

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

Mailed:
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Bucher

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re DV International, Inc.

Serial No. 77501020

Daniel M. Pauly of Pauly Devries Smith & Deffner LLC for DV International, Inc.

Shaila E. Settles, Trademark Examining Attorney, Law Office
114 (K. Margaret Le, Managing Attorney).

Before Bucher, Cataldo and Ritchie, Administrative Trademark
Judges.

Opinion by Bucher, Administrative Trademark Judge:

DV International, Inc. seeks registration on the
Principal Register of the expression **ORGANIZED GOES
BEYOND ORDINARY** (*in standard character format*) for goods
identified as "plastic storage containers for household or
domestic use" in International Class 21.¹

The Trademark Examining Attorney refused registration
on the ground that the proffered specimen is unacceptable as
evidence of trademark use because it does not show the
expression functioning as a trademark for the goods

¹ Application Serial No. 77501020 was filed on June 17, 2008,
based upon applicant's allegation of a *bona fide* intention to use
the mark in commerce. On August 3, 2009, applicant filed its
Statement of Use with the specimen at issue herein.

identified in the Notice of Allowance dated February 3, 2009. Trademark Act Sections 1, 2 and 45, 15 U.S.C. §§ 1051, 1052 and 1127.

After the Trademark Examining Attorney made the refusal final, applicant appealed to this Board.

We affirm the refusal to register.

Applicant's specimen was identified as a screen "capture of web page from applicant's www.MadeSmart.com":



Applicant has applied to register the slogan, "Organized goes beyond ordinary," and argues that its specimen should be treated as a "display associated with the

goods.”² Hence, the sole question before us is whether this specimen meets the long-standing requirement that the applied-for matter be “associated with the goods.” *In re Bright of America, Inc.*, 205 USPQ 63, 71 (TTAB 1979). The Trademark Examining Attorney has asserted “no” – that the specimen of record is mere advertising material, and hence unacceptable as a specimen showing use of the applied-for mark for goods. We agree with the position of the Trademark Examining Attorney.

This matter, as presented on the specimen of record, suffers from two infirmities. First, the expression, as shown, does not appear as an indicator of the source of the goods for which applicant seeks registration. The screen-print applicant captured has the advertising slogan “Organized goes beyond ordinary.” In fact, this imagery appears to be the first slide in an online presentation, where the viewer who is ready immediately to make a purchase from applicant’s kitchen or office collection can “SKIP” the next dozen promotional slides. This type of advertising copy projects the vision of applicant’s principal while

² At no point has applicant argued that these proffered specimens function as labels affixed to the goods. Hypothetically, this image may well serve as a specimen if applicant were applying for *Made Smart* for plastic storage containers, much as would a photograph of the same label on a storage bin. However, that is not the case before us.

touting the special features of applicant's container collections. To the person viewing such a slide show, the expression "Organized goes beyond ordinary" is no more likely to be perceived as a source indicator for these goods than would be hypothetical, prosaic slogans like "See the difference," "Sophisticated design," or "Soft, Textured Surface," etc. The only source indicator to emerge from this viewing would be *Made Smart*. Unlike some analogous reported decisions, the applied-for matter does not incorporate a house mark or any other inherently distinctive matter. *Contra In re Hydron Technologies Inc.*, 51 USPQ2d 1531 (TTAB 1999) [slogan was "HYDRON MAKES THE DIFFERENCE"].

However, the second, closely-related infirmity, and the one on which the Trademark Examining Attorney focuses exclusively, is the unacceptability of applicant's website-based specimen. Generally, copies of web pages have been found to be acceptable as displays associated with the goods where the screen-print of a web page (i.e., a screen-capture submitted as a specimen of use displaying the applied-for matter) also contains adequate information for routinely and easily placing orders for the goods. *In re Valenite Inc.*, 84 USPQ2d 1346, 1348 (TTAB 2007); and *In re Dell Inc.*, 71 USPQ2d 1725, 1727 (TTAB 2004).

Applicant cites to *In re Sones*, 590 F.3d 1282, 93 USPQ2d 1118, 1124 (Fed. Cir. 2009) for support of its position that its website-based specimen of use should be acceptable. However, in the wake of the *Sones* decision by our primary reviewing Court, this Board has had further opportunities to determine when web pages are acceptable as displays associated with the goods. *In re Anpath Group Inc.*, 95 USPQ2d 1377 (TTAB 2010); and *In re Quantum Foods, Inc.*, 94 USPQ2d 1375 (TTAB 2010). Most importantly, the *Sones* court did not eliminate the clear "line of demarcation" between mere advertising materials and point-of-purchase promotional materials. See *Anpath*, 95 USPQ2d at 1380, and cases cited therein. As our post-*Sones* cases demonstrate, we have continued to find website-based specimens to be unacceptable where the promotional screen-prints *qua* specimens of use contain inadequate information for routinely and easily placing orders for the goods. As in the physical world of a catalogue (*Land's End, Inc. v. Manbeck*, 797 F. Supp. 511, 24 USPQ2d 1314, 1316 (E.D. Va. 1992)), so it is in the case of the virtual, online world -- the critical threshold query is determining whether the specimen has the nature of a point-of-sale display.

As was the case in *Anpath*, we find that applicant's purported point-of-sale display does not provide the

potential purchaser with the information normally associated with ordering products of that kind. This issue has long been an important factor to the Board and its reviewing Courts. See *Anpath*, 95 USPQ2d at 1381, and cases cited therein, such as *In re Marriott*, 459 F.2d 525, 173 USPQ 799, 800 (CCPA 1972); *Land's End, Inc. v. Manbeck*, 24 USPQ2d at 1316 (E.D. Va. 1992); and *In re Shipley Co.*, 230 USPQ 691, 693-94 (TTAB 1986).

While applicant's slogan is placed close to the image of the involved goods, that alone is not sufficient to make it acceptable as a display associated with the goods. There is nothing in the record to suggest proximity in space or time to information normally associated with ordering products of this kind. In *Hydron*, 51 USPQ2d at 1532-33, that applicant's half-hour infomercial, as broadcast on the QVC buying channel, displayed the slogan "HYDRON MAKES THE DIFFERENCE" immediately before or immediately after the images of the involved goods and proximate to a screen showing pricing information and how to order and pay for specific items. By contrast, here we have only what appears to be the first slide of a series, with no idea what the skips, slides, clicks or links may be before reaching critical information (e.g., details of sizes, features, prices, ways to order, etc.) about specific goods. A

prospective purchaser cannot be presumed to be at the point of making a purchase at the time this particular advertising copy appears on the screen. Hence, we find that applicant's specimen of August 2009 is merely promotional material, and does not qualify as a display associated with the goods.

Decision: The refusal of the Trademark Examining Attorney under Sections 1, 2 and 45 of the Lanham Act to register this matter in the absence of an acceptable specimen of use is hereby affirmed.