

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

Mailed:
August 21, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re San Diego Regional Economic Development Corporation

Serial No. 778678729

Kathleen A. Pasulka of Procopio Cory Hargreaves & Savitch
for San Diego Regional Economic Development Corporation.

Jay K. Flowers, Trademark Examining Attorney, Law Office
112 (Angela B. Wilson, Managing Attorney).

Before Seeherman, Drost and Ritchie de Larena,
Administrative Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

San Diego Regional Economic Development Corporation
has appealed from the final refusal of the Trademark
Examining Attorney to register "AT C-LEVEL" as a trademark
for "magazines featuring economic information specific to
municipalities."¹ Registration has been refused because the

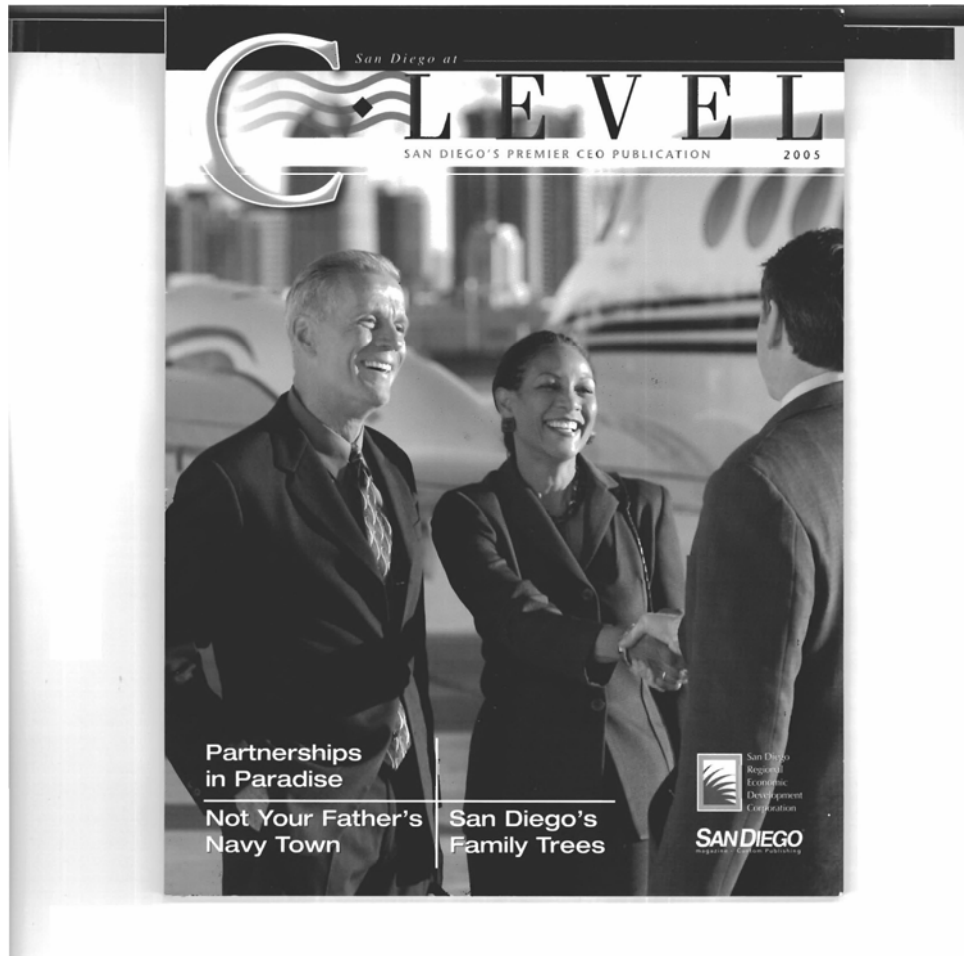
¹ Application Serial No. 78678729, filed July 26, 2005, based on
Section 1(a) of the Trademark Act (use in commerce), and
asserting first use and first use in commerce as of June 13,
2005.

specimens applicant has submitted do not show use of the mark depicted in the drawing. Specifically, the Examining Attorney contends that both the original and substitute specimens submitted by applicant show the mark, respectively, as "C-LEVEL" and "SAN DIEGO AT C-LEVEL," and therefore the mark shown in the drawing, "AT C-LEVEL," is not a substantially exact representation of the mark as used.²

Applicant and the Examining Attorney filed appeal briefs. No reply brief was filed.

Trademark Rule 2.41(a) provides that, in an application based on Section 1(a) of the Trademark Act, as the present application is, the drawing of the mark must be a substantially exact representation of the mark as used on or in connection with the goods/or services. In order to determine this, we must examine the specimens, which we set forth below:

² In his brief the Examining Attorney has made statements that are applicable to a refusal to accept an amendment of a drawing, e.g., "applicant is attempting to amend a portion of the mark" (p. 4) and "the substitute specimen materially alters the mark on the drawing page" and "the addition of any element that would require a further search will constitute a material alteration" (p. 6). However, applicant has not attempted to amend its mark so that the mark shown in the drawing would conform more closely to the specimens, and therefore the issue of whether an amendment to the drawing would be acceptable is not before us.



The original specimen (above) shows C ♦ LEVEL in large type, with the phrase "San Diego at" in much smaller type size, and in a different type font, above it.

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SPECIAL THANKS TO:
 THE CITY OF SAN DIEGO



On the cover, Hank Nordhoff is chairman, president and CEO of Gen-Probe, Inc., a global leader in nucleic acid diagnostics used to diagnose human diseases and screen donated human blood. In addition to being presented with the prestigious National Medal of Technology by President G.W. Bush (see pg. 62), Nordhoff serves on the boards of several well-known organizations, including the UCSD Cancer Center and the California Healthcare Institute (CHI). He will complete a two-year term as chairman of the San Diego Regional EDC this year. Nordhoff and his wife, Robin, are avid golfers. They live near the ocean in Del Mar with their two teenage Mountain dogs, Buster and Bertha.

Cover photograph by Marshall Williams. 619.543-9159 www.marshallwilliams.com
 All photographs, unless indicated otherwise, are courtesy of San Diego Magazine Custom Publishing

San Diego Regional Economic Development Corporation (EDC) works to create and sustain a region that is globally competitive – fueled by a diversified, technology-driven economy – and positioned to achieve sustained economic prosperity and opportunity for its residents.

EDC's core mission is to assist companies in locating or expanding – and with solving problems – while also focusing on issues of regional competitiveness through a CEO-driven issue agenda that supports the growth and expansion of high-wage, high-growth industries in the region.

EDC works in partnership with, and receives significant funding from, the City of San Diego. Additional funding comes from the County of San Diego, San Diego Unified Area District, the City of Chula Vista and other cities in the region, and more than 200 private-sector investors.



San Diego
 Regional
 Economic
 Development
 Corporation

530 B Street, Seventh Floor
 San Diego, CA 92101
 619-234-8484 phone
 619-234-1035 fax
www.sandiegobusiness.org

President & CEO
 Julie Meyer Wigan

**Vice President,
 Economic Development & Marketing**
 Andrea Moser

Director, Research
 Michael Schuerman

Director, Economic Development
 Janet Anderson

Manager, Communications
 Stacy Isbert

SAN DIEGO

magazine • Custom Publishing

1450 Front Street
 San Diego, CA 92101
 Tel: (619) 230 9292
 Toll free: (800) 600-CITY (2489)
 Fax: (619) 230-0493
www.sandiegomag.com

President and CEO
 James Fitzpatrick

Publisher
 Maureen Sullivan

**Vice President
 Custom Publishing**
 Steve Fisher

**Art Director
 of Custom Publishing**
 Joe Gallo

Graphic Designers
 Carly Ransfield
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The substitute specimen is the Table of Contents page. At the very bottom of the page appears the line:

San Diego at C•LEVEL • San Diego's Premier CEO Publication

The Examining Attorney contends that the original specimen submitted by applicant shows the mark as "C-LEVEL," while the substitute specimen shows the mark as "SAN DIEGO AT C-LEVEL." According to the Examining Attorney, neither specimen shows use of the mark depicted in the drawing, "AT C-LEVEL."

The entirety of applicant's reasons as to why its specimen is acceptable is set forth in the following paragraph of its brief:

Applicant submits that its mark "AT C-LEVEL" is shown in the specimen the Applicant submitted in response to the Office Action. The specimen shows the words "at C-LEVEL" at the bottom of the magazine Table of Contents page.

Thus, applicant apparently has conceded that the original specimen does not show use of the mark depicted in the drawing. Accordingly, we need not engage in an extended discussion of the acceptability of the original specimen, but will say only that we agree with the Examining Attorney that the mark shown in the drawing is not a substantially exact representation of the mark shown in that specimen.

As for the acceptability of the substitute specimen, "[i]t all boils down to a judgment as to whether that designation for which registration is sought comprises a separate and distinct 'trademark' in and of itself." In re Yale Sportswear Corporation, __USPQ2d__, Serial No. 78653373 (TTAB July 3, 2008), quoting Institut des Appellations d'Origine v. Vintner's Int'l Co., Inc., 958 F.2d 1574, 22 USPQ2d 1190, 1197 (Fed. Cir. 1992). In the present case, the question is whether "AT C-LEVEL" makes a separate and distinct commercial impression when used in the phrase "San Diego at C-LEVEL" on the bottom of the Table of Contents page.

We find that it does not. Consumers will either view the entire phrase, "San Diego at C-LEVEL," as a mark, or perhaps, because it is depicted in all capital letters, they will view "C-LEVEL" as making a separate commercial impression. However, the word "at," which is depicted in lower case, will be seen as part of the "San Diego" portion of the phrase because "San Diego" also contains lower case letters, rather than as part of the all upper case "C-LEVEL" portion. Further, the inclusion of "at" in applicant's drawing results in a mark, "AT C-LEVEL," which is different in connotation from either "C-LEVEL" or "San Diego at C-LEVEL." Accordingly, the mark "AT C-LEVEL"

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depicted in applicant's drawing is not a substantially exact representation of the mark shown in either the original or the substitute specimen.

Decision: The refusal of registration is affirmed.