

for “financial analysis and consultation” in International Class 36.¹ The description of the proposed mark states: “The mark consists of the term ‘XXX.XX’ forming a pattern of overlapping circles. The design consists of a distinctive arrangement of numerical financial data. Each ‘X’ in the design represents a single digit integer, for example, 0, 1, 2, 3, 4, 5, 6, 7, 8 or 9.”

The Trademark Examining Attorney has refused registration of Applicant’s proposed mark under Trademark Act Sections 1 and 45, 15 U.S.C. §§ 1051 and 1127, for seeking registration of more than one mark.

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed. We affirm the refusal to register.

I. Evidentiary Issue

In denying reconsideration, the Examining Attorney argued that the commercial impression would change based on the integers used in the proposed mark, and provided some hypothetical examples.² On appeal, Applicant has provided, as Exhibit

¹ Application Serial No. 86104779 was filed on October 29, 2013, based upon Applicant’s allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). Color is not claimed as a feature of the mark.

² In arguing that different commercial impressions can be created by the missing information, the Examining Attorney stated: “For example, if all the xxx.xx were replaced with 111.11, then the commercial impression is vastly different than 666.66. Or if the left half were replaced with 000.00 and the right half replaced with 111.11, then consumers would also have the commercial the [sic] impression of the numbers ‘0’ and ‘1’ rather than the commercial impression of an oval. Or the numbers could be replaced with the numbers ‘222.22’ ‘000.00’ ‘111.11’ ‘555.55’ which would leave the commercial impression of the year.” 5 TTABVUE 3. The citations to “TTABVUE” throughout the decision are to the Board’s public online database that contains the proceeding file, available on the USPTO website,

1, a visual representation of these examples proposed by the Examining Attorney in her denial of reconsideration. The Examining Attorney did not object to this exhibit and has provided substantive arguments addressed to this exhibit in her appeal brief. Therefore, we have considered the exhibit of record. *See e.g., In re Homeland Vinyl Products Inc.*, 81 USPQ2d 1378, 1381 n.5 (TTAB 2006) (declarations submitted for first time with applicant's appeal brief treated of record because examining attorney did not object and addressed the evidence on the merits).

II. Applicable Law

A trademark application may only seek to register and must be limited to a single mark. Section 1(a)(1) of the Trademark Act, 15 U.S.C. § 1051(a)(1); Trademark Rule 2.52, 37 C.F.R. § 2.52. *See In re International Flavors & Fragrances Inc.*, 183 F.3d 1361, 51 USPQ2d 1513 (Fed. Cir. 1999), and authorities cited therein. A mark that contains a changeable or “phantom” element is considered to be more than one mark and, as such, does not provide proper notice to other trademark users. *Id.* at 1517. Generally, a mark with a changeable or “phantom” element is not registrable. *Id.* at 1518; *In re Primo Water Corp.*, 87 USPQ2d 1376, 1378 (TTAB 2008). However, a mark with a changeable element may be registrable if the changeable or “phantom” element is limited in terms of the number of possible variations, such that the drawing provides adequate notice as to the nature of the mark. *Cf. In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 1347-48, 57 USPQ2d 1807, 1812-13 (Fed. Cir. 2001)

www.USPTO.gov. The first number represents the prosecution history number listed in the electronic case file and the second represents the page number(s).

(the “phantom” mark (212) M-A-T-T-R-E-S, considered registrable where the changeable element “212” was “an area code, the possibilities of which are limited by the offerings of the telephone companies”).

III. Discussion and Analysis

The Examining Attorney’s position is that Applicant is seeking to register more than one mark because the “X” in Applicant’s drawing refers to a changing single digit integer (whole number) where “each change of ‘X’ would result in a different mark.” The Examining Attorney argues that “the numbers [that would be inserted for “X” in the drawing] can range from 000.00 to 999.99 and everything in-between” and “could be randomly selected or could be a pattern such as ‘222.22 000.00 111.11 666.66’” and such combinations are limitless.³ The Examining Attorney submits that “it would be impossible to search all the possible combinations” because “[t]he number of possible scenarios is too great” and sufficient notice to the public cannot be provided because the “mark can change with the insertion of a different integer.”⁴

Applicant, on the other hand, argues that its mark is not a phantom mark because the “coordinates of the [changeable integer] element [in the mark] create the oval design” and “notwithstanding the specific integers which may appear within applicant’s oval, the oval and the visual pattern within the oval remain fixed.”⁵ Applicant analogizes the changeable integers, represented as XXX.XX in the drawing,

³ 9 TTABVUE 4-5.

⁴ 9 TTABVUE 5.

⁵ 7 TTABVUE 4.

to pixels, arguing that, in accordance with the principles of micrography or text art, the integers are always located at the same coordinates within the oval, the spaces or voids between the rows of integers do not change, and that the possibilities created by the missing integers are limited.⁶ Applicant submits that it is seeking registration of a single mark for which the overall commercial impression is a fixed oval design as the integers constitute text art.⁷ Applicant further contends that the fixed oval design provides sufficient notice to the public of the scope of the mark, allowing third parties to effectively search a fixed oval under the Office's designated design codes for oval designs.⁸ Applicant disputes the Examining Attorney's assertion that the numbers in the mark would be random or in a pattern, pointing to its description of the mark which provides for a "distinctive arrangement of numerical financial data."⁹

Looking at the description of the proposed mark submitted by Applicant, it is apparent that Applicant's proposed mark refers to more than one mark. Although the numbers will be organized within the proposed mark along certain coordinates, there are no restrictions as to the numbers used or combination of numbers used, or the manner in which the numbers 0-9 can be displayed within the oval. For example, the numbers 0-9 can be any color, any font-style (normal, italic or bold) or any font-type (san-serif, serif, script, or decorative), and while the coordinates of the numbers remain fixed, the orientation of the numbers could be in normal position or upside

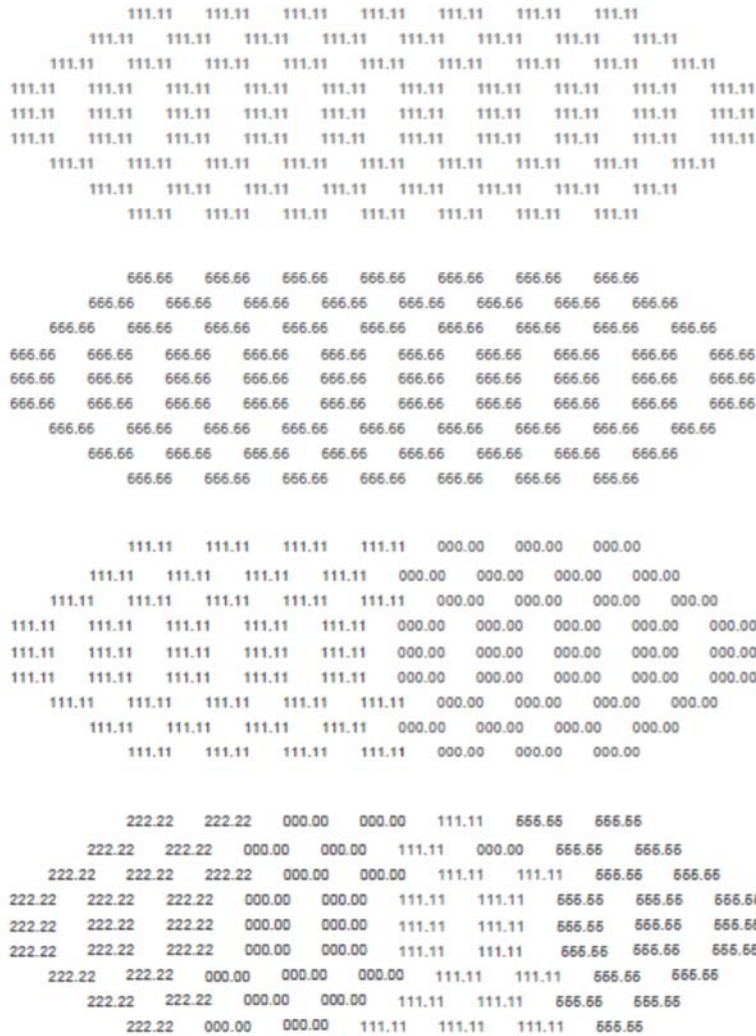
⁶ 7 TTABVUE 4-5.

⁷ 7 TTABVUE 4-5, 7.

⁸ 7 TTABVUE 10-11.

⁹ 10 TTABVUE 4.

down position. The commercial impression of the proposed mark will change depending on the numbers used, repeating and/or in combination, font-style, font-type, or color (or a mix of font-styles, font-types or colors) in connection with identical or varied number-strings (XXX.XX) within the oval, with resultant areas within the oval being more prominent than the oval itself. Even without a mix of font-styles, font-types or colors, the use of certain number-strings in the same font can create a different commercial impression, as illustrated by the hypothetical examples of the Examining Attorney generated by Applicant in Exhibit 1, which contain either mixed or identical integer-strings:



In the first and second examples, (identical number-strings used throughout) the ovals have different commercial impressions resulting from the use of the number-string 111.11 versus 666.66, as the oval with 666.66 appears darker (bold) than the oval with the 111.11 number-string (not bold). As can be seen by the third and fourth examples which use mixed number-strings, certain areas of the oval are more prominent based on the location of the numbers used in the number-string, resulting in different areas of the oval being emphasized; some areas are more prominent while

other areas are more recessed, all of which creates different resultant patterns and commercial impressions. Simply by using certain number-strings, Applicant can create a varying commercial impression; the number-strings could be used in such a way to create prominent and recessive sections within the oval so as to create a design, and the design may not be perceived as simply a fixed oval or interlocking ovals as stated in the description of the mark. This is particularly the case inasmuch as the proposed mark, as described, consists of a “distinctive arrangement of numerical financial data” that may be subject to change. Thus, while the overall oval design may remain as a background carrier, the oval design itself might be lost if different patterns result from the choice of integer-strings within the oval as well as the font-type, font-style, or color used.

We find this case similar to that of *In re Hayes*, 62 USPQ2d 1443 (TTAB 2002), in which the Board affirmed a refusal to register a rectangular color-block mark that was described as consisting of the colors green, amber and red with no claim to any particular pattern of the three colors. The applicant in *Hayes* had argued that the mark should be considered a single mark as long as all variations fit within the characterization of the description. However, the Board found the applicant was attempting to register a variety of patterns in a single application with different commercial impressions which could include a grid pattern of all green squares, a grid pattern of alternating red, amber and green squares, a grid pattern of red, green and amber forming a checkerboard, and a grid pattern of red, green and amber to form a flag. The Board found that “applicant’s attempt to register all permutations of

green, amber and red squares in a grid would make an effective search impossible” and was an attempt to register multiple marks in a single application. *Id.* at 1446.

Similarly, in the present case, Applicant is attempting to register an oval shaped mark containing an unlimited number of integer-string variations within a particular pattern. Although Applicant argues that the dominant element is the fixed oval, we find that the ability to change the number-strings within the oval (as well as the ability of Applicant to use any particular font-type, font-style, or color) results in more than one mark. The patterns created by the choice of integer-strings result in different commercial impressions, such that adequate notice to the public and the ability to conduct a thorough search is not possible.

IV. Conclusion

We find that Applicant’s proposed mark contains a changeable element, resulting in an application for more than one mark, and thus registration is prohibited under Trademark Act Sections 1 and 45, 15 U.S.C. §§ 1051 and 1127.

Decision: The refusal to register is affirmed.