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Mailed:
June 27, 2013

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re McGowan Publishing Company, Inc.

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Serial No. 77582970

Remy M. Davis of Klemchuk Kubasta LLP for McGowan Publishing Company, Inc.

Ronald E. Aikens, Trademark Examining Attorney, Law Office 112 (Angela Wilson, Managing Attorney).

—
Before Bucher, Bergsman and Masiello, Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

McGowan Publishing Company, Inc. (“applicant”) filed an intent-to-use application for the mark CASHFLOW UNITS, in standard character form, for “investment products, namely, wealth management and performance tracking, and providing financial advisory and financial portfolio management services,” in Class 36. Applicant disclaimed the exclusive right to use the term “Cashflow.” After publication, applicant filed a statement of use and submitted the two webpages, shown below, as its specimens of use.

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The Trademark Examining Attorney refused registration on the ground that the specimens do not show applicant's mark used to identify "investment products, namely, wealth management and performance tracking, and providing financial advisory and financial portfolio management services."

An applicant for registration must submit a specimen showing the mark as used in commerce. Section 1(a) of the Trademark Act of 1946, 15 U.S.C. 1052(a); Trademark Rule 2.34(a)(1)(iv), 37 CFR §2.34(a)(1)(iv). A service mark specimen "must show the mark as actually used in the sale or advertising of the services." Trademark Rule 2.56(b)(2), 37 CFR §2.56(b)(2). A service mark specimen must show an association between the mark and the services for which registration is sought. *In re Adair*, 45 USPQ2d 1211, 1214 (TTAB 1997) (the mark must be used in such a manner that it would be readily perceived as identifying the source of the services); TMEP §1301.04(a) (October 2012).

The Trademark Examining Attorney argues that the web pages do not display the term CASHFLOW UNITS in connection with any particular services associated with the mark.¹ According to the Trademark Examining Attorney, the specimen "contains only general information about The McGowan Group Asset Management Company (the Applicant), and makes no specific reference to 'wealth management and performance tracking' or the provision of 'financial advisory and financial portfolio management services.'"²

¹ Examining Attorney's Brief, TTABVue p. 8.

² Examining Attorney's Brief, TTABVue p. 12.

On the other hand, applicant contends that the second web page “features links to two of Applicant’s specific investment products. ... These two items offered clearly under the mark CASHFLOW UNITS are in fact two of the ‘investment products’ identified by Applicant’s application and offered under Applicant’s Mark. These products are used by Applicant to provide financial advisory and portfolio management services under Applicant’s mark.”³

The issue before us is whether the term CASHFLOW UNITS, as displayed on the web pages, is used as a service mark to identify “investment products, namely, wealth management and performance tracking, and providing financial advisory and financial portfolio management services.” In determining whether CASHFLOW UNITS is used as a service mark to identify “investment products, namely, wealth management and performance tracking, and providing financial advisory and financial portfolio management services,” we must review the specimens (web pages) to determine whether consumers will associate CASHFLOW UNITS with such services. *In re Moody’s Investors Service Inc.*, 13 USPQ2d 2043 (TTAB 1989) (“Aaa,” as used on the specimen, found to identify the applicant’s ratings instead of its rating services); *In re McDonald’s Corp.*, 229 USPQ 555 (TTAB 1985) (APPLE PIE TREE did not function as mark for restaurant services, where the specimen showed use of mark only to identify one character in a procession of characters, and the proposed mark was no more prominent than anything else on specimen); *Intermed Communications, Inc. v. Chaney*, 197 USPQ 501 (TTAB 1977)

³ Applicant’s Brief, p. 1 (TTABVue p. 2).

(business progress reports directed to potential investors do not show service mark use for medical services); *In re Reichhold Chemicals, Inc.*, 167 USPQ 376 (TTAB 1970) (technical bulletins and data sheets on which mark was used merely to advertise chemicals do not show use as a service mark for consulting services). Unfortunately, there is no evidence bearing on the reaction of the purchasing public to applicant's use of CASHFLOW UNITS. Accordingly, we must rely on our own analysis of the web pages to determine whether consumers would perceive CASHFLOW UNITS as a service mark identifying applicant's "investment products, namely, wealth management and performance tracking, and providing financial advisory and financial portfolio management services." *In re The Signal Companies, Inc.*, 228 USPQ 956, 957 (TTAB 1986); *In re Wakefern Food Corp.*, 222 USPQ 76, 77 (TTAB 1984).

The second web page is the relevant web page because it shows how applicant uses the mark CASHFLOW UNITS. The disclosures at the bottom of the web page inform the viewer that applicant is a "Federally Registered Investment Advisory Firm." A "Registered Investment Advisor" or "RIA" is "any person (in the legal sense) registered with the SEC, 'who for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing or selling securities.'"⁴

⁴ Gastineau and Kritzman, **THE DICTIONARY OF FINANCIAL RISK MANAGEMENT**, p. 260 (1999). *See also* Downes and Goodman, **DICTIONARY OF FINANCE AND INVESTMENT TERMS**, p. 591 (8th ed. 2010); **STANDARD & POOR'S DICTIONARY OF FINANCIAL TERMS**, p. 171 (2007). The Board may take judicial notice of dictionary definitions. *Univ. of Notre*

The mark CASHFLOW UNITS appears under the McGowanGroup Asset Management banner, thus, informing the viewer that CASHFLOW UNITS are part of an asset management service.

Appearing immediately below CASHFLOW UNITS are (1) the “MGAM Wrap Program Assets Discretionary Advisory Agreement” and (2) the “MGAM RIA Disclosure.” The agreement is applicant’s contract with the investor and the RIA disclosure is the notification to the client of applicants’ compliance with rules regarding conflicts of interest.⁵ In other words, these are documents used by applicant in rendering its services.

The Trademark Examining Attorney argues that the web page only displays a link to the above-noted documents and does not display the documents themselves and, thus, there is no direct association between the mark and the service.⁶

Binding agreements for payments, absent specific reference to the service in connection with the asserted mark, are not themselves “services” nor are they “offered for the benefit of others” but instead are documents used in the normal course of business to memorialize a promise between two parties: a beneficial service for agreed upon compensation; presenting a consumer with a “binding agreement” is not a service sufficiently separate from an Applicant’s principal activity to constitute a service. Furthermore, as noted in the Statement of Use Final Refusal, the attached “MGAM Wrap Program Assets Discretionary Advisory Agreement” engagement agreement is not disseminated to the public as advertising and, as set forth in connection to the link, contains blank fields for completion by users and

Dame du Lac v. J.C. Gourmet Food Imp. Co., 213 USPQ 594 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

⁵ Examining Attorney’s Brief, TTABVue p. 14.

⁶ *Id.*

therefore does not show actual use but instead, only potential use of the asserted mark in connection with the financial services. Therefore, because the agreement is not used to disseminate financial advice or instruct in the management of financial portfolios, the Examining Attorney contends that the “MGAM Wrap Program Assets Discretionary Advisory Agreement” does not constitute an “investment product” for the purposes of establishing use of the mark “CASHFLOW UNITS” in commerce.⁷

We disagree with the Trademark Examining Attorney. The crux of our analysis is that a client or prospective client of applicant’s investment advisory services would view the mark on the web page in close proximity to links for documents used by applicant in rendering those services (*i.e.*, the contract between applicant and the client and applicant’s Registered Investment Advisor disclosures). The link to the “Discretionary Advisory Agreement” functions as an offer to enter into an arrangement for the provision of “Advisory” services relating to the client’s assets. Thus, the links to these documents create an association between the mark and the offered service activity. *See In re Metriplex Inc.*, 23 USPQ2d 1315, 1316 (TTAB 1992) (there are situations in which the specimens do not contain a reference to the services, yet are acceptable, since they show direct use of the mark in connection with the rendering of the services).

In view of the foregoing, we find that the specimens show use of the mark CASHFLOW UNITS in the “sale or advertising of the services” specified in the application, as required by 37 CFR §2.56(b)(2).

Decision: The refusal to register is reversed.

⁷ Examining Attorney’s Brief, TTABVue p. 15.