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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Mississippi Cheese Straw Factory, Inc.

Application Serial No. 76617223
Filed October 21, 2004

W. Whitaker Rayner, Watkins Ludlam Winter & Stennis, P.A.
for Mississippi Cheese Straw Factory, Inc.

Allison Holtz, Examining Attorney, Law Office 111, Craig D.
Taylor, Managing Attorney.

**Before Walsh, Cataldo, and Mermelstein, Administrative
Trademark Judges.**

Opinion by Mermelstein, Administrative Trademark Judge:

Mississippi Cheese Straw Factory, Inc., filed an application for registration of the mark MUDPUPPIES (in standard characters) for "cookies," in International Class 30.¹ Upon examination of applicant's Statement of Use, the examining attorney has refused to register the mark in light of her final requirement for an acceptable specimen of use.

We affirm.

¹ The application was originally filed based on use in commerce, under Trademark Act § 1(a). Among other issues raised during initial examination, the examining attorney found that the drawing did not agree with the mark as used on the specimens of record. In response, applicant amended the basis for the application to intent-to-use under Trademark Act § 1(b), and the application was approved for publication.

I. Specimens

Applicant submitted the following specimen, described as "a[n] order form," with its Statement of Use:

The screenshot shows the 'Store' page of the website mscheesestraws.com. The page has a header with the company logo, navigation links (HOME, WHOLESALE, STORE, CONTACT), and a 'MY ACCOUNT' link. Below the header, there is a section titled 'Store' with the instruction 'Add items to your shopping cart below.' The main content area is a table listing various products, their package sizes, and prices. Each row includes an 'Add to Cart' button. The products listed are: TRADITIONAL CHEDDAR CHEESE STRAWS, ORIGINAL LEMON STRAWS, MUDPUPIES, THREE-CHEESE CHEESE STRAWS, CINNAMON PECAN STRAWS, KEY LIME STRAWS, TRAILER TRASH, ASIAGO CHEESE STRAWS, PINEAPPLE COCONUT STRAWS, FIRE ROASTED TOMATO STRAWS, and ELVIS PRESLEY PEANUT BUTTER BANANA STRAWS. The prices range from \$7.95 to \$25.00. The footer of the page displays the URL https://www.mscheesestraws.com/order/?CFID=9493284&CFTOKEN=59451361 and the date 8/7/2007.

Product	Package Size	Quantity	Add to Cart
TRADITIONAL CHEDDAR CHEESE STRAWS	16 oz. gift tin, \$17.95	<input type="text"/>	Add to Cart
ORIGINAL LEMON STRAWS	16 oz. gift tin, \$17.95	<input type="text"/>	Add to Cart
MUDPUPIES	16 oz. gift tin, \$17.95	<input type="text"/>	Add to Cart
THREE-CHEESE CHEESE STRAWS	6.5 oz. carton, \$7.95	<input type="text"/>	Add to Cart
CINNAMON PECAN STRAWS	6.5 oz. carton, \$7.95	<input type="text"/>	Add to Cart
KEY LIME STRAWS	6.5 oz. carton, \$7.95	<input type="text"/>	Add to Cart
TRAILER TRASH	6.5 oz. carton, \$7.95	<input type="text"/>	Add to Cart
ASIAGO CHEESE STRAWS	6.5 oz. carton, \$7.95	<input type="text"/>	Add to Cart
PINEAPPLE COCONUT STRAWS	6.5 oz. carton, \$7.95	<input type="text"/>	Add to Cart
FIRE ROASTED TOMATO STRAWS	6.5 oz. carton, \$7.95	<input type="text"/>	Add to Cart
ELVIS PRESLEY PEANUT BUTTER BANANA STRAWS	16 oz. gift tin, \$25.00	<input type="text"/>	Add to Cart

https://www.mscheesestraws.com/order/?CFID=9493284&CFTOKEN=59451361 8/7/2007

Upon consideration of the Statement of Use, the examining attorney found the specimen unacceptable:

The current specimen of record comprises [sic] web site order form. The specimen is not acceptable to show trademark use in a display associated with the goods because, although identified as a catalog page or webpage, it does not show the mark in close proximity to a picture of the goods. Trademark Act Section 45, 15 U.S.C. §1127; 37 C.F.R. §2.56(b)(1); TMEP §§904.06(a)-(b).

A printed or web catalog, web page, or similar specimen is acceptable to show trademark use as a display associated with the goods only if it includes (1) a picture of the relevant goods, (2) the mark appearing sufficiently near the picture of the goods so as to associate the mark with the goods, and (3) information necessary to order the goods (e.g., sales form, price list, instructions for ordering, etc.) or a visible weblink to order the goods. *Lands' End, Inc. v. Manbeck*, 797 F. Supp. 511, 514, 24 USPQ2d 1314, 1316 (E.D. Va. 1992); *In re Dell Inc.*, 71 USPQ2d 1725, 1727-1729 (TTAB 2004); *In re MediaShare Corp.*, 43 USPQ2d 1304 (TTAB 1997); TMEP §§904.06(a) and (b).

Office Action, Sept. 21, 2007. Applicant was advised that it may overcome the refusal by submitting a substitute specimen and a declaration that "[t]he substitute specimen was in use in commerce prior to the expiration of the time allowed applicant for filing a statement of use." *Id.*

Applicant responded to the examining attorney's requirement as follows:

The Examining Attorney has initially refused to accept the specimen which shows the mark within the context of an order form, on the basis that the mark is not shown in close proximity to the goods.

However, a review of the Applicant's website from which the specimen was taken, www.mscheeseastraws.com shows that the order form is reached by clicking the "store" link from the preceding page which shows the cookies and tins in which the products are sold. In other words, the consumer must view such picture in order to reach the order form that comprises the Applicant's tendered specimen.

For this reason, it is respectfully urged that the specimen is indeed in close proximity to the picture of the goods. Indeed, it is "only a click away". For this reason, the Applicant

respectfully urges the Examining attorney to accept the tendered specimen and approve the mark for publication.

Response to Office Action, Dec. 26, 2007. Applicant's response was accompanied by the following exhibit:



Upon review, the examining attorney again - and finally - found applicant's specimen to be unacceptable for the same reason, adding that

The applicant's specimen contains no picture of the goods whatsoever, let alone in close proximity to the goods. The applicant suggests that a "review of the website" affords a picture which must be viewed in order to reach the order form comprising the specimen, but a "review of the

website" is not part of the statement of use.

Final Office Action, Feb, 27, 2008. Applicant was again advised that it may overcome the refusal by submitting a substitute specimen supported by an appropriate declaration.

This appeal ensued.

II. Discussion

A. Second "Specimen"

We begin by considering the exhibit accompanying applicant's response to the first office action. It appears likely that applicant intended this exhibit to be considered as a specimen of use, although applicant did not clearly state this explicitly until it filed its brief on appeal. In any event, it appears that the examining attorney did not consider it as a specimen of use.² We are constrained to do the same on appeal.

As the examining attorney advised applicant in both office actions at issue here, in an application filed under Trademark Act § 1(b), once a Statement of Use is filed, a substitute specimen must be accompanied by an affidavit or

² It is not certain whether the examining attorney understood applicant's intention in submitting this exhibit. If she had, it clearly would have been appropriate to specifically advise applicant that the exhibit could not be considered as a specimen in the absence of a declaration. Further, although applicant moved in its reply brief for an order remanding the application to the examining attorney for submission of a declaration, such a request should have been filed separately, along with an explanation of why its declaration was not submitted prior to appeal, for consideration prior to full briefing and final determination.

verification "that the applicant used the substitute specimen(s) in commerce ... prior to the expiration of the deadline for filing the statement of use." Trademark Rule 2.59(b)(2). It is clear that no such declaration was submitted with the exhibit in question. The document is therefore not acceptable as a specimen of use.³

We note that that applicant was not specifically advised that this document was not being considered as a specimen because applicant did not submit the required supporting declaration. Nonetheless, the examining attorney twice advised applicant that any substitute specimen must be so supported, and we are not at liberty to waive the clear requirement of the Trademark Rule.

B. Original Specimen

We likewise agree with the examining attorney that the original specimen of use does not satisfy the requirements set out in the *Lands End* and *Dell* line of cases for use as a display associated with the goods under Trademark Act § 45. Although this web page includes a means to purchase the goods, it clearly does not display the goods in association with the mark. *In re Dell, Inc.*, 71 USPQ2d at 1727 ("we hold that a website page which displays a product, and provides a means of ordering the product, can constitute a

³ Since the examining attorney apparently did not examine the exhibit as a specimen, we will not speculate on whether it would have been acceptable as such.

'display associated with the goods'" (emphasis added)).

We understand applicant's argument that the goods are displayed on another page from which the order form can be reached. But aside from the fact that the other page cannot itself be considered a specimen, a "specimen" which spans two or more pages is too attenuated, particularly where the pages involved include multiple trademarks not all of which appear to be associated with the pictured goods. *Compare In re Dell*, 71 USPQ2d at 1727-28 (specimen acceptable when all marks are clearly associated with the *same* image of goods).

III. Conclusion

After careful consideration of the evidence and argument of record, we affirm the examining attorney's requirement for an acceptable specimen of use.

Decision: The refusal to register is affirmed.