

This Opinion Is Not a  
Precedent of the TTAB

Mailed: January 15, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Herschend Adventure Holdings, LLC*<sup>1</sup>  
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Serial No. 87562135  
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F. Richard Rimer Jr. of Seyfarth Shaw LLP,  
for Herschend Adventure Holdings, LLC.

Linda M. Estrada, Trademark Examining Attorney, Law Office 104,  
Dayna Brown, Managing Attorney.

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Before Mermelstein, Shaw, and Hightower,  
Administrative Trademark Judges.

Opinion by Hightower, Administrative Trademark Judge:

Applicant Herschend Adventure Holdings, LLC seeks registration on the



Principal Register of the mark, described as follows: “The mark consists

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<sup>1</sup> Application Serial No. 87562135 was filed August 9, 2017, by Pink Adventure Group, Inc. Assignment to Herschend Adventure Holdings, LLC in a merger effective July 2, 2018, was recorded with the USPTO Assignment Recordation Branch on August 23, 2018, at Reel/Frame 6421/0113.

of the color pink as applied to vehicles, brochures and websites (the mark consists of the color pink alone – the broken lines indicate the position of the mark and do not form part of the mark).” The application recites the following services:

- “On-line transportation reservation and travel ticket reservation services; Organisation of travel; Organization of travel and boat trips; Travel and transport information service; Travel guide and travel information services; Travel guide services; Travel information; Travel information services; Travel ticket reservation service; Escorting of travellers; Making reservations and bookings for transportation for tourists; Providing information about travel, via the Internet; Providing transport for guided tours; Providing transport for sightseeing tours; Providing transport for sightseeing tours by land vehicle; Transport services for sightseeing tours,” in International Class 39; and
- “Education services, namely, providing in-person verbal instruction in the fields of historical, cultural, geological, plant, and animal facts about a tour location; Arranging and conducting guided hiking tours; Conducting guided tours of a geographical location lead by travel guides versed in historical, cultural, geological, plant and animal facts about the geographical location,” in International Class 41.

The application was filed pursuant to Trademark Act Section 1(a), 15 U.S.C. § 1051(a), alleging first use anywhere and use in commerce as of December 31, 1965.

The Examining Attorney refused registration on the following grounds:

1. The proposed mark differs on the drawing and specimen. Trademark Act Sections 1 and 45, 15 U.S.C. §§ 1051 and 1127; Trademark Rules 2.34(a)(1)(iv) and 2.56(a), 37 C.F.R. § 2.34(a)(1)(iv) and 2.56(a). The Examining Attorney also required an amended drawing and description of the mark, stating that the drawing must display the manner in which the mark is used in connection with the services, and the description must

indicate the specific position of the color. *See* March 30, 2018 Final Office Action.

2. Applicant seeks to register multiple marks. Trademark Act Sections 1 and 45, 15 U.S.C. §§ 1051 and 1127; Trademark Rule 2.52, 37 C.F.R. § 2.52.
3. The proposed mark consists of non-distinctive trade dress which fails to function as a service mark, and Applicant has not established that it has acquired distinctiveness for the identified services. Trademark Act Sections 1, 2, 3, and 45, 15 U.S.C. §§ 1051-53 and 1127; Trademark Act Section 2(f), 15 U.S.C. § 1052(f).

Applicant timely appealed after the refusal to register was made final. We affirm the refusal under Trademark Act Section 2(f) and the requirement for an amended drawing and description of the mark, and reverse as to the other grounds.

#### **I. Drawing of the Mark and Specimens of Use**

Trademark Act Section 1(a)(1) requires an applicant to submit specimens of its mark as used; *see also* Trademark Rules 2.34(a)(1)(iv) and 2.56(a) (“An application under section 1(a) of the Act . . . must . . . include one specimen per class showing the mark as used on or in connection with the goods or services.”). An applicant also is required to submit a drawing, which “must be a substantially exact representation of the mark as used on or in connection with the goods and/or services.” Trademark Rule 2.51(a), 37 C.F.R. § 2.51(a).

**A. Applicant Must Submit an Amended Drawing and Description**

As explained in Trademark Manual of Examining Procedure (“TMEP”)


§ 1202.05(d)(ii) (Oct. 2018):

As with color used on goods, a color service mark does not consist of color in the abstract. Rather, the mark consists of color used in a particular manner, and the context in which the color is used is critical to provide notice of the nature of the mark sought to be registered.

Here, the Examining Attorney required an amended drawing displaying the manner in which the mark is used in connection with the services, and an amended description of the mark indicating the specific position of the color. *See* March 30, 2018 Final Office Action. We find these requirement to be consistent with TMEP § 1202.05(d)(ii), which also provides that:

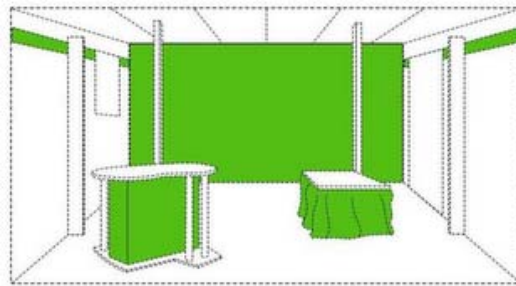
If an applicant who seeks to register a single color as a service mark used on a variety of items not viewed simultaneously by purchasers, e.g., stationery, uniforms, pens, signs, shuttle buses, store awning, and walls of the store, submits a drawing that displays the mark as a solid-colored square with a dotted peripheral outline, the application will receive a filing date. However, the examining attorney will generally require the applicant to submit a single amended drawing showing how the mark is used in connection with the services. The applicant must also submit a detailed description of the mark identifying the color and describing its placement.



Applicant’s drawing  and description of its mark as “the color pink as applied to vehicles, brochures and websites” are so vague as to comprehend the color

pink applied in any manner to vehicles, brochures, and websites. They are insufficient to provide notice of the scope of rights Applicant claims.

The Examining Attorney submitted examples of other single-color registrations. These include a registration owned by AT&T Intellectual Property II, L.P. for telecommunications and other services.<sup>2</sup> The description of the mark states: “The mark consists of the color green as used on promotional materials, product displays, brochures, website [sic], television commercials, billboards, and other advertising for telecommunications services. The matter shown in dotted lines serves to show positioning of the mark and is not part of the mark.” The drawing is:

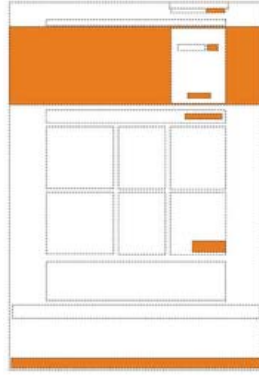


Another example, registered for education services, is described as follows:<sup>3</sup> “The mark consists of the color orange as applied to the website through which services are marketed. The matter depicted in broken lines is used to show the position of the mark and is not claimed as a feature of the mark.” The drawing is:

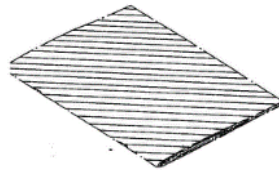
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<sup>2</sup> Registration No. 4219637 on the Supplemental Register, March 30, 2018 Final Office Action at TSDR 5-7.

<sup>3</sup> Registration No. 4618885 on the Supplemental Register, *id.* at TSDR 10-12.



One more example is a robin's-egg shade of blue used by Tiffany (NJ) LLC on catalog covers for retail store and mail order catalog services.<sup>4</sup> In that registration,



the description of the drawing includes a statement that: "The matter shown in broken lines represents covers of various sizes and serves to show the positioning of the mark."

All of these registrations differ from the subject application in that they specifically display and describe the placement of the color in which the owner claims service mark rights. Indeed, the same is true of Applicant's existing registration made of record by the Examining Attorney.<sup>5</sup> That registration, reciting some of the same services identified in the subject application in International Classes 39 and 41, is for

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<sup>4</sup> Registration No. 2416794 on the Principal Register, *id.* at TSDR 2-4; March 1, 2018 Response to Office Action, Appendix CA, TSDR 26-32.

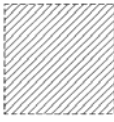
<sup>5</sup> Registration No. 5188950 on the Principal Register, March 30, 2018 Final Office Action at TSDR 13-15.



the mark with a claim of acquired distinctiveness in whole and the following description:

The mark consists of the color pink as applied to the exterior surface of a land vehicle. The matter shown in dotted or broken lines in the nature of the configuration of the vehicle is not claimed as part of the mark and only shows the position or placement of the mark as used in connection with the services.

With its March 1, 2018 Response to Office Action, Applicant submitted copies of numerous third-party color registrations in support of its arguments that its drawing and specimens are acceptable. The Examining Attorney persuasively distinguishes many of them in her brief.<sup>6</sup> One that Applicant argues is not distinguished is owned by United Parcel Service of America, Inc. (“UPS”) for “transportation and delivery of personal property by air and motor vehicle.”<sup>7</sup> Like the subject application, the mark

in the UPS registration is drawn as a dashed-line square , but the placement of the color mark is specifically described:

The mark consists of the color chocolate brown, which is the approximate equivalent of Pantone Matching System 462C, **as applied to the entire surface of vehicles and uniforms**. The mark consists of the color brown alone. The broken lines indicate the position of the mark and do not form part of the mark. (emphasis added).

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<sup>6</sup> 6 TTABVUE 12-13.

<sup>7</sup> Registration No. 2901090 on the Principal Register. Reply Brief at 7-8, 8 TTABVUE 8-9; March 1, 2018 Response to Office Action, Appendix ZA, TSDR 33-37.

As the Board has often said, each case must be decided on its own merits and we are not bound by the allowance of prior registrations. *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001). But here, the third-party registrations of record – including those on which Applicant relies – only serve to underscore the deficiencies in its application. We affirm the requirement to submit an amended drawing displaying the manner in which the mark is used in connection with the services, and an amended description indicating the specific placement of the color.

**B. The Proposed Mark Differs on the Drawing and Specimens**

We also must determine whether the mark as shown in the drawing is a substantially exact representation of the mark shown in the specimens, that is, if they “are basically the same marks creating the same impressions.” *In re Schechter Bros. Modular Corp.*, 182 USPQ 694, 695 (TTAB 1974). “[E]ach case presents its own unique circumstances and requires a judgment as to that particular designation.” *In re 1175856 Ontario Ltd.*, 81 USPQ2d 1446, 1448 (TTAB 2006).

As noted above, Applicant’s proposed mark is  and its specimens, described as “website, brochures, and land vehicles bearing mark,” are:





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• Scenic Sedona Adventure with Diamond Back Coach Tour (Approx. 11.5hrs)	\$ 184.00	\$138.00
• Scenic Sedona Adventure with Coyote Canyons or Scenic Bus Tour (Approx. 11.5hrs)	\$ 164.00	\$123.00
• Grand Canyon Adventure (Approx. 11.5hrs)	\$ 145.00	\$108.75
• Grand Canyon Adventure with Helicopter Tour Upgrade with Eco Star Helicopter Upgrade (Approx. 11.5hrs)	\$340.00	\$288.75
• Grand Canyon Adventure with Helicopter Upgrade (Approx. 11.5hrs)	\$395.00	\$338.75
• Sonoran Desert Adventure (Approx. 3hrs)	\$ 115.00	\$ 88.25

\*Child rates apply to children 12 years and under on most tours. Child rates for the Grand Canyon Adventure apply to children 9-13 years old. Recommended guide gratuity is 15%.

THE ROAD TO ADVENTURE IS PAVED IN PINK!



Although we have found the drawing and description of the mark unacceptable, we find that the color pink is the same in the drawing and the specimens. Therefore, we reverse the refusal on the ground that the proposed mark differs on the drawing and the specimens.

## II. Applicant Seeks To Register Multiple Marks

Under the Trademark Act, an application may seek to register only a single mark. *In re Int'l Flavors & Fragrances Inc.*, 183 F.3d 1361, 51 USPQ2d 1513, 1516. Once again, we have found the drawing and description of the mark improper in that the application does not seek to register a color used in a particular way. Nonetheless, we find that Applicant seeks only to register the color pink alone, applied in some unspecified fashion to vehicles, brochures, and websites. We therefore reverse the refusal to register on the basis that Applicant seeks to register multiple marks.

### III. Applicant Has Not Established Acquired Distinctiveness

Finally, we consider the refusal to register the mark under Trademark Act Section 2(f). Color marks are never inherently distinctive. *Wal-Mart Stores Inc. v. Samara Bros. Inc.*, 529 U.S. 205, 54 USPQ2d 1065, 1068 (2000); *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 34 USPQ2d 1161, 1162-63 (1995); *In re Forney Indus., Inc.*, 127 USPQ2d 1787, 1793 (TTAB 2018) (“Colors alone cannot be inherently distinctive.”); *In re Florists’ Transworld Delivery Inc.*, 106 USPQ2d 1784, 1792 n.6 (TTAB 2013) (“*FTD*”). In order to obtain a registration on the Principal Register, it is Applicant’s burden to demonstrate that its mark has acquired distinctiveness. *See Yamaha Int’l Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 6 USPQ2d 1001, 1007-08 (Fed. Cir. 1988); *FTD*, 106 USPQ2d at 1792. Any claim to color per se used as a service mark must be specific as to use and include evidence of acquired distinctiveness for each claimed use. TMEP § 1202.05(g) (citing *In re Thrifty Inc.*, 274 F.3d 1349, 61 USPQ2d 1121, 1124 (Fed. Cir. 2001) (stating that “evidence submitted to demonstrate acquired distinctiveness of a color may show consumer recognition with respect to certain objects (e.g., blue vehicle rental centers), but not for other objects (e.g., blue rental cars)”)).

Six interrelated factors are weighed together to determine whether a mark has acquired secondary meaning: (1) association with a particular source by actual purchasers (typically measured by customer surveys); (2) length, degree, and exclusivity of use; (3) amount and manner of advertising; (4) amount of sales and number of customers; (5) intentional copying; and (6) unsolicited media coverage of

the product embodying the mark. *Converse, Inc. v. ITC*, 909 F.3d 1110, 128 USPQ2d 1538, 1546 (Fed. Cir. 2018). “By their nature color marks carry a difficult burden in demonstrating distinctiveness and trademark character.” *In re Owens-Corning Fiberglas Corp.*, 774 F.2d 1116, 227 USPQ 417, 424 (Fed. Cir. 1985). Accordingly, the burden Applicant bears to establish that the color pink has acquired distinctiveness and is perceived as a designation of source for its services is a heavy one.

In support of its claim of acquired distinctiveness, Applicant submitted with its application a declaration from Shawn Wendell, president and owner of original applicant Pink Adventure Group, Inc. (“PAG”). Mr. Wendell testified in part that PAG, directly or through its subsidiaries:

- Has used the applied-for mark on vehicles since 1965, on brochures since at least 1988, and on websites since at least 1998 (¶ 3, TSDR 14);
- Has at least 80 vehicles bearing the mark used to advertise and provide the identified services in Arizona and Nevada (¶ 7, TSDR 15);
- Distributed nearly two million brochures advertising the services and including the mark between 2009 and 2014 (¶ 8, TSDR 15);
- Gave tours in a vehicle bearing the mark to more than one million passengers between 2009 and 2013 (¶ 9, TSDR 15-16);
- Had more than 1.2 million unique visitors to its website bearing the mark between 2011 and 2014 (¶ 10, TSDR 16);
- Spent more than \$2 million on advertising between 2009 and 2013, including nearly \$370,000 for brochures (¶ 11, TSDR 16-17); and
- “PAG believes that the Mark has become distinctive, as applied to vehicles, websites and brochures, through applicant’s substantially exclusive and continuous use in commerce for at least the five years immediately before the date of this statement, in conjunction [with] advertising and providing the Services.” (¶ 30, 25 TSDR).

Mr. Wendell also averred to numerous mentions of Applicant and its services in the media (¶¶ 14-29, 18-24 TSDR). Applicant submitted copies of consumer reviews, print stories, and seven television and radio news segments devoted to its services, among other evidence. In each instance, however, the focus is on the pink color of the vehicles Applicant uses to provide its services, not its brochures or website. The record demonstrates that Applicant has acquired distinctiveness in the color pink as applied to the exterior of vehicles for tour and travel guide services, as reflected in its existing Registration No. 5188950, issued under Trademark Act Section 2(f). There is no evidence, however, that Applicant has acquired distinctiveness in the color pink as applied to brochures and websites for its identified services.

The Examining Attorney argues that: “Applicant’s extensive sales and promotion may demonstrate the commercial success of applicant’s services, but not that relevant consumers view the matter as a mark for these services.”<sup>8</sup> We agree. Here, the raw numbers alone (length of use, website visitors, and brochures distributed) are insufficient to meet the heavy burden to establish that consumers recognize Applicant’s use of the color pink on brochures and websites as a service mark. *See, e.g., FTD*, 106 USPQ2d at 1793-94 (finding evidence insufficient to establish secondary meaning in color black); *In re Ferris Corp.*, 59 USPQ2d 1587, 1592 (TTAB 2001) (finding evidence insufficient to establish secondary meaning in color pink). We affirm the refusal on the ground that the mark lacks distinctiveness.

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<sup>8</sup> 6 TTABVUE 21.

**Decision:** The refusal to register is affirmed on the grounds that the applied-for mark is not inherently distinctive and Applicant has not established that it has acquired distinctiveness for all of the identified applications under Trademark Act Sections 1, 2, 3, and 45. We also affirm the requirement to submit an adequate drawing and description of the mark. We reverse the refusal on the grounds that Applicant seeks to register multiple marks and that the proposed mark differs on the drawing and specimen.