

**This Opinion is Not a
Precedent of the TTAB**

Mailed: November 6, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Chris Irvine, Inc.

Serial No. 97156945
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Michael E. Dockins of Shumaker Loop & Kendrick, LLP for Chris Irvine, Inc.

Rebecca Ruiz, Trademark Examining Attorney, Law Office 113,
Myriah Habeeb, Managing Attorney.

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Before Greenbaum, Thurmon and O'Connor,
Administrative Trademark Judges.

Opinion by O'Connor, Administrative Trademark Judge:

Chris Irvine, Inc. ("Applicant") seeks to register the proposed mark



on the Principal Register for

Entertainment in the nature of wrestling contests; Entertainment services, namely, wrestling exhibits and performances by a professional wrestler and entertainer; Entertainment services, namely, live appearances by a [] professional wrestler and sports entertainer; Entertainment services, namely, personal appearances by a professional wrestler and sports entertainment personality; Entertainment services, namely, televised appearances by a professional wrestling and sports entertainment personality; Providing wrestling news and information via a global computer network; Providing online interviews featuring a professional wrestling and sports entertainment personality in the field of professional wrestling and sports entertainment for entertainment purposes, in International Class 41.¹

Applicant provided the following description of the proposed mark: “The mark consists of a full figure design of a character comprising a fedora, a leather jacket having spikes protruding therefrom, a scarf, and a painted face.” Color is not claimed as a feature of the mark.

The Trademark Examining Attorney ultimately refused registration of Applicant’s proposed mark in Class 41 under Trademark Act Sections 1, 2, 3 and 45, 15 U.S.C. §§ 1051-1053, 1127, for failure to function as a service mark because it merely identifies a particular character, and under Trademark Act Sections 1 and 45,

¹ Application Serial No. 97156945 was filed on Dec. 6, 2021 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant’s claim of first use of the proposed mark in connection with the Class 41 services anywhere and in commerce at least as early as June 00, 2018, which we interpret as June 30, 2018. *See JNF LLC v. Harwood Int’l Inc.*, Can. No. 92070634, 2022 TTAB LEXIS 328, at *12-13 (TTAB 2022); TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMPEP) § 903.06 (May 2024). The Application also seeks registration of the proposed mark for use in connection with goods in Classes 9 and 25 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s bona fide intent to use the proposed mark. Classes 9 and 25 are not the subject of this appeal.

15 U.S.C. §§ 1051, 1127, because the specimens of record do not match the mark drawing and do not show Applicant's use of the proposed mark in commerce.²

Applicant appealed and requested reconsideration, which was denied. The appeal is now fully briefed. We affirm the refusal to register Applicant's proposed mark in Class 41 based on the specimen refusal and therefore need not reach the failure to function refusal.

I. Legal Standard

Under Section 1 of the Trademark Act, every trademark application must include a drawing of the mark sought to be registered and, where based on use in commerce, a specimen showing use of the mark. 15 U.S.C. § 1051(a)(1), (2); *see* Trademark Rule 2.51, 37 C.F.R. § 2.51 (drawing requirement); Trademark Rule 2.56(a), 37 C.F.R. § 2.56(a) ("An application under section 1(a) of the Act ... must include one specimen per class showing the mark as actually used in commerce on or in connection with the goods or services identified."). "In an application under section 1(a) of the Act, the drawing of the mark 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). The "drawing depicts the mark sought to be registered." Trademark Rule 2.52, 37 C.F.R. § 2.52. Failure to comply with these requirements warrants refusal of the application. *See, e.g., In re Guitar Straps Online, LLC*, Serial No. 85047191, 2012

² July 18, 2023 Final Office Action, TSDR 2-6; Feb. 9, 2024 Denial of Request for Reconsideration, TSDR 2-3. References to the Application record refer to the online database of the USPTO's Trademark Status & Document Retrieval (TSDR) system. All citations to documents contained in the TSDR database are to the downloaded .pdf versions of the documents.

TTAB LEXIS 287, at *21-22 (TTAB 2012) (affirming refusal where drawing was not a substantially exact representation of the mark as used in commerce); *In re Thomas White Int'l, Ltd.*, Serial No. 77080379, 2013 TTAB LEXIS 8, at *17 (TTAB 2013) (affirming refusal where specimen was unacceptable to support registration of the mark for the identified goods).³

II. Analysis

The Examining Attorney refused registration on the grounds that the drawing is not a substantially exact representation of the matter shown in Applicant's specimens, which thus do not show use of the mark in commerce, because none of the specimens shows all of the costume elements of the character depicted in the mark drawing.⁴ Applicant does not argue that all of the elements are shown in the specimens, but instead argues that its specimens show use in a manner that "is not only analogous to but identical to [third-party registration] precedent of the USPTO."⁵ Applicant's Brief includes a list of seven third-party registrations

³ As part of an internal Board pilot program to broaden acceptable forms of legal citation in Board cases, citations in this opinion are in the form recommended in TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 101.03 (2024). This opinion cites decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs and Patent Appeals by the pages on which they appear in the Federal Reporter (*e.g.*, F.2d, F.3d or F.4th). For opinions of the Board, this opinion uses citations to the Lexis legal database and cites only precedential decisions, including in the citation, where available, the application serial number or proceeding number. Practitioners should also adhere to the practice set forth in TBMP § 101.03.

⁴ July 18, 2023 Final Office Action, TSDR 5-7. The proposed mark depicts a wrestling character played by Christopher Irvine. Applicant's Brief, 6 TTABVUE 5 (discussing the "mark applied for representing a character"); Applicant's Consent to Use and Registration, Sept. 27, 2022 Response to Office Action, TSDR 28.

⁵ Applicant's Brief, 6 TTABVUE 5. Applicant does not point to elements of the character's costume themselves as source identifiers, and it is undisputed that Applicant seeks to

submitted during prosecution, with links to the TSDR database entries for both the registration certificates and specimens of use, along with similar links for an eighth recently issued registration.⁶

As an initial matter, the only evidence properly made of record by Applicant are the seven registration certificates and certain specimens of use for two of those registrations owned by McDonald's Corporation, copies of which were submitted with Applicant's response to the first Office action.⁷ Although Applicant included hyperlinks to specimens for the other registrations during prosecution and again in Applicant's Brief, merely providing hyperlinks to entries on the TSDR website does not make the underlying documents of record. *See, e.g., In re ADCO Indus. – Techs., L.P.*, Serial Nos. 87545258 and 87545533, 2020 TTAB LEXIS 7, at *4 (TTAB 2020) (“Web addresses or hyperlinks are not sufficient to make the underlying webpages of record.”). We do not consider the registration and specimens for the eighth third-party registration, cited (and hyperlinked) for the first time in Applicant's Brief, for the additional reason that they are untimely. *In re Midwest Gaming & Entm't LLC*, Serial No. 85111552, 2013 TTAB LEXIS 55, at *5 n.3 (TTAB 2013) (new evidence

register the design of a character, not three-dimensional trade dress. Dec. 6, 2022 Application, TSDR 1 (“The mark consists of a full figure design of a character comprising a fedora, a leather jacket having spikes protruding therefrom, a scarf, and a painted face.”), 7 (drawing); *cf.* 37 C.F.R. § 2.52(b)(2) (“If the mark has three-dimensional features, ... the applicant must indicate that the mark is three-dimensional.”); TMEP § 1202.02(c)(iv) (“To accurately reflect the exact nature of the mark, the mark description must state that the mark is three-dimensional in nature.”). *See* Applicant's Brief, 6 TTABVUE 8 (acknowledging, without disagreement, Examining Attorney's reasoning that “Applicant did not apply for the trade dress, clothing and/or make-up used by the character”).

⁶ Applicant's Brief, 6 TTABVUE 5-7.

⁷ Sept. 27, 2022 Response to Office Action, TSDR 8-10, 11-27.

submitted in briefing is “untimely and therefore not part of the record for this case”); Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d) (record “should be complete prior to the filing of an appeal”; proper procedure to introduce evidence after appeal is to seek to suspend the appeal and remand the application for further examination).

Applicant’s argument that it should receive “the exact same treatment”⁸ as the third-party registrations must fail. The third party registrations say nothing about whether Applicant’s proposed mark as shown in the drawing is a substantially exact representation of the matter shown in Applicant’s specimens.⁹ We are not bound by the decisions to register those marks and must decide the instant Application on its own merits. *In re Nett Designs, Inc.*, 236 F.3d 1339, 1342 (Fed. Cir. 2001). Further, as noted, for the vast majority of those registrations we only have evidence of the registrations themselves, not of the specimens of use. Thus, we have no basis to assess whether use of the marks in those specimens was comparable to Applicant’s use in its specimens. *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1371 (Fed. Cir. 2018) (“Attorney argument is no substitute for evidence.”) (cleaned up); see *In re Ride, LLC*, Serial No. 86845550, 2020 TTAB LEXIS 2, at *15 (TTAB 2020) (rejecting argument that USPTO has accepted similar specimens of use in prior registrations where their file histories were not of record and Board was not privy to circumstances resulting in approval of the underlying applications).

⁸ Applicant’s Brief, 6 TTABVUE 8.

⁹ For example, we do not find the two registrations for which Applicant provided specimens, depicting cartoon-like drawings of Ronald McDonald rather than the lifelike design of a wrestling character, to be analogous

Applicant argues that the specimens in other cases were accepted even though they “did not at all match the drawing ‘exactly’” because they showed “an accurate reflection” of the mark in a three-dimensional, live context.¹⁰ This argument only takes Applicant so far, however, because the Examining Attorney did not refuse to accept any of Applicant’s specimens because they are photos from live wrestling events,¹¹ but because the images seen in the specimens do not match the mark drawing.

Although the law does not require that the drawing “exactly match” the mark as used in the specimens, it must be a “substantially exact representation” of the mark as used; “minor alterations” that do not create a new and different mark with a different commercial impression are acceptable. *In re MN Apparel LLC*, Serial No. 87876633, 2021 TTAB LEXIS 162, at *10 (TTAB 2021) (quoting *In re Schechter Bros. Modular Corp.*, 1974 TTAB LEXIS 84, at *2-3 (TTAB 1974)).

Comparing Applicant’s mark drawing and specimens reveals more than minor differences in Applicant’s proposed mark as applied-for and as actually used. Applicant’s first two specimens are advertisements for a wrestling match.¹² When seen next to the mark drawing, as in the excerpts below, it is clear that the specimens

¹⁰ Applicant’s Brief, 6 TTABVUE 7-9.

¹¹ We note, however, that this may be an additional shortcoming of at least some of Applicant’s substitute specimens. *See* TMEP § 1202.02(c)(iv) (“[T]hree-dimensional feature of the mark must be shown in the supporting specimens of use, in order for the drawing to comprise a substantially exact representation of the mark as actually used. Conversely, a specimen depicting a three-dimensional representation of a mark would not be acceptable to show use for a mark that is described or depicted as a two-dimensional mark.”).

¹² Dec. 6, 2021, TEAS Plus New Application, TSDR 2, 8-9.

contain only partial images of the character of the proposed mark, shown from the chest up.



Only certain elements of the character in the mark drawing can be seen, such as a fedora, painted face, long hair and portions of a leather jacket with spikes. Something that could be a white scarf—or a shirt—is visible under the jacket, and a gloved hand can be seen in front of the individual’s chest in the second advertisement. Other elements of the character in the mark drawing are entirely missing, such as the full torso, arms with hands by his sides, and upper legs. Unlike the character in the mark drawing, the individual depicted in the specimens is snarling, teeth bared, and cannot be seen at all below the chest.

Applicant’s substitute specimens are photos showing the proposed mark in use during live wrestling performances.¹³ These photos show the character depicted in Applicant’s proposed mark in various poses and actions. As seen below, the first two such photos show only the individual’s face or chest and face and none of the other

¹³ May 9, 2023 Preliminary Amendment, TSDR 2, 6-8.

elements of the mark drawing, including the full torso with entirety of the jacket, scarf, upper legs, arms and gloved hands.



Finally, the last two specimens show more of the character, but the images differ from the mark drawing in several respects.



Unlike the mark drawing, these images show the individual's face turned to one side, not looking directly at the camera, again with his teeth bared. The individual is wearing a t-shirt with a design that is not featured in the mark drawing, and the gloved hands are not shown.

These differences are more than minor alterations. The mark drawing contains the full figure design of the character, from the thighs up, showing both arms and gloved hands, whereas most of the specimens show no more of the individual than his head and chest. In each of the specimens that shows more than the head, the facial expression is different, with the character making expressions such as a snarl, teeth showing. Unlike the mark drawing, in none of the specimens is the character seen standing with his arms at his sides, both gloved hands visible, mouth closed, as if ready, but waiting patiently, for a fight. These differences between the mark drawing and Applicant's specimens create distinct commercial impressions, such that the mark drawing is not a substantially exact representation of the applied-for mark as used, and Applicant has failed to provide a specimen showing use of that mark in commerce in connection with the identified services. *See* 15 U.S.C. § 1051(a)(1), (2); Trademark Rule 2.51, 37 C.F.R. § 2.51; Trademark Rule 2.56(a), 37 C.F.R. § 2.56(a); *Ride, LLC*, 2020 TTAB LEXIS 2, at *11 (specimens either lacking matter on mark drawing or showing matter that did not match the drawing "all are unacceptable because they fail to show the proposed mark in use in commerce with Applicant's services"); *In re Keep A Breast Found.*, Ser. No. 85316199, 2017 TTAB LEXIS 259, at *9-10 (TTAB 2017) (affirming refusal because, inter alia, substitute specimens did

not display mark depicted in the drawing, three-dimensional breast cast, but instead displayed six different breast casts).

III. Conclusion

We find that the Application's mark drawing does not contain a substantially exact representation of the proposed mark as seen in Applicant's specimens, and Applicant's specimens therefore do not show use of the applied-for mark in commerce in connection with the identified services, as required by Sections 1 and 45 of the Trademark Act.

Decision: The refusal to register Applicant's proposed mark because the drawing is not a substantially exact representation of the mark shown in the specimens, which do not show use of the proposed mark in commerce, is affirmed. Accordingly, we do not reach the failure to function refusal. *See, e.g., In re Suuberg*, Serial No. 88234650, 2021 TTAB LEXIS 459, at *11 (TTAB 2021) (affirming nonuse refusal, and because application was void, declining to reach failure to function refusal).