

This Opinion is not a  
Precedent of the TTAB

Mailed: July 28, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Bar NND Ranches, LLC*  
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Serial No. 77928601  
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Justin R. Jackson of Peacock Myers, P.C.,  
for Bar NND Ranches, LLC

Maureen Dall Lott, Trademark Examining Attorney, Law Office 105,  
Susan Hayash, Managing Attorney.

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Before Richey, Deputy Chief Administrative Trademark Judge, and Ritchie and  
Hightower, Administrative Trademark Judges.

Opinion by Hightower, Administrative Trademark Judge:

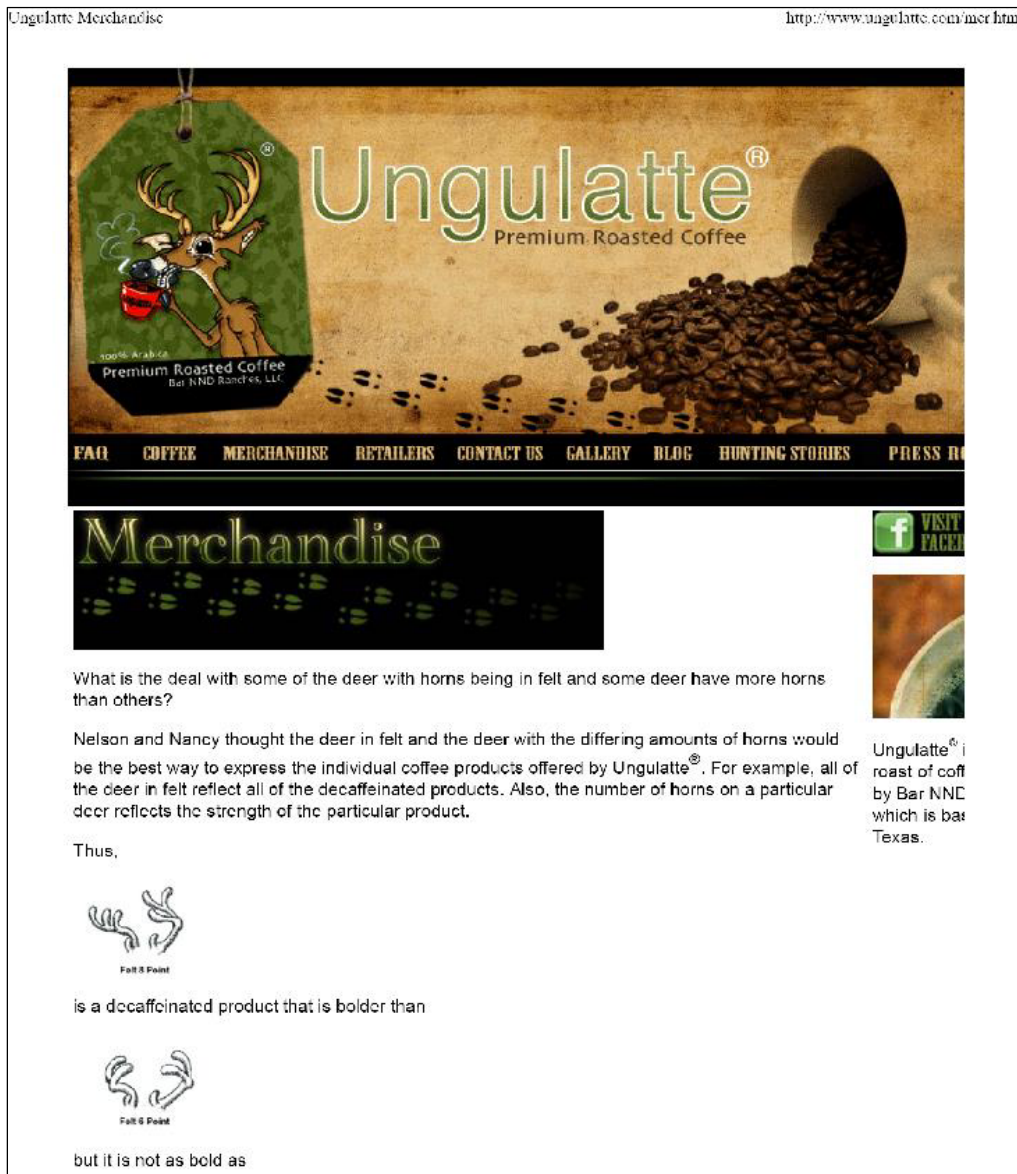
Bar NND Ranches, LLC (“Applicant”) seeks registration on the Principal Register of the mark shown at right for “Coffee; coffee based beverages; roasted coffee beans” in International Class 30.<sup>1</sup> The mark includes the following description:



<sup>1</sup> Application Serial No. 77928601 was filed on February 4, 2010, based on Applicant’s allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act.

The mark consists of a two dimensional fanciful deer design; the deer is holding a coffee mug which has the words “UNGULATE”; the matter shown by the dashed lines in the drawing show placement of the mark; the matter shown by the dashed lines in the drawing is a “non-claimed” feature of the mark and serves to show the position of the mark.


On August 15, 2012, Applicant submitted a specimen of use consisting of printouts of three pages from the website [ungulatte.com](http://ungulatte.com), as follows:<sup>2</sup>




<sup>2</sup> White space has been cropped from each page of the specimen in this decision.

Ungulatte Merchandise <http://www.ungulatte.com/mcr.htm>


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Felt 12 Point


Likewise,

  
Horn 8 Point

is a caffeinated product that is bolder than

  
Horn 6 Point

but it is not as bold as

  
Horn 10 Point

As far as we can tell, we are the only coffee marketer that markets its coffee this way.

For multiple orders of Ungulatte<sup>®</sup> brand coffee and merchandise, contact us at 432-683-8420 or email us at [sales@ungulatte.com](mailto:sales@ungulatte.com)

Ungulatte Merchandise <http://www.ungulatte.com/mcr.htm>

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8 oz Ungulatte Coffee \$11  
\$5.20 shipping and handling for one unit  
\$10.40 shipping and handling for 2-7 units.

Choose Quantity  
1 Qty 8oz Coffee \$16.20 USD  
Ground or Whole Bean  
Ground

[Buy Now](#)

The Trademark Examining Attorney has refused registration of Applicant's mark on four related grounds:

1. The application seeks registration of more than one mark – that is, the antlers formed in the drawing by dashed lines represent a changeable or “phantom” element – in violation of Trademark Act Sections 1 and 45, 15 U.S.C. §§ 1051 and 1127;
2. Applicant's drawing is unacceptable pursuant to Section 1(a)(1) of the Act;
3. The description of the mark is unacceptable pursuant to Trademark Rule 2.37, 37 C.F.R. § 2.37; and
4. The mark on the specimen of use does not match and show use of the mark in the drawing, as required by Trademark Act Sections 1 and 45.

When the latter three refusals were made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request, the appeal was resumed and Applicant filed an appeal brief. The case then was remanded at the request of the Examining Attorney, who issued and made final the phantom mark refusal. The appeal subsequently resumed, and briefing is complete.<sup>3</sup>

We affirm the refusal to register.

#### I. Refusals under Trademark Act Sections 1 and 45

We begin by summarizing the system Applicant employs to designate its different coffee products, topping its deer design with sets of antlers of differing sizes and composition. The introductory paragraphs on the first page of Applicant's specimen explain the classification:

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<sup>3</sup> Applicant filed a supplemental brief (“Amended Appeal Brief”) and a reply brief. The Examining Attorney also filed a brief.

What is the deal with some of the deer with horns being in felt and some deer have [sic] more horns than others?

Nelson and Nancy thought the deer in felt and the deer with the differing amounts of horns would be the best way to express the individual coffee products offered by Ungulatte®. For example, all of the deer in felt reflect all of the decaffeinated products. Also, the number of horns on a particular deer reflects the strength of the particular product.

As Applicant further explains in its appeal brief:

Applicant's mark consists of a two dimensional fanciful deer design; the deer is holding a coffee mug which has the words UNGULATTE. Applicant places different antler configurations above the deer to describe particular qualities for each particular coffee product sold. For example, Applicant applies antlers having more tips (i.e. "points") above the deer for bolder coffee. For decaffeinated coffee, Applicant applies antlers having velvet thereon above the deer.<sup>4</sup>

The Examining Attorney contends that applicant impermissibly seeks registration of more than one mark because the antlers shown in broken lines in Applicant's drawing constitute a changeable, phantom element of the mark.<sup>5</sup>

A "phantom" trademark "is one in which an integral portion of the mark is generally represented by a blank or dashed line acting as a placeholder for a generic term or symbol that changes, depending on the use of the mark." *In re Int'l Flavors & Fragrances Inc.*, 183 F.3d 1361, 51 USPQ2d 1513, 1515 n.1 (Fed. Cir. 1999). Under the Trademark Act, however, "a trademark application may only seek to register a *single* mark." *Id.* at 1516. A mark that contains a changeable or

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<sup>4</sup> Amended Appeal Brief at 2-3, 7 TTABVUE 3-4.

<sup>5</sup> Examining Attorney's brief at 1, 15 TTABVUE 2.

“phantom” element is considered to be more than one mark. *In re Primo Water Corp.*, 87 USPQ2d 1376, 1378 (TTAB 2008).

In order to determine whether Applicant is seeking to register a phantom mark, we must decide whether antlers are integral to Applicant’s mark. Applicant argues that antlers are not integral to or claimed as part of its mark, as indicated by the representation of the small antlers on its drawing in broken lines pursuant to Trademark Rule 2.52(b)(4), 37 C.F.R. § 2.52(b)(4)<sup>6</sup>:

In fact, the point of this appeal is to show that the antlers do not constitute a phantom element because . . . the antlers are separable from the rest of the mark and the antlers do not constitute an “integral portion” of the mark as would be required in order to support a claim that the antlers are a “phantom element” of the mark.<sup>7</sup>

Applicant characterizes the antlers as “different antler drawings above its logo” and analogizes them to the words “bold roast” above the logo.<sup>8</sup> Applicant argues that although the rest of its applied-for mark serves as a trademark for its goods, the antlers merely describe a characteristic or quality of those goods: “Applicant’s dashed antler portion, along with the language in the specimen of record, which describes the commercial meaning of the different antler configurations, the more

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<sup>6</sup> Rule 2.52(b)(4) states: “*Broken lines to show placement.* If necessary to adequately depict the commercial impression of the mark, the applicant may be required to submit a drawing that shows the placement of the mark by surrounding the mark with a proportionately accurate broken-line representation of the particular goods, packaging, or advertising on which the mark appears. The applicant must also use broken lines to show any other matter not claimed as part of the mark. . . .”

<sup>7</sup> Reply Brief at 1-2, 16 TTABVUE at 2-3.

<sup>8</sup> Amended Appeal Brief at 9-10, 13 TTABVUE 10-11.

points, the bolder the coffee, creates a separate commercial impression from the rest of the deer image.”<sup>9</sup> Applicant concludes:

Antlers, both in real life and on applicant’s highly stylized deer image, are separable from the rest of the deer. Antlers are deciduous and from year to year, the same deer will have a different antler configuration. Further, the antlers in Applicant’s specimen convey a separate and distinct commercial impression from the rest of the deer image. Because of this, the antlers and the rest of the deer do not meet the requirements of a unitary mark under [Trademark Manual of Examining Procedure] § 1213.05. Because the antlers and the rest of the deer are not a unitary mark, and because the antlers are a non-claimed element, the use of dashed lines for the antlers is proper and does not constitute a phantom element. (internal citation omitted).<sup>10</sup>

The question before us is not whether actual deer are deciduous, annually growing antlers that are separable “in real life,” but whether the antlers are separable from Applicant’s mark, which would reside on the Register in fixed two-dimensional form. Below are Applicant’s drawing and an enlarged image of the label on a bag of Applicant’s coffee submitted as part of its specimen of use:



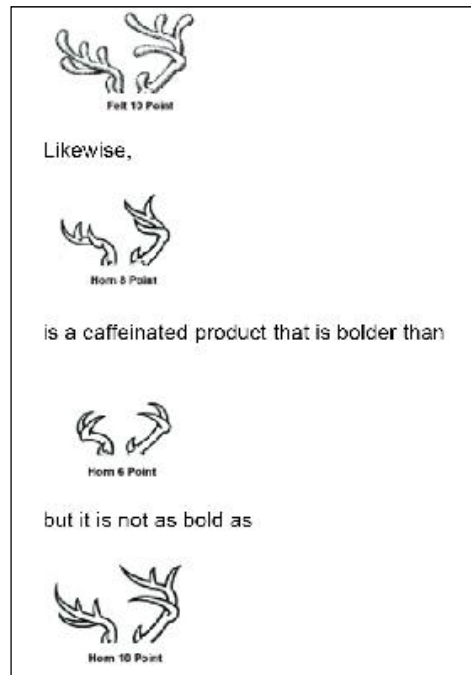
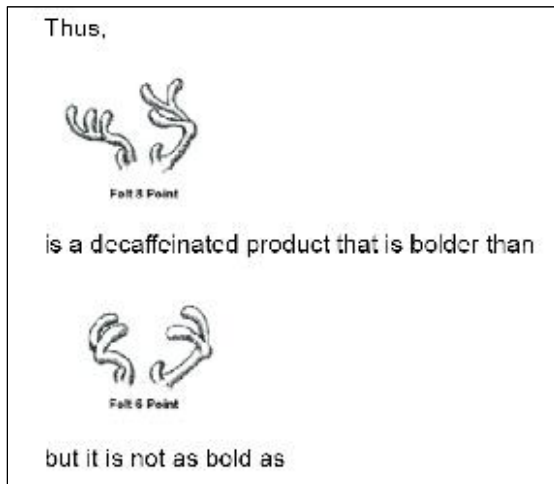
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<sup>9</sup> *Id.* at 9, 13 TTABVUE 10.

<sup>10</sup> *Id.* at 15, 13 TTABVUE 16.

In both the drawing and the specimen, the antlers are not pictured “above” the stylized deer’s head, as Applicant asserts, but attached to it. We find that the antlers are integrated into the image of a deer holding a steaming mug of coffee. Applicant’s stylized deer, with antlers of either size, constitutes a unitary composite mark conveying a single commercial impression that does not vary with the size of the antlers or the strength of Applicant’s coffee.

We note that we are not addressing a coffee classification system employing the freestanding antler images shown in the legend below, enlarged from the first and second pages of Applicant’s specimen:



In both Applicant’s drawing and specimen label, the antlers are attached to the head of the stylized deer, not separate from it (for example, on a different part of the label).

Nor has Applicant indicated that any antler configuration it may use will be within a range limited by size, shape, or number of points. Indeed, the antlers in the



mark on Applicant's specimen label, which incorporate sweeping curves rather than sharp angles, are different from any of the examples in the explanatory paragraphs from Applicant's website (shown immediately above); so are the antlers represented in Applicant's drawing, which are smaller than any of the specimen exemplars. The case before us therefore is distinguishable from *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 57 USPQ2d 1807, 1813 (Fed. Cir. 2001), in which the phantom element in the mark **(212) M-A-T-T-R-E-S** was "an area code, the possibilities of which are limited by the offerings of the telephone companies." Applicant does not contend that the potential configurations of the antlers integral to its mark are similarly circumscribed.<sup>11</sup>

For all of these reasons, we agree with the Examining Attorney that the dashed lines in Applicant's mark represent a phantom element in the form of changeable antlers that may be depicted as felt or horn, in multiple shapes, with an unspecified and variable number of points. We therefore affirm the refusal on the ground that Applicant seeks to register more than one mark in violation of Trademark Act Sections 1 and 45.

For the same reasons, we find that the specimen, which depicts the unitary image of a stylized deer sporting very large, prominent antlers, does not show the

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<sup>11</sup> Applicant's mark also is readily distinguishable from the two registrations discussed at pages 13-14 of the Amended Appeal Brief, 13 TTABVUE 14-15, which are for product configuration and packaging trade dress, respectively. We emphasize that we must decide each case on its own facts. *See In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) ("Even if some prior registrations had some characteristics similar to [Applicant's] application, the PTO's allowance of such prior registrations does not bind the Board or this court.").

applied-for mark in the drawing in use in commerce. We therefore affirm the refusal on the ground that Applicant's specimen of use does not match and show use of the mark in the drawing, as required by Trademark Act Sections 1 and 45.

## II. Refusals for Unacceptable Drawing and Description of the Mark

Finally, we address the refusals on the grounds that Applicant's drawing is unacceptable pursuant to Section 1(a)(1) of the Act and its description of the mark is unacceptable pursuant to Trademark Rule 2.37, 37 C.F.R. § 2.37. These two refusals flow from the substantive issue that Applicant is seeking to register more than one mark in a single application. For that reason, based on our conclusion with regard to the latter, both the drawing and description of the mark are unacceptable, and we affirm the refusals on both grounds.

**Decision:** The refusal to register Applicant's mark is affirmed.