

This Opinion is not a
Precedent of the TTAB

Mailed: December 20, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re SlurryMonster, LLC
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Serial No. 90513717
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Alex Szypa and Karin H. Butchko of Carlson, Gaskey & Olds, P.C.
for SlurryMonster, LLC.

David Yontef, Trademark Examining Attorney¹, Law Office 118,
Michael Baird, Managing Attorney.

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Before Wellington, Goodman and English,
Administrative Trademark Judges.

Opinion by Goodman, Administrative Trademark Judge:

SlurryMonster, LLC (“Applicant”) seeks registration on the Principal Register of the mark CONCRETE PORN (in standard characters, CONCRETE disclaimed) for “Advertising services, namely, providing a website for the promotion of concrete services and designs of others” in International Class 35.²

¹ The Examining Attorney during examination of the statement of use was K. Margaret Le.

² Application Serial No. 90513717 was filed on February 5, 2021 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), alleging August 21, 2020 as the date of first use and first use in commerce of the mark and accompanied by a specimen identified as a Facebook page. After a rejection of the specimen in the September 7, 2021 Office action, Applicant

The Trademark Examining Attorney has refused registration of Applicant's mark under Trademark Act Sections 1 and 45, 15 U.S.C. §§ 1051, 1127 and 37 C.F.R. §§ 2.34(a)(1)(iv), 2.56(a), on the ground that the specimens of record fail to show a direct association between the mark and the identified Class 35 advertising services.

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed. Applicant and the Examining Attorney filed briefs.³

We affirm the refusal to register.

I. Specimen Refusal

With its statement of use, Applicant submitted a seven-page specimen it described as a "website showing use of the services." July 14, 2022 Statement of use. Applicant also provided a link to the site. *Id.*

The Examining Attorney refused registration of the mark on the ground that the specimen was "not sufficient to show use [of the mark] in connection with the recited [advertising] services." August 13, 2022 Office action at TSDR 2.

amended its application on October 16, 2021 to Section 1(b) based on a bona fide intention to use the mark in commerce. Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). On July 14, 2022, Applicant filed a statement of use claiming February 5, 2021 as the date of first use of the mark anywhere and in commerce for the identified services.

³ Page references to the application record refer to the online database pages of the USPTO's Trademark Status & Document Retrieval (TSDR) system. References to the briefs on appeal refer to the Board's TTABVUE docket system.

Applicant's brief is at 6 TTABVUE. The Examining Attorney's brief is at 8 TTABVUE.

In its response to Office action, Applicant explained that the Facebook specimen is an advertising platform and an advertising vehicle that calls to the attention of the public the work of concrete project contractors along with providing their contact information. January 5, 2023 Response to Office action at TSDR 2. According to Applicant, the Facebook group also provides a means for the public to contact or message the contractors. *Id.*

The Examining Attorney maintained the refusal stating that the specimen showed “a social site for the sharing of accomplished tasks done with concrete” and was not an “advertising vehicle.”⁴ January 12, 2023 Office action at TSDR 2.

Applicant filed a request for reconsideration further explaining how the specimen shows use in connection with advertising and marketing services and explaining how Facebook business groups can be utilized as a marketing tool. April 6, 2023 Request for reconsideration at TSDR 2. To support its explanation, Applicant also provided articles about using Facebook business groups to market a business. *Id.* Applicant asserted that “the Examiner seems to be operating under the incorrect premise that a forum for sharing projects is not an advertising vehicle.” *Id.*

In denying reconsideration the Examining Attorney reiterated the position that Applicant’s specimen is “a social site for the sharing of accomplished tasks done with concrete” and does not show a direct association between the mark and the advertising services. April 21, 2023 Denial of reconsideration at TSDR 2.

⁴ The Examining Attorney raised the same arguments for rejecting the specimen that were raised during examination. September 7, 2021 Office action at TSDR 1.

Applicant's 7-page specimen is described in the statement of use as a "website showing use of the services." July 14, 2022 Specimen at TSDR 1.

The first page of the specimen shows the mark CONCRETE PORN, which is identified on the page as a Facebook "community" and includes rules about posting. Page 7 of the specimen is the "about" page for the Facebook "community" and states that the community is for posting "pictures of your finished art with your company information so we can all support each others [sic] work ... if you post pictures, post the contractor." Specimen page 7. The specimen pages 2 and 3 are examples of third-party posting from the community. Page 2 of the specimen is a post from Authentic Environments Rockwork displaying a photograph, information about the concrete project, and a website link to authenticenvironments.com. Page 3 of the specimen is a post from Kim Stevens and includes a photograph of a concrete floor, text about a "quick cure" used on concrete, and a phone number and email for the contractor OneMaster that applied the "quick cure."

II. Arguments

Applicant argues that "providing a website for the promotion of concrete services and designs of others" is a species of the "advertising services genus" and that the Examining Attorney's interpretation of advertising is "narrow and incorrect." 6 TTABVUE 8. To support its argument, Applicant points to the evidence of record that it provided as to "how forums like Facebook groups provide advertising." *Id.* at 9. Applicant asserts that its "creation and maintenance of the forum allows the posters to advertise in this way," is a form of "engagement," and that the "specimen and

evidence do establish that others use [Applicant's] provided site to promote their concrete services.” *Id.*

Applicant argues that it

“created and manages the website, where community members are encouraged to ‘post pictures of [their] finished art with [their] company information’... As shown in the submitted specimen, community members do just that – they post pictures of their or others’ work as advertisements.”

Id. at 7.

III. Applicable Law

Section 45 of the Trademark Act, 15 U.S.C. § 1127, provides that a service mark is used in commerce “when it is used or displayed in the sale or advertising of services, and the services are rendered in commerce.” Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), provides that an application must be accompanied by a specimen of the mark as used in commerce.

To show service mark use, the specimen must show a direct association between the services identified in the application and the mark sought to be registered. *See In re Univ. Oil Prods. Co.*, 476 F.2d 653, 177 USPQ 456, 457 (CCPA 1973); *see also In re Osmotica Holdings Corp.*, 95 USPQ2d 1666, 1668 (TTAB 2010); *In re DSM Pharms. Inc.*, 87 USPQ2d 1623, 1624 (TTAB 2008); Trademark Rule 2.56(b)(2), 37 C.F.R. § 2.56(b)(2) (“A service mark specimen must show the mark as used in the sale of the services, including use in the performance or rendering of the services, or in the advertising of the services. The specimen must show a direct association between the mark and the services.”).

While a specimen “showing the mark used in rendering the services need not explicitly refer to those services in order to establish the requisite direct association between the mark and the services, . . . ‘there must be something which creates in the mind of the purchaser an association between the mark and the service activity.’” *In re WAY Media, Inc.*, 118 USPQ2d 1697, 1698 (TTAB 2016) (quoting *In re Johnson Controls, Inc.*, 33 USPQ2d 1318, 1320 (TTAB 1994)).

“Whether a mark sought to be registered as a service mark has been used ‘to identify’ the services specified in the application is a question of fact to be determined on the basis of the specimens submitted by applicant, together with any other evidence of record.” *In re Adair*, 45 USPQ2d 1211, 1214 (TTAB 1997) (citation omitted). In determining whether a mark is used in connection with the services described in the application, a key consideration is the perception of the user. *See In re JobDiva, Inc.*, 843 F.3d 936, 121 USPQ2d 1122, 1126 (Fed. Cir. 2016); *Lens.com, Inc. v. 1-800 Contacts, Inc.*, 686 F.3d 1376, 103 USPQ2d 1672, 1676 (Fed. Cir. 2012). In addition, we may consider an applicant’s explanations as to how the specimen is used in determining whether a specimen is acceptable evidence of service mark use. *In re DSM Pharms., Inc.*, 87 USPQ2d at 1626 (citing cases).

The issue before us is whether Applicant’s specimen shows use of CONCRETE PORN as a service mark in connection with the identified advertising services. We limit our consideration to the arguments raised by the Examining Attorney during examination of the statement of use that the specimens do not show a direct

association with advertising services.⁵ *In re Peace Love World Live, LLC*, 127 USPQ2d 1400, 1401-02 (TTAB 2018) (Board exercised discretion to limit its review of failure to function refusal to whether I LOVE YOU was merely ornamental).

We look to the specimen and consider Applicant's explanation as to the nature of the specimen and how the services are rendered as well as any other supporting materials in the record to determine whether consumers likely would perceive CONCRETE PORN as an indication of origin for "Advertising services, namely, providing a website for the promotion of concrete services and designs of others." *In re Phoseon Tech. Inc.*, 103 USPQ2d 1822, 1827-28 (TTAB 2012).

IV. Analysis

Considering the factual record before us, which includes Applicant's explanation, the supporting articles about Facebook business group marketing, and consideration of the specimen as a whole, we find a lack of direct association between the mark and the identified advertising services.

Applicant is hosting a sub forum that allows third parties to post photographs and contact information relating to completed concrete projects. By Applicant's own explanation of its services, it is merely hosting, moderating, and administering a community. It is not posting or creating the posts on the forum on behalf of others

⁵ The Examining Attorney on brief is not the same attorney who examined the statement of use. On appeal, the Examining Attorney argues that as shown on the specimen CONCRETE PORN is a "username," "Applicant does not provide the underlying website shown on the specimen" and "as a fundamental matter," the "specimen fails to show applicant providing a website." 8 TTABVUE 5. However, these are new issues that Applicant did not have an opportunity to address during prosecution. Because we limit our review to whether the specimens in this case show a type of advertising service, we do not consider these arguments.

but is allowing the posting by third parties who are providing the information. While it may be that third parties can post pictures and contact information, that is tantamount to those third parties advertising their own services and does not amount to Applicant providing advertising services for them. Again, Applicant is merely the moderator and administrator of a community group. Thus, Applicant is not providing the advertising service on behalf of third parties but is simply providing a means for third parties to post their own photographs and contact information.

V. Conclusion

We find that as used on the specimen, CONCRETE PORN is not used in direct association with Applicant's identified "Advertising services, namely, providing a website for the promotion of concrete services and designs of others."⁶

Decision: The refusal to register the mark CONCRETE PORN under Sections 1 and 45 is affirmed.

⁶ If there is any association, between the mark and services, it is more akin to a type of hosting service, since Applicant is not actually offering third-party advertising services, i.e., creating or posting the forum posts to promote the services of others, but, again, by Applicant's own explanation, it is simply providing the forum for any such advertising to take place.