 2(d) of the Trademark Act, codified under 15 U.S.C. 1052(d) on the grounds that the mark for which registration is requested resembles the Mark ZOE, Registration Number 2839818, so that the consumer will be confused as to the origin of the services vis-à-vis the Mark.

Appellant respectfully submits that no likelihood of confusion exists between the two marks based on an analyzation of the DuPont Factors (*In Re E.I. DuPont de Nemours & Co, 476*

F.2d 1357, 177 USPQ 563 (C.C.P.A 1973)), and the Sleekcraft Factors (*AMF, Inc. v. Sleekcraft Boats, 599 F.2d 341, 347 (9th Cir. 1979)*) .

STATEMENT OF UNDISPUTED FACTS

Applicant, in pro per, filed the application on November 18, 2004 for the aforementioned Mark, whose date of first use in commerce was December 3, 2002. Applicant received his First Office Action dated June 24, 2005, and decided to seek assistance of a registered attorney in December of 2005. Mark was originally filed as a standard character Mark but was changed to a Design Mark after communication between the Examiner and Applicant's attorney of record. Attorney replied to the First Office Action on December 24, 2005 after revoking the previous Power of Attorney on December 22, 2004. Examiner withdrew her objection and Approved the Mark for Publication on February 20, 2006, which was withdrawn from publication twice prior to issuance of the Final rejection was issued on July 4, 2006. Final rejection was based on the likelihood of confusion with the Mark in Standard Character of "ZOE" which is owned by the ZOE Life Enrichment Foundation, whose mission statement reads,

> *The Zoe Life Enrichment Foundation was created to empower churches and ministries to fill a needed role of cooperatively working with both government and community to improve the overall condition of our society. The Foundation's funding areas are Educational Enlightenment and Social Improvement, and they provide capacity building services in the form of grant funding, nonprofit training, and technical assistance to churches and ministries that are engaged in social service delivery.*

Zoe International Ministries, who operates the Zoe Children Homes and who will use the Mark, has as it's mission statement :

> *ZOE Children's Homes is an international Christian organization that rescues children who are sold, or at risk of being sold, into prostitution slavery; orphaned, or victims of other heinous crimes and abuse. To be an effective participant in ending human*

trafficking of children worldwide, and to go wherever children are at risk, to provide rescue, a hope and a future for them. Our commitment to these children is long-term. 24 hours a day, 7 days a week, 365 days a year, we support and provide for our children all the basic necessities of life. This includes, but is not limited to nurture, meals, shelter, education, hygiene items, medical, dental and emergency care, clothing and shoes.

The Notice for filing of this Appeal Brief was filed on December 15, 2006 appealing the refusal to register the Design Mark ZOE under international classes 041 and 043.

ARGUMENTS

There is no likelihood of consumer confusion as the consumer of the Marks are constituted from different distinctive classes of consumer.

The Trademark Trial and Appeals Board utilizes the DuPont Factors (*In re E.I. DuPont de Nemours & Co. 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973)*) to determine the likelihood of confusion of the proposed mark ZOE to the existing mark ZOE. First consideration is whether the marks are similar in appearance, sound, connotation and commercial impression.

1) Appearance constitutes a major difference between the proposed mark and the registered mark. Applicant urges the examiner to note the difference between a stylized logo of the applicant and the plain text of the registered mark. The registered mark is no different than looking under Zoe in the phonebook, where many Zoes are listed in connection with many churches and congregations, ministries and philanthropic organizations. Registered Mark is used in connection with the company title of Zoe Life Enrichment Program. Proposed Mark ZOE is using the Greek word for "life" designed around an elliptical band symbolizing the circle of life described in the Greek meaning of Zoe .

2) Sound is conceded to be the same.

3) Connotation infers a meaning associated with the name. Proposed mark is connotative of life, as the stylized logo of the applicant contains the circle or completeness of ZOE, where the plain text registered mark has no known connotation other than with the rest of the words

Life Enrichment Foundation. Proposed Mark is a symbol whereby those in need desperate of their services are able to recognize the unique symbol and relate to their services. Registered Mark is not used in this connotation as they do not provide housing, shelter or food services to those in need. Registered Mark provides grant development assistance. Registered Mark is not associated as the ultimate provider of services so there is no likelihood of confusion to those seeking the services.

4) Commercial impression is the largest factor in this test. The DuPont Factors examine, amongst others, the similarity or dissimilarity of established streams of commerce, sophistication of the buyers, fame of the prior mark and market interface between the applicant's goods and those of the owner of the Mark under the guise of commercial impressions amongst other factors.

The Registered Mark ZOE is used in connection with an organization that provides assistance to entities in International Class 36. This company shows churches how to raise money and provides financial management in the United States to entities who are comprised of personnel who are active, educated and English speaking. The proposed mark is under International Class 43, where applicant provides housing internationally for children of abuse and neglect. The proposed mark is associated with providing educational and religious services to those under International Class 41. The stylized logo of the proposed mark is a symbol to those unable to read where the user of the service will be able to connect the stylized logo with the service. The users of this service are poor, impoverished, uneducated young people whose language is not necessarily English or Greek. The Registered Mark is aimed at entities looking to write grants and the Proposed Mark in on the front line providing services. The two services, the registered Mark and the applicant, have no competing value nor would their chain of commerce ever cross as the Mark "ZOE" is not associated with the grants once they are funded.

It is the sophistication of the buyer where the greatest divergence if found. If one was looking for grant money to build a church program, one could look to Zoe Life Enrichment

Foundation. These are sophisticated buyers, educated with a financial background who are instructed how to get the grants. The Mark ZOE is ***not*** associated with the grants, nor is it associated with the outreach or program of the church. The Mark "ZOE" is not used other than in relation with Zoe Life Enrichment Foundation and is purely a vehicle to find grant money and is not in the public eye. Applicant's services are associated with their design Mark ZOE through recognition that their Design Mark "ZOE" is the symbol of safety and shelter from abuse. Those receiving service are individuals not churches, are uneducated through oppression or other maladies, who might not even be able to read, just understand symbols, and who are in need of food or a roof. These people are not about to sit down and write a 20 page grant proposal which is emailed to the Grantors.

Another prong of the DuPont factor is whether activities surrounding the marketing are such that confusion as to origin is likely.

> Though the goods "need not be identical or directly competitive to find a likelihood of confusion... they need only to be related in some manner or conditions surrounding their marketing be such that they could be encountered by the *same* purchaser under circumstances that could give rise to the mistaken belief that the goods and/or services come from a common source". *On-line Careline Inc. v. America Online Inc., 229 F.3d 1080, 56 USPQ2d 1471 (Fed. Cir. 2000); In re Martin's Famous Pastry Shoppe, Inc., 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); In re Melville Corp., 18 USPQ2d 1386, 1388 (TTAB 1991); In re Corning Glass Works, 229 USPQ 65 (TTAB 1985); In re Rexel Inc., 223 USPQ 830 (TTAB 1984); Guardian Prods. Co., Inc. v. Scott Paper Co., 200 USPQ 738 (TTAB 1978); In re Int'l Tel. & Tel. Corp., 197 USPQ 910 (TTAB 1978); TMEP §1207.01(a)(i)*. Italics added for emphasis.

It is believed that the examiner has mistaken the notion that public and private entities looking to find ways of getting grant money would be confused should those entities also be individuals looking to give money to orphan children. Not only are the markets different, getting money versus giving money, but the buyers are different - entities versus individuals, basically it is the givers versus the receivers. Registered Mark is not associated with the end program with whom the grant money has funded. Proposed Mark is associated directly with the

actual program giving to those in need. They are the last step on the food chain so to speak, not a middle rung not directly associated with the actual giving of service.

The fame of the registered Mark can be gauged by the popular impression of this mark. To this ends, a search on Google of Zoe Life Enrichment Foundation finds articles on theft, corruption, and criminal indictments and their website is no longer in operation. Zoe Life Enrichment is referred to those entities as a clearinghouse of information regarding the giving of grant monies. Zoe Children Homes branch of Zoe International Ministries have multiple links with more than 20 top-level links to their web site. All such links are directly involved in the distribution of aid to needy children. Zoe Life Enrichment Foundation is not associated with the giving of aid to children, as Zoe International or Zoe Childrens Home are associated.

The marketing channel of the registered Mark is clear from their mission statement:

> *The Zoe Life Enrichment Foundation was created to empower churches and ministries.. grant funding, nonprofit training, and technical assistance to churches and ministries that are engaged in social service delivery.* Underlining added for emphasis. Complete statement supra.

Appellant urges Appeals Board to examine the marketing channel of the Applicant in light of the marketing channel of the registered Mark. As previously highlighted, the registered Mark ZOE is part of Zoe Life Enrichment Foundation whose purpose is to help churches find money through grants and trains them into getting these grants. "ZOE" as a mark is not associated with these churches nor does their name get attached to any of the outreach for which the grants are intended. Applicant uses the Design Mark ZOE as a stand alone entity, a simple single word, in a simple design, for those to remember who are in need of shelter, food and clothing. It is a symbol that associates safety for children in any language.

Applicant encourages the Appeal Board to understand that the difference in the appearance, commercial impression and marketing channels would not lead to confusion between the two marks as by these factors, the two marks are in completely diverse fields.

Applicant would also show to the Appeals Board similar conclusions of non-confusion should other case law supported tests be used. If one uses Sleekcraft (supra) or the Polaroid Factors (*Polariod Corp. v Polariod Elecs., Corp., 287 F.2d 492, 495 (2nd Cir. 1961)*,) one of the principle factors is based on Market Factors. Lanham Act 15 USC 1052 § 21 uses Market Factors as a guide. In dealing with Market Factors, the Lanham Act shows 3 areas of concentration : Degree of similarity, similarity in marketing methods, characteristics of prospective purchasers.

1) Degree of Similarity - As mentioned supra, the proposed Mark, though containing the same characters, differs significantly from the noted registered Mark. The proposed Mark is stylized inside of elliptically shaped blended lines, where the registered Mark is simple type. Also mentioned supra, is the fact that ZOE as a typed drawing is used throughout the phone book and listings of corporations that are primarily charitably based in the registered Mark's home state of Pennsylvania. Though first impression is similar, the registered Mark is part of Zoe Life Enrichment Foundation and is located by those who can read. The Design Mark "ZOE" is stylized to attract the attention of those who might not be able to read, just recognize the symbol and equate safety, shelter and food.

2) Similarity in Marketing Methods - Applicant urges the Appeals Board to examine the channels of distribution as described supra to see the significant differences in this field. The registered Mark is marketed to churches and ministries as a service provider to consult the public and private entities as to the obtaining of grant monies and other financial services. The registered Mark is not used on the end product associated with the actual grants sought. The user of the service for which the grant was obtained, does not see the "ZOE" mark associated with that service. The proposed Mark is marketed to individuals to give donations and is marketed to homeless abused children around the world as a symbol of hope and education. It would be

extremely difficult to observe that their marketing methods, channels of distribution, and stream of commerce could be similar.

3) Characteristics of prospective purchasers - The sophistication of the buyer is measured by the likelihood that the purchaser would expect the company to expand it's marketing or sponsorship into the product, service or market of the actor and the degree of care likely to be exercised. It would be difficult to fathom that one who is seeking to contract with the registered Mark holder to obtain ways of getting money, would be confused with the proposed Mark who is seeking donations. Why would one give money from whom they are seeking grant money? The purchaser of the registered Marks service is an entity, where the purchaser of the proposed Mark is an individual donor or one in need of shelter : One is looking for grants and the other is spending the money for homeless children. One uses the Design Mark of "ZOE" in attracting children and the other does *not* use the name ZOE in the writing, the receiving or the distribution of the grant monies. There is a total dichotomy between the two marks which by their defined Identification of Goods/Services could never be associated with one another.

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CONCLUSION

It must be found that there is a likelihood of confusion upon the consumer such that the proposed Mark would be unfairly benefited by it's use or association with that of the registered Mark. Appellant has clearly pointed out that though the names are similar in sound, they are not similar in sight or connotation. Critical evaluation the stream of commerce and type and sophistication of the buyers clearly differentiates the two marks, whereby the Marks will never be shown in similar channels.

Appellant urges the Appeal Board to reverse the refusal of registration of this Mark and release this mark for publication.

Dated this 5th day of February, 2007

Respectfully submitted

By: _____

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