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

Proceeding	86629630
Applicant	No Show Productions, LLC
Correspondence Address	PAUL W. KRUSE Bone McAllester Norton PLLC 511 Union St Ste 1600 Nashville, TN 37219-1780 UNITED STATES trademarks@bonelaw.com
Submission	Appeal Brief
Attachments	Brief.PDF(641086 bytes )
Filer's Name	Paul W. Kruse
Filer's e-mail	trademarks@bonelaw.com
Signature	/Paul W. Kruse/
Date	05/03/2016

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

Applicant Name: No Show Productions, LLC

Mark: Miscellaneous Design

Ser. No. 86629630

Filing Date: May 14, 2015

Allowance Date:

Attorney Ref. No. 008709-60818

**APPEAL BRIEF**

Box TTAB NO FEE  
Commissioner for Trademarks  
P.O. Box 1451  
Alexandria, Virginia 22313-1451

Jonathan Ryan O'Rourke, Esq.  
Law Office 104

As a world famous celebrity, George Jones was photographed countless times during his lifetime. The image of George Jones that Applicant seeks to register is perhaps one of the most iconic photographs of him ever taken. Nevertheless, the Examining Attorney is of the opinion that Applicant's proposed mark is used in a merely ornamental way and not as a mark. Consequently, the Examining Attorney finally refused registration under Sections 1, 2 and 45. Applicant timely appealed to the Trademark Trial and Appeal Board from the decision of the Examining Attorney.

The Examining Attorney asserts that the proposed mark is perceived as merely a decorative or ornamental feature of the packaging for the goods because of the large size and

location on the bottom half of the bottle. Specifically, the Examining Attorney notes that websites from Quality Liquor Store, Liquorama, and Best Buy Liquors and BonApetit.com show similar designs placed broadly across the center of the bottle and then sweepingly concludes that the designs are being used aesthetically as opposed to being an indicator of the source of the goods. Just because a “mark” is visually pleasing or attractive to consumers does not render it unregistrable if the mark is also inherently distinctive. *See, In re Swift & Co.*, 223 F.2d 950 (CCPA 1955).

While placement of a mark might be relevant to a determination of whether it is merely ornamental if sought to be registered for bottles, *sold empty*, the placement has absolutely no bearing on whether a mark is merely ornamental for distilled spirits. This distinction is important for it means Applicant’s proposed mark as encountered by consumers on Applicant’s packaging is perceived by consumers as source identifying when viewed in relation to the distilled spirits it contains. This perception is further enhanced by the placement of George Jones’ signature, which is set forth in application Reg. No. 4885165, immediately below Applicant’s proposed mark. Evidence of such use, of which the Board may take judicial notice, is submitted herewith as Exhibit A, incorporated herein and made of record thereby. The two marks together make the distilled spirits on which they appear stand out from the others with which it competes in the distilled spirits category and serves no other purpose than to immediately convey to the consumer the source of the goods.

The Supreme Court, when discussing the source identifying aspects of product packaging, stated the following:

The attribution of inherent distinctiveness to certain categories of word marks and product packaging derives from the fact that ***the very purpose of*** attaching a particular word or a product, or ***encasing it in a distinctive packaging***, is most often ***to identify the***

**source** of the product. Although the words and packaging can serve subsidiary functions ... a garish form of packaging (such as Tide's squat, brightly decorated plastic bottles for its liquid laundry detergent) may attract an otherwise indifferent consumer's attention on a crowded store shelf- **their predominant function remains source identification**. Consumers are therefore **predisposed** to regard those symbols **as indication of the producer**, which is why such symbols '**almost automatically** tell a customer that they refer to a brand' ... 'and **immediately ... signal** a brand or a product **source**.' *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205 (2000) (internal citations omitted) (emphasis added).

Although it can serve subsidiary functions as used on packaging, there is no question that Applicant's proposed mark attracts otherwise indifferent consumers. This is not a case where Applicant has simply applied a decorative element to a commonly-shaped container (*In re F.C.F. Inc.*, 30 USPQ2d 1825 (TTAB 1994) (a decorative flower added to a typical perfume bottle)), or has tried to register a shape which describes the contents of the packaging (*In re J. Kinderman & Sons Inc.*, 46 USPQ2d 1253 (TTAB 1998) (packaging for Christmas decorations shaped like a wrapped Christmas present)). Rather, Applicant's Mark is completely arbitrary when viewed in relation to the distilled spirits it contains. It stands out from the other labels with which it competes in the distilled spirits category and serves no other purpose than to immediately convey to the consumer the source of the goods. Since Applicant's proposed mark is not merely ornamental as a consequence, it is entitled to registration on the Principal Register without a claim of acquired distinctiveness.

Applicant's proposed mark also identifies a secondary source for services not set forth in this application. Specifically, Applicant uses the proposed mark for its museum, gift shop and restaurant services. Evidence of such use, of which the Board may take judicial notice, is submitted herewith as Exhibit B, incorporated herein and made of record thereby. As a

consequence, the proposed mark is closely associated in the public mind with Applicant's goods as well as its services.

In *In re Paramount Pictures Corp.*, 213 USPQ 1111, 1112 (TTAB 1982), the Board held that MORK & MINDY was registrable for decals because the applicant had a television series of that name and had previously registered MORK & MINDY for various goods and services, and found that the *primary* significance of the term MORK & MINDY to a prospective purchaser of decals was to indicate the television series and the principal characters of the television series. The Board held that the case was controlled by its decision in *In re Olin Corp.*, 181 USPQ 182 (TTAB 1973) (stylized "O" design registrable for T-shirts, where applicant had previously registered the "O" design for skis), in which that Board had stated:

It is a matter of common knowledge that T-shirts are "ornamented" with various insignia ... or ... various sayings such as "Swallow Your Leader." In that sense what is sought to be registered could be construed to be ornamental. If such ornamentation is without any meaning other than as mere ornamentation it is apparent that the ornamentation could not and would not serve as an indicia of source. Thus, to use our own example, "Swallow Your Leader" probably would not be considered as an indication of source.

*Id.* at 182.

In *Paramount*, the Board stated that "[t]he 'ornamentation' of a T-shirt can be of a special nature which is [sic] inherently tells the purchasing public the source of the T-shirt, not the source of manufacture but the *secondary source*." 213 USPQ at 1112. Applying the test set forth in *Olin*, the Board found that "the paired names 'MORK & MINDY', while certainly part of the ornamentation of the decal, also indicate source or origin in the proprietor of the Mork & Mindy television series in the same sense as the stylized 'O' in *Olin*." *Id.* at 1113. The Board noted that "while purchasers may be accustomed to seeing characters' names and images as part of the

ornamentation of decals, T-shirts and the like, they are also accustomed to seeing characters' names and images used as trademarks to indicate source of origin." *Id.* at 1114.

*See also In re Watkins Glen Int'l, Inc.*, 227 USPQ 727, 729 (TTAB 1985) (reversing the refusal and finding stylized checkered flag design registrable for patches and clothing items, where applicant had previously registered WATKINS GLEN and checkered flag design (with "WATKINS GLEN" disclaimed) for services); *In re Expo '74*, 189 USPQ 48, 50 (TTAB 1975) (reversing the refusal and holding EXPO '74 registrable for handkerchiefs and T-shirts, since applicant, organizer of the 1974 World's Fair, had previously registered EXPO '74 for other goods and services).

Although it believes that the proposed mark is not ornamental and thus entitled to registration on the Principal Register, Applicant will accept registration on the Supplemental Register if the Board so determines. For purposes of registration on the Supplemental Register, a mark may consist of any word, name, symbol, or device, or any combination, but such mark must be capable of distinguishing Applicant's goods. *See* Trademark Act Section 23(c). Applicant's mark is capable of performing the function of a mark. Consequently, Applicant's mark is clearly entitled to registration on the Supplemental Register if the Board determines that it is not entitled to registration on the Principal Register and in that event asks that the Board so amend this application.

## **REMARKS**

Applicant has amended the application in a manner thought to comply with the Examining Attorney's requirements. Consequently, it is respectfully requested that the application be promptly approved for publication.

Please direct all communications to the undersigned at (615) 238-6300 or [trademarks@bonelaw.com](mailto:trademarks@bonelaw.com).

No Show Productions, LLC

A handwritten signature in black ink, appearing to read 'P. Kruse', with a long horizontal flourish extending to the right.

By: \_\_\_\_\_

Name: Paul W. Kruse

Title: Attorney

Date: May 3, 2016

Submitted by:

Bone McAllester Norton PLLC  
511 Union Street  
Suite 1600  
Nashville, Tennessee 37219

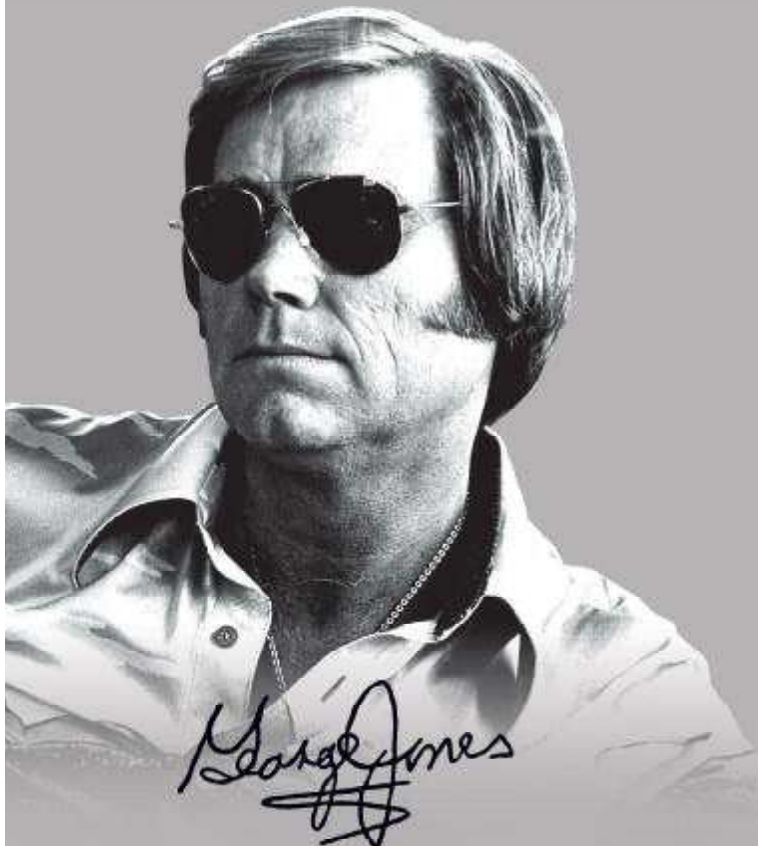
# Exhibit A



**WHITE**  
DISTILLED AND BOTTLED BY  
**VODKA**  
POSSUM STILL WORKS  
**LIGHTNING**  
PEMBROKE, KENTUCKY

“ALCOHOL HAS OWNED ME AND CONTROLLED ME MUCH OF MY LIFE. NOW IS MY TIME TO OWN IT.”

*Margie Jones*



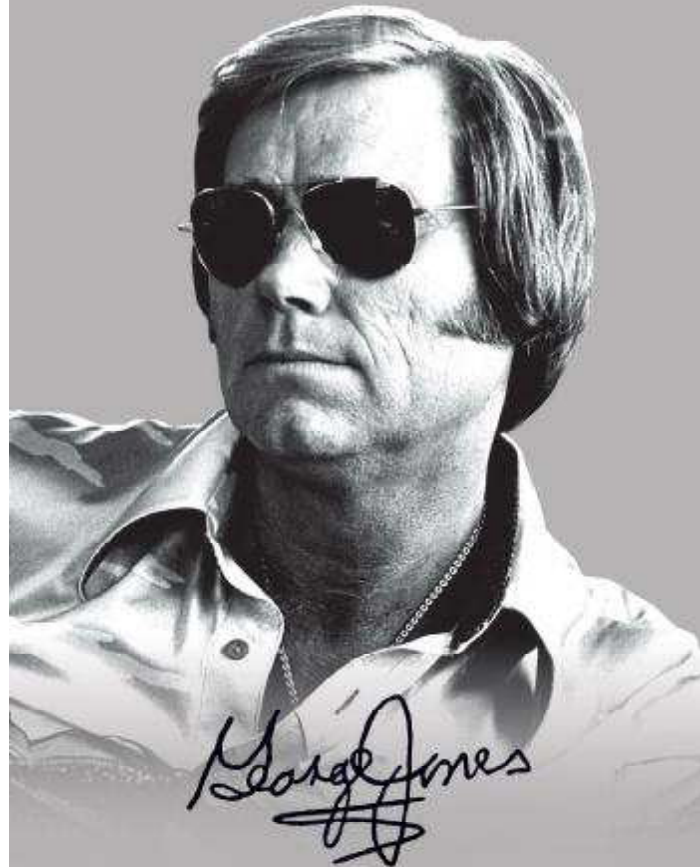
40% ALC./VOL. (80 PROOF) 750 ML

**DISTILLED FROM GRAIN**



**GOVERNMENT WARNING:**  
(1) According to the Surgeon General, women should not drink alcoholic beverages during pregnancy because of the risk of birth defects. (2) Consumption of alcoholic beverages impairs your ability to drive a car or operate machinery, and may cause health problems.

**WHITE**  
DISTILLED AND BOTTLED BY  
**VODKA**  
POSSUM STILL WORKS  
**LIGHTNING**  
PEMBROKE, KENTUCKY



*George Jones*

40% ALC./VOL. (80 PROOF) 750 ML







## Exhibit B



Hide imagery

George Jones Museum

George Jones Museum

George Jones Museum



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