

**THIS OPINION IS NOT A
PRECEDENT OF
THE TTAB**

Mailed: August 4, 2009

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Anderson

Serial No. 76497832

Kent G. Anderson, pro se.

Y. I. Lee, Trademark Examining Attorney, Law Office 107 (J. Leslie Bishop, Managing Attorney).

Before Seeherman, Hairston and Walters, Administrative Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

Kent G. Anderson has filed an application to register the mark TOMORROW (standard character form) for goods and services in International Classes 1, 3, 35, 41 and 43.¹

This case is on appeal from the trademark examining attorney's final refusal to register the mark on the grounds that (1) the specimens do not show the applied-for

¹ Application Serial No. 76497832 was filed on March 17, 2003, based upon applicant's assertion of his bona fide intent to use the mark in commerce. A statement of use with specimens was filed on April 7, 2008, alleging first use anywhere and first use in commerce as of May 17, 2003.

mark in use in commerce for the goods in Classes 1 and 3, and (2) applicant failed to comply with a requirement for additional specimens to support the wide range of goods in Classes 1 and 3.²

When the refusals were made final, applicant appealed. Applicant and the examining attorney have filed briefs.

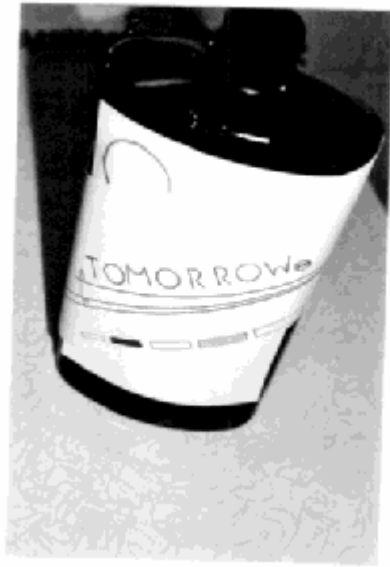
As background for this matter, we note that applicant's Class 1 goods are identified as: "photographic chemicals; unprocessed artificial resins and plastics used in agriculture, horticulture and forestry and for general industrial use; manure; fire extinguishing compositions; food preservative compositions; tanning agents for use in the manufacture of leather." Applicant's Class 3 goods include over one-hundred items, many of which are cosmetic and skin preparations, such as "after-shave gel, baby oil, bath foam, skin concealers, deodorant soap, shower gel, talcum powder, hair lotions; and non-medicated dental rinse." Also included in the Class 3 goods are "boot cream," "dish detergents," and "non-medicated grooming preparations for cats, dogs, pets and livestock, namely grooming sprays, grooming wipes, deodorants, coat

² The two refusals pertain only to Classes 1 and 3. Other refusals and/or requirements in the case have been resolved or withdrawn.

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conditioners, anti-matting sprays, colognes, and pet shampoo."

With his statement of use filed April 7, 2008, applicant submitted the specimens reproduced below in support of the goods in Classes 1 and 3, respectively:



In an office action mailed July 25, 2008, the examining attorney advised applicant that additional specimens were required. Specifically, she stated that:

Because applicant has listed a wide range of unrelated goods ... in its [sic] identification, the applicant must submit additional specimens to support ... the classes of goods ... recited in the Statement of Use. The additional specimens for each class of goods ... are necessary for proper examination of the mark. The examining attorney may request additional specimens under 37 C.F.R. §2.61(b), TMEP §904.01(a). Based on the limited and unacceptable specimens that applicant has submitted with its [sic] Statement of Use, the examining attorney is uncertain as to whether applicant is using the mark in connection with all the goods and services that are recited in the Statement of Use.

In addition, the examining attorney rejected the specimens submitted with the statement of use, stating as follows:

... the specimens consist of ... duplicated photos of bottles. Although ... the photos display the mark, there is absolutely no association between the proposed mark and any of the recited goods Applicant has not demonstrated any connection between the proposed mark and any of the recited goods ... in Classes 1, 3 These specimens fail to demonstrate what the goods ... are and how prospective consumers would perceive the proposed mark as a source-indicator for applicant's recited goods

The examining attorney required applicant to submit "a substitute specimen showing use of the mark for each class of goods," and a statement, verified with an affidavit or

signed declaration, that the specimens were in use in commerce prior to expiration of the time allowed applicant for filing a statement of use. (underlining in original)

In response to the refusal, applicant submitted specimens consisting of several sheets of paper displaying circles bearing only the mark TOMORROW and, respectively, the words "cosmetics" and "chemicals."

In an office action issued September 16, 2008, the examining attorney advised applicant that he had failed to comply with her requirement for additional specimens to support the goods in Classes 1 and 3. In addition, the examining attorney rejected the substitute specimens stating that "they are not acceptable as evidence of actual trademark use because their appearance suggests that they are not actual labels used with all the recited goods." Thus, [they] fail to show proper use on the goods or on packaging of the Class 1 and Class 3 goods that are identified in the Statement of Use." The examining attorney then finally refused registration on the grounds that (1) the specimens do not show use of the applied-for mark in use in commerce for the goods in Classes 1 and 3, and (2) applicant failed to comply with the requirement for additional specimens to support the wide range of goods in Classes 1 and 3.

Applicant, on January 5, 2009, filed a request for reconsideration along with specimens consisting of several pictures of two different bottles with labels thereon bearing only the mark TOMORROW and, respectively, the words "Photographic Chemicals" and "Mouthwash."

On February 12, 2009, the examining attorney denied applicant's request for reconsideration.

We turn first to the examining attorney's refusal to register on the ground that applicant failed to comply with the requirement for additional specimens to support the wide range of goods in Classes 1 and 3. The examining attorney argues in her brief that:

The examining attorney also required applicant to provide additional specimens because the listed Class 1 goods and Class 3 goods, as recited in the Statement of Use, are long and contain numerous unrelated goods. Under 37 C.F.R. § 2.61(b) and TMEP §904.01(a), the examining attorney may request additional specimens, especially in cases where the applicant has listed a wide range of unrelated goods and services in its identification. In the examining attorney's final office action, dated September 16, 2008, she maintained the requirement that applicant provide additional specimens that would demonstrate actual use of the mark in connection with these goods recited in the Statement of Use for Class 1 and 3. The applicant did not provide additional specimens for the other goods in Class 1 or Class 3.

The only Class 1 specimens provided during prosecution were of "photographic chemicals" and "additive fuel treatment." Photographic chemicals and fuel additives are unrelated to

artificial resins and plastics used in agriculture, as well as manure, fire extinguishing compositions, food preservative compositions, and tanning agents for use in the manufacture of leather.

...

Applicant's identification of goods of Class 3 goods is extremely long and contains a wide variety of goods that are also unrelated. Applicant did not provide any other specimens other than mouthwash and lipstick. These are not related to adhesive removers, adhesives for attaching artificial fingernails or eyelashes, non-medicated pet shampoo, pre-moistened cosmetic wipes, or tailors' wax, to name a few. Applicant did not provide specimens demonstrating use of the mark with any of the other Class 3 goods listed in the identification.

Applicant's brief consists of the following two statements: "The applicant has attempted to comply with all requirements set forth [b]y the examining attorney in [the] February 12, 2009 office action. The applicant believes that the mark is in condition for Registration." Accompanying applicant's brief are specimens consisting of several pictures of two different containers with labels thereon bearing only the mark TOMORROW and, respectively, the words "Fuel Additive" and "Lipstick."

TMEP §904.01(a) provides, in pertinent part, that: "If more than one item of goods, or more than one service, is specified in an application in one class, it is usually not necessary to have a specimen for each product or service. However, if the range of items is wide or

contains unrelated articles, the examining attorney may request additional specimen(s) under 37 C.F.R. §2.61(b).” 37 C.F.R. §2.61 provides that “[t]he examiner may require applicant to furnish such information and exhibits as may be reasonably necessary to the proper examination of the application.”

In this case, there is no question that the involved application lists a wide range of goods in Class 1 and Class 3. Thus, the examining attorney’s requirement for additional specimens for these classes was proper. Also, there is no question that the examining attorney, in her July 25, 2008 and September 16, 2008 office actions, specifically advised applicant that these classes listed a wide range of unrelated goods and that additional specimens were required to support these classes.

In response to the July 25, 2008 office action, applicant submitted specimens consisting of several sheets of paper displaying circles bearing only the mark TOMORROW and, respectively, the words “cosmetics” and “chemicals.” In his request for reconsideration, applicant submitted specimens consisting of several pictures of two different bottles with labels thereon bearing only the mark TOMORROW and, respectively, the words “Photographic Chemicals” and “Mouthwash.” Finally, with his brief on the case,

applicant submitted specimens consisting of several pictures of two different containers with labels thereon bearing only the mark TOMORROW and, respectively, the words "Fuel Additive" and "Lipstick."

Even assuming that the specimens submitted by applicant are acceptable, they fail to meet the examining attorney's requirement for additional specimens for the goods listed in Classes 1 and 3. We recognize that the examining attorney, in her office actions, did not specify the number of additional specimens that applicant was required to submit. However, in view of the wide range/disparate nature of the goods listed in the application in Classes 1 and 3, the submission of specimens for goods identified as "Chemicals," "Photographic Chemicals" and "Fuel Additive" for Class 1; and "Cosmetics," "Mouthwash," and "Lipstick" for Class 3 is not sufficient to comply with the examining attorney's requirement. In other words, this small number of specimens fails to demonstrate use of the applied-for mark for the wide range of goods listed in Classes 1 and 3.

In view of the foregoing, we find that applicant failed to comply with the examining attorney's requirement for additional specimens. Under the circumstances, we need not reach the issue of whether any of the specimens

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submitted by applicant are acceptable, i.e., show the applied-for mark in use in commerce for the goods in Classes 1 and 3.

Decision: The refusal to register applicant's mark in Classes 1 and 3 on the ground that applicant failed to comply with the examining attorney's requirement for additional specimens is affirmed. The application will go forward with respect to the other classes.