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WRANGLER - 13,161 - EXAMINER BRIEF

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UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

APPLICATION SERIAL NO. 77713665

MARK: RATTLESNAKE WRANGLER



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GENERAL TRADEMARK INFORMATION:

<http://www.uspto.gov/main/trademarks.htm>

TTAB INFORMATION:

<http://www.uspto.gov/web/offices/dcom/ttab/index.html>

APPLICANT: Slyapich, Bo

CORRESPONDENT'S REFERENCE/DOCKET NO:

13,161

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EXAMINING ATTORNEY'S APPEAL BRIEF

Applicant appeals the Examining Attorney's final refusal that the specimens of use do not show use of the mark RATTLESNAKE WRANGLER on, or in connection with, any of the goods or services in the application, namely "*Photographs; photographic albums; photographic prints*" in International Class 16 and "*Entertainment services in the nature of dramatic theater productions, production of sound recordings*" in International Class 41 under Trademark Act Sections 1 and 45, 15 U.S.C. §§1051, 1127; 37 C.F.R. §§2.56(a), 2.88(b)(2); TMEP §§904, 904.07(a).

I. SUMMARY OF FACTS

Applicant, Bo Slyapich, filed an application for the mark THE RATTLESNAKE WRANGLER on April 14, 2009 for goods and services in International Classes 16 and 41. After initial examination, the application was published for opposition on February 9, 2010. A Notice of Allowance was mailed on May 4, 2010. Applicant filed a Statement

of Use on November 4, 2010. The Examining Attorney issued a non-final action on December 19, 2010 requiring applicant to submit acceptable specimens showing use of the mark in commerce with the goods and services identified in the application. In addition, applicant was required to either amend the mark to match the specimens or submit a specimen that agreed with the drawing of record. Applicant responded on May 27, 2011, arguing that the specimens of record should be acceptable for the identified goods and services. At that time, applicant submitted a substitute specimen in the alternative. Applicant also amended the mark from THE RATTLESNAKE WRANGLER to RATTLESNAKE WRANGLER. The Examining Attorney issued a final office action refusing registration and requiring acceptable specimens of use on June 21, 2011, while also accepting the amended drawing. Applicant submitted a substitute specimen with its Request for Reconsideration on August 8, 2011. The Examining Attorney denied the Request for Reconsideration on September 7, 2011 and continued the refusal to register for failure to show use of the mark with any of the identified goods and services in commerce.

II. EVIDENCE SUBMITTED AFTER APPEAL

The record in an application must be complete prior to the filing of an appeal; however, applicant has submitted additional evidence with its appeal brief. A copy of applicant's website was submitted as a specimen with applicant's August 8, 2011 Request for Reconsideration. An additional copy of this website was attached to applicant's appeal brief. However, the copy of applicant's website attached to its appeal brief contains additional information that neither the original website nor specimens of record contain. Specifically, pages 1 and 2 of the copy of the website submitted with

applicant's brief contain additional text that does not appear on the original specimen. This text appears in a different font, and appears to have been typed onto the webpage printouts. Furthermore, pages 1 and 3 of the copy of the website submitted with applicant's brief contain arrows pointing to particular portions of the website. These arrows do not appear on the original specimen. Because the proposed evidence was untimely submitted, this evidence should not be considered. 37 C.F.R. §2.142(d); *In re Fitch IBCA Inc.*, 64 USPQ2d 1058, 1059 n.2 (TTAB 2002); *In re Trans Cont'l Records Inc.*, 62 USPQ2d 1541, 1541 n.2 (TTAB 2002); TBMP §§1203.02(e), 1207.01; TMEP §710.01(c).

III. ISSUE ON APPEAL

The sole issue on appeal is whether the specimens of record show use of the mark in commerce on, or in connection with, the identified goods and services.

IV. ARGUMENTS

THE SPECIMENS OF RECORD DO NOT SHOW USE OF THE MARK ON, OR IN CONNECTION WITH, ANY OF THE GOODS IDENTIFIED IN THE APPLICATION

A statement of use must include a specimen showing the applied-for mark in use in commerce for each class of goods specified in the statement of use. Trademark Act Sections 1 and 45, 15 U.S.C. §§1051, 1127; 37 C.F.R. §§2.56(a), 2.88(b)(2); TMEP §§904, 1109.09(b). The identified goods in International Class 16 are "*Photographs; photographic albums; photographic prints.*" The specimens of record consist of a magazine cover; a promotional flyer; a T-shirt; and pages from applicant's website.

Applicant submitted the cover of a November/December 2004 issue of a magazine titled *CALABASAS LIFE AT ITS BEST* featuring a picture of actress Janel

Moloney. Although the magazine cover specimen shows a reproduced photograph, it is clear that the use of the mark on the specimen refers to a story within the magazine and not to the source of the photograph itself. Even if applicant's identified goods included "*magazines*," the specimen would still not suffice since the mark appears in the section of the magazine cover traditionally reserved for story titles. The magazine cover bearing applicant's mark does not serve as a source indicator for the identified photographic goods in this case. The specimens consisting of a promotional flyer and a T-shirt do not reference any of applicant's identified goods. Instead, they appear to reference a type of snake removal service. Because these specimens make no reference whatsoever to "*Photographs; photographic albums; photographic prints*," they are also unacceptable to show use of the mark in commerce for the identified goods. Trademark Act Sections 1 and 45, 15 U.S.C. §§1051, 1127; 37 C.F.R. §§2.56(a), 2.88(b)(2); TMEP §§904, 904.07(a).

The specimen consisting of pages from applicant's website shows the mark in proximity to the following statement: "Live Action (made safe) Rattlesnake Photo Shoots Available for Print, TV, and Movies." While the website mentions that photo shoots are available, this is not the equivalent of providing photographs, photographic albums or photographic prints. Instead, providing photo shoots is a type of photography service correctly classified in International Class 41, for which applicant has not applied.

Furthermore, applicant argues that "dramatic photos, for TV or providable for prints, and/or movies" appear throughout its website specimen (Applicant's brief, page 5). However, there is no indication on the specimen that these photographs are for sale. The web page specimen is not acceptable to show trademark use as a display associated

with the goods because it fails to include a textual description of the goods, the necessary ordering information, or a weblink for ordering the goods. In fact, the website appears to be mere advertising for applicant's rattlesnake removal services, with no mention of applicant's photographic goods whatsoever. See *In re Sones*, 590 F.3d 1282, 1286-89, 93 USPQ2d 1118, 1122-24 (Fed. Cir. 2009); *In re Genitope Corp.*, 78 USPQ2d 1819, 1822 (TTAB 2006); *In re Dell Inc.*, 71 USPQ2d 1725, 1727-29 (TTAB 2004); TMEP §904.03(h), (i); cf. *Lands' End, Inc. v. Manbeck*, 797 F. Supp. 511, 513-14, 24 USPQ2d 1314, 1316 (E.D. Va. 1992). Leaflets, handbills, brochures, advertising circulars and other advertising material, while normally acceptable for showing use in connection with services, generally are not acceptable specimens for showing trademark use in connection with goods. See *In re MediaShare Corp.*, 43 USPQ2d 1304, 1307 (TTAB 1997); *In re Schiapparelli Searle*, 26 USPQ2d 1520, 1522 (TTAB 1993); TMEP §§904.04(b), (c), 1301.04. Thus, the website specimen is also unacceptable to show use of the mark in commerce for the identified goods. Trademark Act Sections 1 and 45, 15 U.S.C. §§1051, 1127; 37 C.F.R. §§2.56(a), 2.88(b)(2); TMEP §§904, 904.07(a).

Based on the above arguments, the Examining Attorney submits that the specimens of record do not show use of the mark on, or in connection with, the goods in International Class 16. Accordingly, the Examining Attorney respectfully requests that the refusal to register be affirmed.

**THE SPECIMENS OF RECORD DO NOT SHOW USE OF THE MARK ON, OR
IN CONNECTION WITH, ANY OF THE SERVICES IDENTIFIED IN THE
APPLICATION**

A statement of use must include a specimen showing the applied-for mark in use in commerce for each class of services specified in the statement of use. Trademark Act Sections 1 and 45, 15 U.S.C. §§1051, 1127; 37 C.F.R. §§2.56(a), 2.88(b)(2); TMEP §§904, 1109.09(b). The identified services in International Class 41 are “*Entertainment services in the nature of dramatic theater productions, production of sound recordings.*” As noted above, the specimens of record consist of a magazine cover; a promotional flyer; a T-shirt; and pages from applicant’s website.

The magazine cover specimen simply shows the mark as the title or subject of a story inside the magazine. There is no reference whatsoever of any dramatic theater productions or production of sound recordings. Nor does the T-shirt specimen make any reference to these services. These specimens are therefore unacceptable to show use in commerce for the identified services. Trademark Act Sections 1 and 45, 15 U.S.C. §§1051, 1127; 37 C.F.R. §§2.56(a), 2.88(b)(2); TMEP §§904, 904.07(a).

The promotional flyer specimen is an advertisement for applicant’s snake removal services. For example, the flyer states “Beware Rattlesnakes!” and beneath the mark RATTLESNAKE WRANGLER appears the wording “Movie locations,” “Horse Ranches,” “Construction sites,” “Residences,” “Events,” “Safety Information,” “Patrol” and “Relocate.” Although this promotional flyer would be an acceptable specimen to show use of the mark for snake removal services, the current application does not include snake removal services. The flyer makes no reference whatsoever to any dramatic theater productions or the production of sound recordings. This specimen is therefore unacceptable to show use in commerce for the identified services. Trademark Act

Sections 1 and 45, 15 U.S.C. §§1051, 1127; 37 C.F.R. §§2.56(a), 2.88(b)(2); TMEP §§904, 904.07(a).

The website specimen shows the mark being used to advertise services related to the removal of snakes. The specimen includes statements such as:

- #1 expert in Southern California for Rattlesnake Removal, Relocation and Prevention
- Specializing in Family and Pet Education/Safety
- Snake fencing evaluation and installation
- Pre-Clearing & Supervision for Outdoor Events and Parties
- Landscaping Recommendations
- Construction Site Clearing
- Filming Location Clearing and Supervision
- Live Action (made safe) Rattlesnake Photo Shoots Available for Print, TV, and Movies

Applicant argues that these referenced activities and the accompanying photographs are “clearly in the nature of entertainment services...used in advertising” (Applicant’s brief, page 5). The fact that applicant removes snakes for others for events and parties does not render applicant’s services entertainment services. However, even if these activities were deemed “entertainment services,” applicant’s identified services are not merely “entertainment services” – they are “*entertainment services in the nature of dramatic theater productions, production of sound recordings*” (emphasis added). None of the activities referenced on applicant’s website indicate any connection to dramatic theater productions or the production of sound recordings.

Applicant submits that the “Examiner’s position that the applied for services are not ‘entertainment services in the nature of dramatic theater productions’ is believed not well taken, from a practical standpoint, and is urged to be erroneous” (Applicant’s brief, page 5). However, applicant does not provide any evidence to support this claim. Instead, applicant argues that its “services clearly fall within the Webster dictionary

definition of ‘entertainment’ as follows: ‘something that entertains, a performance or show’” (Applicant’s brief, page 6). While this may be true, whether applicant’s services are entertaining is not the issue on appeal. The issue on appeal is whether the specimens of record support the use of the applied-for services in commerce, namely, “*entertainment services in the nature of dramatic theater productions, production of sound recordings.*” The Examining Attorney submits that they do not support such use. Finally, it is noted that applicant makes no argument that the specimens of record support the use of its mark for “*entertainment services in the nature of...production of sound recordings*” in commerce.

Based on the above arguments, the Examining Attorney submits that the specimens of record do not show use of the mark on, or in connection with, the services in International Class 41. Accordingly, the Examining Attorney respectfully requests that the refusal to register be affirmed.

V. CONCLUSION

The specimens of record do not show use of applicant’s mark, RATTLESNAKE WRANGLER, on, or in connection with, “*Photographs; photographic albums; photographic prints*” in International Class 16 or “*Entertainment services in the nature of dramatic theater productions, production of sound recordings*” in International Class 41. Accordingly, the Examining Attorney respectfully requests that the TTAB affirm the refusal to register under Trademark Act Sections 1 and 45.

Respectfully submitted,

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