

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Mailed: March 22, 2013

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re Zinpro Corporation*

—  
Serial No. 85369372

Edmund J. Sease of McKee Voorhees & Sease PLC,  
for Zinpro Corporation.

Brian Pino, Trademark Examining Attorney, Law Office 114,  
K. Margaret Le, Managing Attorney.

—  
Before Bucher, Kuhlke and Hightower,  
Administrative Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

Zinpro Corporation (“applicant”) seeks registration on the Principal Register of the mark **FOOD FOR FEET** (*in standard character format*) for “retail store services, featuring mineral supplements to promote healthy feet and/or legs of livestock and poultry,” in International Class 35.<sup>1</sup>

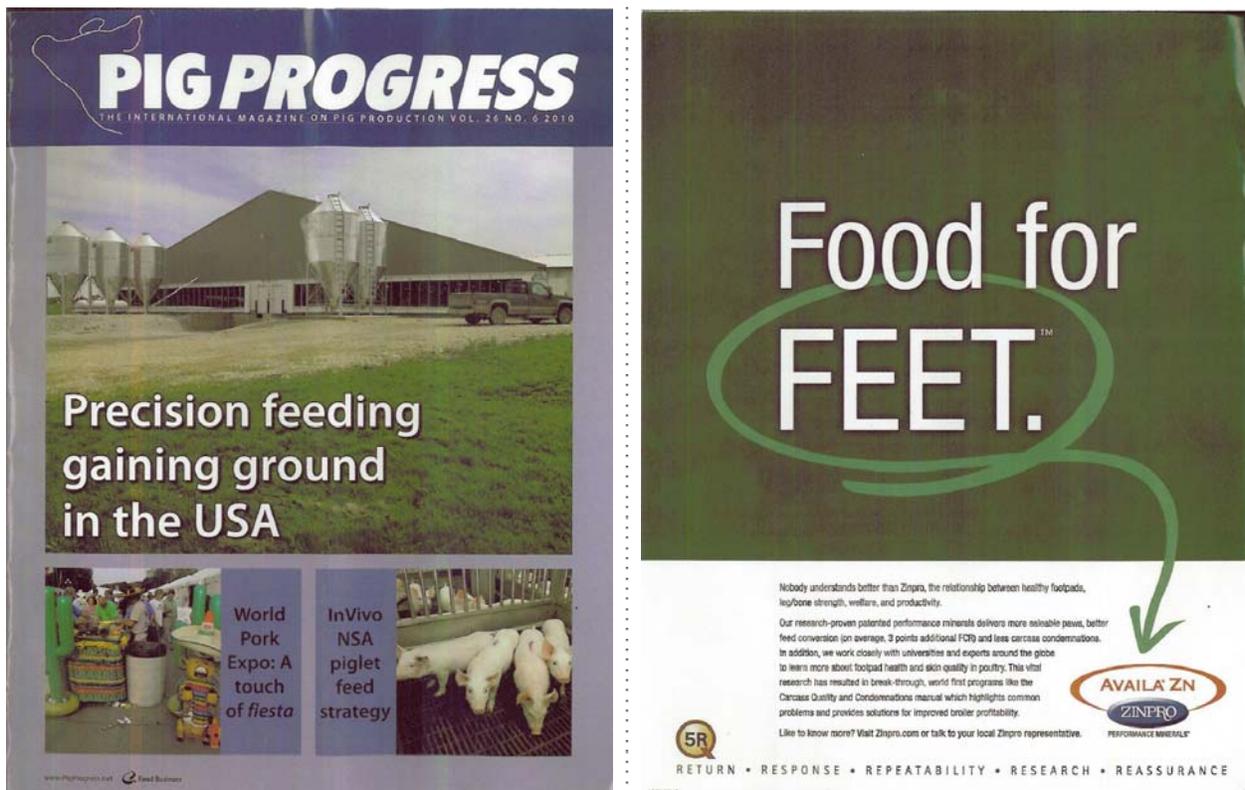
The examining attorney has issued a final refusal to register applicant’s mark on the ground that applicant has failed to comply with the requirement to submit

<sup>1</sup> Application Serial No. 85369372 was filed on July 12, 2011, based upon applicant’s claim of use anywhere and use in commerce since at least as early as October 2008.

an acceptable specimen demonstrating use of the mark as a service mark for the recited retail store services.

Applicant has appealed the final refusal, and the appeal has been fully briefed. We affirm the refusal to register.

The original specimen as filed with the application consisted of scanned images of the front page of *Pig Progress* magazine, and the back cover of the same periodical, showing a full page advertisement applicant placed for Zinpro's **FOOD FOR FEET** products designed to provide healthy feet in livestock animals, such as pigs:



The examining attorney required a new specimen, claiming that the original specimen was “nothing more than advertising copy.”<sup>2</sup>

<sup>2</sup> See First Office Action, August 31, 2011.

In its response to the examining attorney's initial refusal, applicant submitted (on October 26, 2011) six substitute specimens (dubbed "flyers" or "informational sheets") supported by the declaration of Felipe Navarro, the Director of Global Marketing for applicant, Zinpro Corporation:

**Feet First**

ZINPRO PERFORMANCE MINERALS

**Food for feet**

Lameness and its effects on swine welfare and production are widely underestimated in commercial operations. Be proactive, avoid significant production losses by lameness with a programme of Availa®Sow.

AVAILA SOW ZINPRO PERFORMANCE MINERALS

**Nutrients Essential For Better Feet**

Role of Micro-Nutrients	Zn	Mn	Cu
For joints, tendons and bone density		X	
For corium health and wound healing	X		
For connective tissue and white line health			X
For sole, heel and horn strength and elasticity	X		X

Manganese for joints, tendons and bone density

Zinc for corium health and wound healing

Copper for connective tissue and white line health

Zinc/Copper for sole, heel and horn strength and elasticity

© Zinpro Performance Minerals

**Availa®Sow**

Availa®Sow contains a combination of zinc, manganese and copper specifically formulated to help optimize foot health and lifetime reproductive performance of sows, gilts and boars. Featuring a unique, patented molecular structure, the trace minerals found in Availa-Sow offers superior bioavailability. This makes Availa-Sow a uniquely effective product for helping reduce claw lesions.

Recommended Feeding Rates: Feed at a rate of 850 grams per ton of complete feed.

AVAILA SOW ZINPRO PERFORMANCE MINERALS

For stronger, healthier feet and fewer claw lesions, we recommend Availa-Sow.

FOR MORE INFORMATION VISIT [www.zinpro.com/feetfirst](http://www.zinpro.com/feetfirst) or email [feetfirst@zinpro.com](mailto:feetfirst@zinpro.com)

**Food for FEET.**

AVAILA SOW ZINPRO PERFORMANCE MINERALS

SR RETURN • RESPONSE • REPEATABILITY • RESEARCH • REASSURANCE

**Food for FEET.**

AVAILA 4 ZINPRO PERFORMANCE MINERALS

SR RETURN • RESPONSE • REPEATABILITY • RESEARCH • REASSURANCE

**Food for FEET.**

AVAILA ZN ZINPRO PERFORMANCE MINERALS

SR RETURN • RESPONSE • REPEATABILITY • RESEARCH • REASSURANCE

**Food for FEET.**

AVAILA 4 ZINPRO PERFORMANCE MINERALS

Manganese for joints, tendons and bone elasticity

Zinc for corium health and wound healing

Copper for connective tissue and white line health

Zinc/Copper for sole, heel and horn strength and elasticity

ZINPRO PERFORMANCE MINERALS

www.zinpro.com

Mr. Navarro's declaration stated in relevant part, as follows:

3. Attached hereto are a series of FOOD FOR FEET flyers or informational sheets that are provided by Zinpro Corporation to its distributors and actual and potential customers that show FOOD FOR FEET and are intended to promote the primary benefit of use of the Zinpro products there described, and to help the animal owners and potential customer decide if he is in need of the FEET FIRST programs recommended products, such as AVAILA SOW.
4. The whole purpose of the flyers is to promote and assist our retail sales services to customers.

According to the examining attorney the substitute specimens are still unacceptable because the specimens do not show the applied-for mark, **FOOD FOR FEET**, in use as a service mark in "direct association" with retail store services.

Under the Trademark Act, an application must include "such number of specimens or facsimiles of the mark as used as may be required by the Director." 15 U.S.C. § 1051(a)(1). Specimens serve as evidence that applicant has used the mark in commerce. "Use in commerce" is defined, in pertinent part, as follows: "... For purposes of this chapter, a mark shall be deemed to be in use in commerce – (2) on services when it is used or displayed in the sale or advertising of services and the services are rendered in commerce ..." Trademark Act Section 45, 15 U.S.C. § 1127. A service mark is defined as any word, name, symbol, or device used "... to identify and distinguish the services of one person, including a unique service, for the services of others and to the source of the services ..." *Id.* The rule implementing the statute provides that a service mark specimen must show the mark as actually used in the sale or advertising of the services recited in the application. Trademark Rule 2.56(b)(2), 37 C.F.R. § 2.56(b)(2).

The examining attorney argues that none of the proffered specimens is acceptable because none shows the applied-for mark, **FOOD FOR FEET**, used in connection with the retail store services recited in the application. In fact, in support of his position that this mark is not being used to indicate the source of the retail store services recited in the application, the examining attorney uses applicant's own statements. Applicant confirms that the wording **FOOD FOR FEET** is being used in advertising and promotional materials for the *products* that it sells. The examining attorney suggests that applicant is operating "under the mistaken belief that because the applicant uses the proposed mark **FOOD FOR FEET** in advertising and promotional materials for the goods that it sells that this fact shows use of the mark as a service mark that indicates the source of the listed retail store services."

The examining attorney argues that it is immaterial whether or not applicant's sales representatives may use the advertising, flyers and/or information sheets to assist in selling the applicant's goods, because **FOOD FOR FEET** as used on the specimens makes no reference at all to the retail store services. The mere usage of any of these materials as a sales aid makes no direct association between **FOOD FOR FEET** and the retail store services in the application. There is no mention anywhere in the specimens of retail store services. Consequently, the examining attorney concludes that none of the specimens shows use of the proposed **FOOD FOR FEET** mark as a service mark for the applicant's retail store services.

Applicant responds that when one considers any of the substitute specimens together with the declaration of Felipe Navarro, there is a direct connection between the mark and Zinpro's retail store services.

Whether a mark has been used to identify a particular type of service is a question of fact. We look closely at the specimens and evaluate them in light of the other evidence of record and the practices of the trade.

Beyond advertisements, the "direct association" test has been applied in a variety of service mark settings. *See, e.g., Peopleware Systems, Inc. v. Peopleware, Inc.*, 226 USPQ 320 (TTAB 1985) (term **PEOPLEWARE** used within a byline on calling card specimen does not constitute service mark usage of that term, even if specimen elsewhere shows that applicant provides the recited services); *In re J.F. Pritchard & Co. and Kobe Steel, Ltd.*, 201 USPQ 951 (TTAB 1979) (the term **PRICO** is used only to identify a liquefaction process in brochure advertising the services and does not function as a mark, because there is no direct association between the mark and the offering of services); *In re Niagara Frontier Services, Inc.*, 221 USPQ 284, 285 (TTAB 1983) (**WE MAKE IT, YOU BAKE IT** only identifies pizza, and does not function as a service mark to identify grocery store services); and *In re British Caledonian Airways Ltd.*, 218 USPQ 737, 739 (TTAB 1983) (the term **SKYLOUNGER** identifies a seat in the first-class section of an airplane but it does not function as mark for air transportation services).

However, under some fact patterns, even if it is clear that the specimens of use do not contain a reference to the services, they are still deemed acceptable. For

example, a computer printout may simply display the mark without disclosing the services when the printout appeared on a computer terminal as the services are being rendered to the actual **GLOBAL GATEWAY** subscribers. *In re Metriplex Inc.*, 23 USPQ2d 1315 (TTAB 1992). This qualifies as a direct association. As to the required degree of specificity, the involved specimen does not have to spell out the specific nature and type of services. Rather, a general reference to the industry may be acceptable to create an association between the mark and the services. *See In re Southwest Petro-Chem, Inc.*, 183 USPQ 371, 372 (TTAB 1974) (service mark registration is not refused where record shows that applicant renders services to specific industries; there is no language in statute or rules which requires that specimens such as letterheads spell out the type of services rendered); and *In re Ralph Mantia Inc.*, 54 USPQ2d 1284, 1286 (TTAB 2000) (use on specimens of the word “design” alone is sufficient to create in minds of purchasers association between mark and applicant’s commercial art services).



In the case at bar, applicant’s declaration states that the purpose of these flyers “is to promote and assist our retail sales services to customers.” That is the most definitive statement anywhere in the record supporting the fact that applicant is even involved in retail store services. The flyers on which the applied-for mark appear make absolutely no reference to the “retail store services” recited in the application. Other than the implications we draw from the declaration, we have no

evidence of applicant's retail store services. *See, e.g., In re Monograms America Inc.*, 51 USPQ2d 1317, 1319 n.2 (TTAB 1999).

However, when a service mark is used in advertising services, the specimen must show an association between the mark and the services for which registration is sought in order to comply with the statutory requirement that the mark "identify and distinguish the services." A specimen that shows only the mark, with no reference to the services, does not show service mark usage. *In re wTe Corp.*, 87 USPQ2d 1536, 1541-42 (TTAB 2008) (the specimen suggests that applicant may be providing some type of goods or services, but it is not at all clear from applicant's specimen that it is providing the specific service for which it seeks registration). *See also, In re Duratech Industries Inc.*, 13 USPQ2d 2052 (TTAB 1989) (the bumper stickers submitted as specimens provide no reference whatsoever to the association services of promoting the interests of persons who denounce the practice of drinking and driving).



The "direct association" test does not create an additional or more stringent requirement for registration. Rather, a direct association "is implicit in the statutory definition of 'a mark used ... to identify and distinguish the services of one person ... from the services of others and to indicate the source of the services.'" *In re Advertising & Marketing Development Inc.*, 821 F.2d 614, 2 USPQ2d 2010, 2014 (Fed. Cir. 1987), quoting, Trademark Act Section 45, 15 U.S.C. § 1127.

In short, whether we focus on applicant's magazine advertisement, its flyers or information sheets, the promotional material must show use of the applied-for

mark in a manner that would be perceived by purchasers as identifying the source for the applicant's services. Essentially, the examining attorney is requiring that the specimens expressly promote applicant's retail store service, or some synonymous terminology.

Based on this record, we cannot be sure applicant even has a retail store where it offers retail store services. We certainly cannot infer that from the vague allegations in the declaration of record. There is nothing inherent in the mark itself that would lead purchasers to view the proposed mark as anything but advertising copy for applicant's products. Moreover, as the mark is presented on these specimens, it does nothing more than identify the goods themselves.

While these specimens may well promote the benefits to potential customers of applicant's various mineral supplements for livestock and poultry, they are not examples of service mark usage. Purchasers would not also directly understand and perceive the mark, as it appears on the flyer, to be a source-indicator for the retail store services themselves.

Even if we were to presume that applicant may provide retail store services, analogizing to the prototypical "product mark" for a particular item in a retail store (e.g., on a label or tag affixed to the goods, or even on a display associated with the goods), such trademark usage is not necessarily also a service mark for the retail store services themselves, merely by virtue of the fact that the mark may be used and encountered in the store, and that the consumer can purchase the goods bearing the mark in the store. That is, a generalized association in the purchaser's

mind between the product mark and the retail store services does not suffice as the requisite “direct association” between the mark and the services which would make the asserted mark a service mark for the retail store services themselves. *See In re Brown & Portillo Inc.*, 5 USPQ2d 1381, 1383-84 (TTAB 1987) (**HEARTY BASKET** from menu board serves only to identify an entree available in the restaurant, but fails to identify any service, and hence, applicant has not met the statutory requirements for service mark registration).

Accordingly, we find that applicant has failed to submit an acceptable specimen establishing that the asserted mark functions as a service mark in connection with applicant’s retail store services. We have carefully considered all of applicant’s arguments to the contrary (including those not specifically discussed in this opinion), but we are not persuaded by them.

**Decision:** The refusal of registration on the ground that not one of applicant’s specimens shows use of the mark for the identified services is hereby affirmed.