



SAN YSIDRO, NEW MEXICO 87053

April 26, 1999

Eleanor K. Meltzer, Attorney-Advisor
Office of Legislative and International Affairs
U.S. Patent and Trademark Office
2121 Crystal Drive, Suite 902
Arlington, VA 22202

Via Facsimile and U.S. Mail

*Re: Comments from the Pueblo of Zia
Advisability of Prohibiting Trademark Registrations for
Official Insignia of Native American Tribes*

Dear Ms. Meltzer:

On behalf of the Pueblo of Zia, I hereby submit the following comments concerning proposed amendments to the Lanham Act to prohibit federal trademark registrations for insignias of "any federally recognized Indian tribe." *See* S. 2260 (Cong. Rec. 7/23/98, pp. S8822-24, S8837). We submit these comments in response to the Patent and Trademark Office's December 29, 1998 and March 16, 1999 formal notices requesting comments. *See* 63 Fed. Reg. 71619 (January 1, 1999) and 64 Fed. Reg. 13004 (March 16, 1999).

The tribe submits a brief background history concerning the Zia Sun Symbol and limits its subsequent comments to the particular issues listed in the Patent and Trademark Office's notice: "(1) how best to conduct the study; (2) where public hearings should be held; and (3) who should be consulted during the study process," 64 Fed. Reg. 13004, and "(4) the definition of official insignia; (5) how the PTO might establish a list of official insignia; (6) the impact of any change in the current law or policy; (6) the impact of such prohibition on federal registration and the new uses of official insignia; (7) the administrative feasibility for changing current law; (8) whether the changes in scope of protection should be offered prospectively, or retrospectively; (9) what statutory changes are necessary to provide such protection; and (10) what other factors may be relevant. *Id.* (numbers added).

Ms. Eleanor K Meltzer
April 26, 1999
Page 2

Background

For a number of years, the Pueblo of Zia has communicated with the Patent and Trademark Office about the Zia Sun Symbol, requesting that the Trademark Office be aware of and sensitive to the tribe's right in a symbol used in tribal religious ceremonies since at least 1200 A.D. It is the tribe's position that registration of this symbol by anyone other than the Pueblo of Zia is a violation of the trust relationship between the United States government and the Pueblo of Zia, and that the symbol is not registrable pursuant to 15 U.S.C. § 1052 for several reasons.

First and foremost, the mark is not registrable because use of it by a non-Native American business for its products disparages the religion and people of the Pueblo of Zia, and brings them into disrepute. 15 U.S.C. § 1052 (a). The Pueblo of Zia is offended by the use of its official and religious symbol with any commercial products, just as any other religions would be offended by the commercial use of their religious symbols. The Pueblo further objects to any implication of its endorsement, interest in, or support of any enterprise or product not affiliated with the tribe which such use by others may create.

Second, the symbol is the design which appears on the State of New Mexico flag, and therefore is not registrable under 15 U.S.C. § 1052 (b). In recent years, as a result of ongoing negotiations, the elders of the tribe have given their permission for the design to appear on the state flag. There has been discussion in the legislature for the past several years concerning the ignorant and unauthorized taking of this symbol for the state flag early in this century.

In 1994, we sent a packet of materials to Trademark Office Attorney Kathy Erskine. These materials concerned the cultural heritage of the Pueblo of Zia and demonstrated the central importance of the Zia Sun Symbol in the tribe's religion. Also included was evidence of the tribe's official use of both the three pronged and four pronged sun symbols for many decades, and statements from tribal elders about how deeply offensive the commercial use of the symbol was to them and their religion, and how federal registration of the symbol was a betrayal. I understood from conversations with David Bucher that these materials would be placed in the Trademark Office library in a separate file created for the Pueblo of Zia.

Early in 1994, Ada Deer, then Assistant Secretary of the Department of Interior, Marcella Giles, and several other people from the Bureau of Indian Affairs met with Trademark Office attorneys and specifically mentioned the Zia Sun Symbol at that meeting.

In 1993, the Pueblo of Zia opposed an attempt to register the symbol by a chemical company, Coulston International Corporation (Application No. 74-123,180; Opposition No. 95,251). Although Coulston fiercely litigated the opposition (refusing

Ms. Eleanor K Meltzer
April 26, 1999
Page 3

to agree to such motions as those requesting a three day extension of time or a protective order to make depositions in which elders talked about sacred matters unavailable to news media), it withdrew its application just before the Trademark Trial and Appeal Board was to decide issues raised in the opposition. The Pueblo's scarce resources were wasted on an opposition that did not result in any helpful precedent.

In a deposition given in the Coulston opposition proceeding, the late Professor Alphonso Ortiz, a leading national academic authority on Native American cultural anthropology, explained the importance of the symbol to the tribe and the deep offense the members of the tribe felt. He further explained that "versions" of the symbol – with proportions distorted – did not serve to distinguish the deformed symbol from the original Zia Sun Symbol, but only increased the offense by desecrating and mocking the symbol.

In more recent years, Senators Bingaman and Domenici have written the Trademark Office concerning the Zia Sun Symbol, asking that a formal policy be instituted so that this mark and other important Native American symbols not be registered. No such policy has been instituted.

Despite these efforts, the Trademark Office still considers and grants applications to register Zia Sun Symbols or distorted Zia Sun Symbols. Although there is a legal basis to prohibit registration of the Zia Sun Symbol as a trademark in existing law, the tribe welcomes Congress's direction to the Patent and Trademark Office to hold hearings on the amendment of the Trademark Act to explicitly prohibit registration of such symbols.

Comments

How, When and Where to Conduct Study

The Pueblo of Zia refers the Patent and Trademark Office to the Comments of the Tuolomne Band of Me-Wuk Indians, prepared by the Native American Rights Fund, and submitted to the Office on February 11, 1999. The Pueblo of Zia adopts by reference the extremely thorough and scholarly discussion in that document of the method of conducting the study. The Pueblo has only a few additional comments. It also requests that there be at least ten hearings, and that one hearing take place in Albuquerque, New Mexico. There are nineteen Indian Pueblos located north, south and west of Albuquerque, and the city is centrally enough located so that members of these pueblos could attend hearings with no great hardship. The Pueblo of Zia offers its tribal offices in San Ysidro, New Mexico – forty-two miles northwest of Albuquerque – as a location for one hearing.

As to material to be considered, the Pueblo agrees that both Indian law scholars and Indian law and related precedent should be considered. *See, e.g. Harjo et al. v. Pro Football, Inc.* Cancellation No. 21,069 to Registration Nos. 1,606,810; 1,085,092; 987,127; 986,668; 978,824; and 836,122 (Cancellation of registrations of various WASHINGTON REDSKINS marks). Cultural historians and cultural anthropologists and their works should also be considered. In addition, the Pueblo would like to submit all declarations and depositions of tribal elders and the deposition of Professor Ortiz taken in the Opposition 95,251 (described above at page 2) before the hearing held in this area.

Official Insignia

Official insignia should be defined as any insignia used by a tribe signifying its identity and/or insignia identified by the governing body of the tribe as an official symbol. The PTO could place a notice in the Federal Register asking tribes to submit their official insignia, and through cooperation with the Bureau of Indian Affairs, mail copies of the notice to the governments of all tribes.

Impact and Feasibility of Change in Law

A change in the law to protect tribal insignias and symbols would make the Trademark Act more consistent and avoid a possible violation of fundamental Constitutional principles and Supreme Court Indian Law precedent. The Act has long prohibited registration of official insignia of "the United States, or of any State or municipality, or of any foreign nation, or any simulation thereof" with no significant administrative problem. 15 U.S.C. § 1052(b). Well established Indian law precedent dictates the recognition of the Indian tribes' sovereignty by the federal government and its agencies, and makes clear the fiduciary duty the federal government and its agencies owe to the tribes. United States v. Creek Nation, 295 U.S. 103 (1935); Seminole Nation v. United States, 316 U.S. 286, 297 (1942). The Act's failure to give official insignia of the tribes the same status as official insignia of cities and states and foreign nations, violates the law, offends fundamental equitable notions, and denies the tribes their equal rights under the Constitution. Changing the Trademark Act would cure these defects. No administrative difficulty in changing current law can justify allowing these defects to persist.

Necessity of Retrospective Application of the Amendment

No business interest should justify the retention of federal registrations in official Native American symbols which Congress decides should not be registrable. Existing federal and state law dictates that non Native American institutions divest themselves of Native American property the institutions may have purchased for large amounts of money. *See* 25 U.S.C. §§ 3001-3013; ARS 41-844- 41-865 (1990). A trademark owner should not be shielded from the scope of the amended law

Ms. Eleanor K Meltzer
April 26, 1999
Page 5

because it registered a trademark before the Act was changed. Allowing present owners of marks that are Native American official insignia to continue to use these marks would make a mockery of the serious attempt of Congress and the United States Government to right a wrong, and would indicate quite clearly that *any* property rights of non Native Americans are to be valued more than the essential cultural values and sovereign identity of an entire tribe.

Statutory Changes

The only statutory change is the amendment to 15 U.S.C. § 1052 to prohibit registration of the official insignia of Native American tribes.

Other Factors

Intellectual property rights and litigation of those rights are ever increasing. The amendment proposed by Congress would avoid costly litigation by Native Americans and their tribes to rectify the failure of the Trademark Act to protect them. The tribal resources saved could be used in hundreds of other necessary and productive ways. A change in the law would acknowledge and effectuate the duty of the Federal government, pursuant to its fiduciary relationship with Native American tribes, to protect the insignia of Native American tribes. It would avoid potential problems under the Equal Protection Clause of the United States Constitution created by 1) the Trademark Act's current prohibition of registration of the insignia of municipalities, states and foreign countries; 2) its failure to explicitly treat the insignia of Native American tribes similarly; and 3) the Patent and Trademark Office's current policy of permitting non-Indians not associated with the tribes to register tribal insignia.

Conclusion

The Pueblo of Zia's comments have been structured by the current request of the PTO. It requests the opportunity to submit additional written comments, documents and articles as necessary prior to the anticipated New Mexico field hearing.

Yours truly,



Amadeo Shije
Governor

AS/rp/sgd

cc: Roberta Price, Esq.
David Mielke, Esq.