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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Odom's Tennessee Pride Sausage, Inc.

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Serial No. 76581899

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Marsha G. Gentner of Jacobson Holman PLLC for Odom's Tennessee Pride Sausage, Inc.

Leigh A. Lowry, Trademark Examining Attorney, Law Office 115 (Tomas V. Vlcek, Managing Attorney).

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Before Hairston, Grendel and Walsh, Administrative Trademark Judges.

Opinion by Walsh, Administrative Trademark Judge:

Odom's Tennessee Pride Sausage, Inc. (applicant) has applied to register the mark shown below for goods identified as "fresh sausage rolls, links and patties; fresh souse; frozen sausage ball appetizers" in International Class 29.[1]

[1] The application also covers International Class 30, but the refusal at issue in this appeal does not apply to International Class 30.

Applicant filed the application on March 18, 2004, on the basis of applicant's statement of its bona fide intention to use the mark in commerce under Trademark Act Section 1(b), 15 U.S.C. § 1051(b). Applicant filed a timely statement of use under Trademark Act Section 1(d)(1), 15 U.S.C. § 1051(d)(1), asserting use in 1994. The specimen applicant filed with the statement of use is at issue in this appeal.[2]

The Examining Attorney has issued a final refusal on the grounds that applicant failed to file an acceptable specimen as required by Trademark Act Sections 1, 2 and 45, 15 U.S.C. §§ 1051, 1052 and 1127. Specifically, the Examining Attorney determined that applicant's specimen, shown below, consisting of a web page from applicant's Internet website, failed to meet the requirements to qualify as a display associated with the goods.

[2] Applicant submitted a second specimen, an "in-store display," after a remand. The Examining Attorney also rejected that specimen. We need not consider the acceptability of the second specimen in view of our determination here that the original specimen is acceptable.

In particular, the Examining Attorney rejected the specimen because, "… the proposed mark 'is not so prominently displayed in the website that customers will

easily associate the mark with the products.' *In re Ostergerg*, 83 USPQ2d 1220, 1223 (TTAB 2007)." Examining Attorney's Brief at 5. The Examining Attorney argues further:

> The only appearance of the mark is in the bottom right-hand corner of the page. Here, the applied-for mark appears directly adjacent to the web page copyright information, the "Ecommerce" web site designer's name, the company profile, the terms of use of the web site, the help guide for the web site, and hyperlinks to various other web site functions, such as the "Bookmark Us" hyperlink, a link to provide feedback, the link for privacy policy information and a return policy link. Although this might suffice as evidence that the applicant uses the mark as a service mark in connection with online retail store services, it does not suffice as a specimen of use of the mark as a trademark in association with the identified goods.
>
> The depiction of the applied-for mark in the bottom corner of the web page is not prominently displayed "sufficiently near the picture of the goods to associate the mark with the goods" or prominently "displayed in such a way that the customer can easily associate the mark with the goods." This particular presentation renders it so separated from the photograph of the goods that the requisite "inevitable" association between the mark *and the identified goods* would not be made by purchasers viewing the page. The proposed mark is not on the goods. The proposed mark is not near the goods or any product information.

Id. at 6 (emphasis in the original).

On the other hand, applicant argues that the specimen fully satisfies the requirements set forth in *Lands' End Inc. v. Manbeck*, 797 F.Supp 311, 24 USPQ2d 1314 (E.D. Va.

1992) and cases following *Lands' End*. In particular, applicant argues:

> In fact, the web page print out submitted by applicant fully satisfies each of these requirements [referring to *Lands' End* and other cases discussed below]. First, there are several different pictures of Applicant's Class 29 goods on the web page specimen. Second, above such photographs appears the price, the unit or package size, weight and the wording "add to cart," and immediately below each picture there is a description of the product, as well as shipping information; on the same page, and immediately to the left of the photographs of the goods with this information, are graphics showing the (credit card) payment options. Finally, Applicant's Farm Boy mark appears *immediately below* these product photographs and ordering information.

Applicant's Brief at 8 (emphasis in original; footnote omitted).

In its reply brief applicant addresses the issue again, with more focus, stating:

> … Specifically, the Examining Attorney contends that Applicant's mark as it appears on this web page, is not displayed "sufficiently near the picture of the goods to associate the mark with the goods" and that it is "so separated from the photographs of the goods that the requisite 'inevitable' association between the mark and the identified goods would not be made by purchasers viewing the page." (emphasis in originals; footnote omitted)
> …
> Applicant's mark prominently appears directly below the picture and description of Applicant's sausage products. It is ***immediately below*** the wording "All Tennessee Pride Sausage Products are shipped frozen from our distribution centers."

> With all due respect, how much "nearer" to the photographs and information regarding Applicant's products sold online could Applicant's mark be? How much less "separation" – here approximately one-half inch of white space, where no other wording or graphics appear – is even possible?

Applicant's Reply Brief at 2-3.

In an appeal from a Board decision, the United States District Court for the Eastern District of Virginia addressed the treatment of catalogs as specimens for goods in trademark applications. More specifically, the Court construed application of the specimen requirement of Trademark Act Sections 1 and 45 in the context of catalog sales. The Court analyzed the catalog, as follows:

> The catalogues display the merchandise that is offered for sale, with descriptions and pictures designed to make a sale to a customer. The pictures and words describing the goods are *supplemented by* specifications and options from which the customer can choose. These options include the various prices, colors, and sizes of the product. An order form and telephone number is also provided so that a customer can make a decision to purchase an item straight from the identification in the catalogue.
> …
> Lands' End's use of the term "KETCH" with the picture of the purse and corresponding description constitutes a display associated with the goods. The catalogue is by no means "mere advertising." A customer can identify a listing and make a decision to purchase by filling out the sales form and sending it in or by calling in a purchase by phone. A customer can easily associate the product with the word "KETCH" in the display. The mark and the accompanying description also distinguish the product from

> others. The point of sale nature of this display, when combined with the prominent display of the alleged mark with the product, leads this court to conclude that this mark constitutes a display associated with the goods.

Lands' End Inc. v. Manbeck, 24 USPQ2d at 1316.

The Board has had occasion to apply *Lands' End* to a variety of online circumstances. See, e.g., *In re Valenite Inc.*, 84 USPQ2d 1346 (TTAB 2007); *In re Osterberg*, 83 USPQ2d 1220 (TTAB 2007); *In re Dell Inc.*, 71 USPQ2d 1725 (TTAB 2004).

In *Dell*, the Board stated:

> Following the reasoning of the *Lands' End* decision, we hold that a website page which displays a product, and provides a means of ordering the product, can constitute a "display associated with the goods," as long as the mark appears on the webpage in a manner in which the mark is associated with the goods. It is a well-recognized fact of current commercial life that many goods and services are offered for sale on-line, and that on-line sales make up a significant portion of trade. Applicant itself sells many goods on-line.
> …
> Web pages which display goods and their trademarks and provide for the on-line ordering of such goods are, in fact, electronic displays which are associated with the goods. Such uses are not merely advertising, because in addition to showing the goods and the features of the goods, they provide a link for ordering the goods. In effect, the website is an electronic retail store, and the webpage is a shelf-talker or banner which encourages the consumer to buy the product. A consumer using the link on the webpage to purchase the goods is the equivalent of a consumer seeing a shelf-talker and taking

> the item to the cashier in a brick and mortar store to purchase it.

In re Dell Inc., 71 USPQ2d at 1727.

In *Valenite*, the Board placed particular emphasis on the need to evaluate the particular facts of each unique case to determine whether the mark, as used on the website, is associated with the goods, even when the association may require "turning the electronic page," through the use of a link, to view all of the elements required in *Lands' Ends*. *In re Valenite Inc.*, 84 USPQ2d at 1350 ("…whether a [web page] specimen is mere advertising or whether it is a display associated with the goods is a question of fact which must be determined in each case based on the evidence in that particular case.").

We find applicant's position in this case entirely consistent with *Lands' End* and subsequent Board precedent. The Examining Attorney's analysis fails to see the forest for the trees. While applicant's mark does appear at the bottom of the page near text including the boiler-plate legal notices and standard buttons providing links, such as "Home" and "About Us," the Farm Boy design mark stands out from this text. The mark is substantially larger and more prominent; it is in no sense boiler-plate or standard; and most importantly, as the Examining Attorney acknowledges,

it is recognizable as a design mark, although the Examining Attorney argues that it is only a service mark.

Furthermore, we agree with applicant that the proximity of the mark to the display of the goods is more than sufficient here to establish the necessary association between the mark and the goods. In this regard, we note that the entire page is devoted to applicant's products. All of the products pictured are within the scope of the goods identified in the application. Reading down the page, the mark appears prominently and immediately beneath the product displays. Also, there is no real dispute as to the fact that the web page satisfies the other elements of *Lands' End*, that is, the page includes pictures of the goods and provides both information regarding the goods and the means to order the goods. Accordingly, we conclude that applicant's specimen is acceptable.

Decision: We reverse the refusal under Trademark Act Sections 1, 2 and 45.