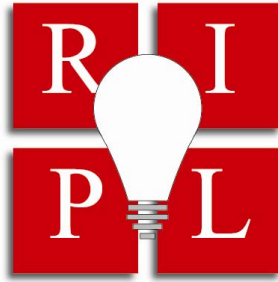


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A TALE OF TWO PIONEERS: TRADEMARKING A TATTOO

JEANETTE BRAUN

ABSTRACT

This is a short article written in a creative style that narrates the story of the first tattoo that was federally registered as a trademark.

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A TALE OF TWO PIONEERS: TRADEMARKING A TATTOO

JEANETTE BRAUN*

“People who end up as ‘first’ don’t actually set out to be first. They set out to do something they love.” - Condoleezza Rice

It was the best of times. A new age was dawning and the spring of hope was abundantly flowing. In New Orleans, Louisiana, there were a Master Piercer with enchanting angel wings tattooed on her back. In Chicago, Illinois, there were an intellectual property attorney with a grand command of the law. In both mortals, a thirst for doing what they love settled forever that the U.S. Patent and Trademark Office would grant trademark rights on a tattoo.

In the year of Our Lord nineteen hundred and ninety, Elayne Angel, Master Piercer and later author¹ had angel wings tattooed on her back, which, strange to relate, she used in interstate commerce to promote her body piercing services. As time came to pass, Ms. Angel and her wings became the driving force in the piercing industry, and daring thieves were hanging on to the tips of Ms. Angel’s wings. Protecting her brand from the lawless matured into a pressing need. Thus, in the year of two thousand and one, did the mortals of this chronicle, lay a road in intellectual property law that had never been laid before.

Mr. Trzyna was no stranger to laying roads that had never been laid before in the world of intellectual property law. In the year of Our Lord nineteen hundred and eighty-seven, Mr. Trzyna demonstrated how plant patents could be protected with a design patent.² This had never been done before.

Mr. Trzyna, whether divinely arranged by fate, destiny, crossing of the stars, or not, we will never know, met Ms. Angel and heard her plight. Chivalry was alive and well in Mr. Trzyna, and he commanded his musketeer to start the process of registering Ms. Angel’s tattoo as a service mark.

The U.S. Patent and Trademark Office received the service mark application³ and reached to the ends of the land searching for a mark that would be similar to Ms. Angel’s. It did not find such a mark. It did not, however, immediately bless the mark for registration. The U.S. Patent and Trademark Office contended that the lines in the drawing needed clarification.⁴ This contention was a low hurdle to jump and easily overcome by amending the application to clarify that the “broken lines . . . show the position of the mark on the back.”

The U.S. Patent and Trademark Office also proclaimed it did not believe that the tattoo functioned as a service mark. “Not all words, designs, symbols or slogans

* © Jeanette Braun 2019. J.D. candidate, May 2019, The John Marshall Law School. Registered Patent Agent. Sincere and special thanks to Stephanie Nikitenko, J.D. Candidate 2020, John Marshall Law School, for confirming SLAVE was the first tattoo to be registered as a trademark, Elayne Angel, author and master piercer, and Peter K. Trzyna, Founder of Peter K. Trzyna Law Office P.C. for blazing this new path in Trademark law.

¹ ELAYNE ANGEL, *THE PIERCING BIBLE: THE DEFINITIVE GUIDE TO SAFE BODY PIERCING* (2009).

² Peter K. Trzyna, *Are Plants Protectable Under the Design Patent Act?*, 69 J. INTELL. PROP. L. OFF. SOC’Y 457 (1989).

³ U.S. PAT. & TRADEMARK OFF., APPLICATION No. 76/195,291, SLAVE (Jan. 11, 2001).

⁴ *Id.*

used in the sale or advertising of goods or services function as trademarks, regardless of the applicant's intent. A term does not function as a trademark unless it is used in a manner which clearly projects to purchasers a single source of the goods or services.”⁵

This proclamation started Mr. Trzyna off on the path to proving Ms. Angel's tattoo did indeed function as a service mark. Mr. Trzyna called upon his musketeer to scour the land for specimens that showed how famous Ms. Angel's tattoo was in the field of commerce. The musketeer did not have to search far and wide for the specimens, as Ms. Angel had them at the ready. The musketeer collected four substitute specimens from Ms. Angel and prepared a response to the U.S. Patent and Trademark Office's proclamation. The original specimens filed with the application showed the tattoo being used at a point of sale in connection with the services. The additional specimens showed the fame of Ms. Angel's tattoo: 1) a Washington Post article advertising a photograph of Ms. Angel's tattoo showcased in the “Skin Deep” exhibition at the Mariners' Museum; 2) the photograph also being displayed at the Justice and Police Museum in Sydney Australia; 3) the photograph further being displayed at the Soho Galleries; and 4) the photograph being incorporated in a cover of a book.

The musketeer argued that the four additional specimens, in combination with the four originally filed specimens, showed the tattoo used in connection with the services. Also included with the response was a photograph of Ms. Angel with display of the tattoo, at a conference for the services she provided. Lastly, eight additional and different advertisement specimens that proved the tattoo was used in connection with the services were also included with the response.

Mr. Trzyna reviewed the musketeer's response, was pleased with it, and sent it off to the U.S. Patent and Trademark Office using first class mail. The U.S. Patent and Trademark Office were convinced that Ms. Angel's tattoo was used in connection with the services she provided, and on the fifth of November, in the year two thousand and two, granted the tattoo registration no. 2645270. The registration forever sealed in history that a tattoo is protectable under the Trademark Act.⁶

Ms. Angel continues to use her tattoo in connection with her services and routinely travels around the U.S. piercing clients and speaking to doctors at hospitals about how to work with piercings in emergency situations. Mr. Trzyna continues to practice IP law in Chicago, IL, and provide services to innovators who have caught lightning in a bottle. The musketeer became the narrator of this story.

⁵ U.S. PAT. & TRADEMARK OFF., APPLICATION No. 76/195,291, Office Action (May 2, 2001).

⁶ U.S. PAT. & TRADEMARK OFF., TRADEMARK MANUAL OF EXAMINING PROCEDURE § 101 (8th ed. 2011), available at <https://tmep.uspto.gov/RDMS/TMEP/current#/current/d1e2.html> [hereinafter TMEP].

