

This Opinion is not a  
Precedent of the TTAB

Oral Hearing: August 11, 2020

Mailed: September 21, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Charlie's Enterprises*  
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Serial No. 88200043  
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Michael Helsley of Wanger Jones Helsley PC,  
for Charlie's Enterprises

Tejbir Singh, Trademark Examining Attorney, Law Office 106,  
Mary Sparrow, Managing Attorney.

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Before Shaw, Goodman and Coggins,  
Administrative Trademark Judges.

Opinion by Goodman, Administrative Trademark Judge:

Charlie's Enterprises, d/b/a/ OK Produce ("Applicant") seeks registration on the

Principal Register of the mark  for "Peas, fresh;  
Vegetables, fresh" in International Class 31.<sup>1</sup>

<sup>1</sup> Application Serial No. 88200043 was filed on November 19, 2018 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based upon Applicant's claim of first use anywhere and use in commerce since at least as early as July 1, 2018. The word "PRODUCE" and "THE PICTORIAL REPRESENTATION OF PEAS" are disclaimed. The description of the mark states: "The mark consists of pea pods with some pods open in dark green and light green. To the right is the slogan 'Just say Peas!' in light green. To the right is the stylized wording 'OK'

The Trademark Examining Attorney has refused registration of Applicant's mark under Trademark Act Sections 1 and 45, 15 U.S.C. §§ 1051 and 1127, and Trademark Rules 2.34(a)(1)(iv) and 2.56(a), 37 C.F.R. §§ 2.34(a)(1)(iv) and 2.56(a), on the basis that the specimen does not show the applied-for mark in use in commerce in connection with any of the International Class 31 goods specified in the application and on the basis that the specimen of use is not a substantially exact representation of the drawing.

After the Trademark Examining Attorney made the refusal final, Applicant appealed to this Board. An oral hearing was held. We affirm the refusals to register.

#### I. Evidentiary Issue

Preliminarily we address an evidentiary matter. After the filing of its appeal brief, Applicant filed a substitute specimen. The Examining Attorney objected to the substitute specimen as untimely. Examining Attorney's brief, 8 TTABVUE 7.

Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d), provides, in relevant part, that the record should be complete upon filing of the appeal, and if either an applicant or the examining attorney desires to introduce additional evidence, the procedure to do so is a request for remand, which was not done here. Applicant's submission of an

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in light blue and dark blue, with the top right of the letter 'K' in dark green with a leaf design. Below this is the term 'PRODUCE' in dark green." The colors light green, dark green, light blue and dark blue are claimed as a feature of the mark.

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.

alternate specimen was untimely filed.<sup>2</sup> The Examining Attorney's objection is sustained, and Applicant's alternate specimen has not been considered.

## II. Specimen Refusals

A. The specimen does not show use in connection with the identified goods.

Applicant submitted the following specimen with its application (filed November 19, 2018) and resubmitted the same specimen on August 22, 2019, in its response to the office action:



In its TEAS application, Applicant described its original specimen as “[a] picture of the trademark phrase in use as a trailer wrap.” Applicant resubmitted the same

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<sup>2</sup> Applicant could have filed a request for reconsideration simultaneously with the appeal and submitted the substitute specimen at that time. Although Applicant checked off the box on the ESTTA form that a request for reconsideration was filed with the appeal, Applicant actually did not seek reconsideration.

specimen in its August 22, 2019 response and identified the specimen as consisting “of a picture of the phrase in use as a trailer wrap. ... Applicant originally submitted a picture showing the mark on the side of a trailer used to transport the goods in commerce.” August 22, 2019 Response to Office Action at TSDR 1.

Applicant also argued that this type of specimen is acceptable to demonstrate use of the mark in commerce because it is considered commercial packaging for the goods, referencing the case, *In re E.A. Miller & Sons Packing Co.*, 225 USPQ 592 (TTAB 1985). *Id.*

In its appeal brief, Applicant states that “it does not sell fruit or vegetables,” its “business has nothing to do with selling its own fruit,” and that it “is a broker who delivers other business’s fruit and vegetables.” Applicant’s brief, 5 TTABVUE 3, 4. Applicant elaborates that as a broker it “stores fruits and vegetables in the warehouse until they are ready to be delivered in OK Produce trucks to retail stores.” *Id.* at 3. Applicant also mentions that the USPTO has approved prior truck wrappings as specimens of use for these goods. *Id.*

The Examining Attorney argues that

Based on Applicant’s own statement, Applicant is not providing fruit and vegetables as a product, but is instead providing brokerage, storage, distribution, and related services in the field of fruits and vegetables. The provided specimen could not and does not demonstrate a connection between the mark and Applicant’s goods because Applicant itself has now stated in the record that it is providing services, not goods. Examining Attorney’s brief, 8 TTABVUE 4.

The Examining Attorney also argues that “even if Applicant were providing goods rather than services, the specimen would remain unacceptable” because Applicant

has not established that “trailer wrap” is the normal mode of use of a mark for the identified goods and “any connection between the mark on the truck trailer and the goods is tenuous and unclear.” *Id.* at 5. The Examining Attorney points to the evidence in the record that shows that common packaging for fruits and vegetables is a label or wrapper on the produce itself. September 5, 2019 Response to Office Action at TSDR 2-8.

Under Section 45 of the Trademark Act, 15 U.S.C. § 1127, a trademark is used in commerce when “it is placed in any manner on the goods or their containers or the displays associated therewith or on the tags or labels affixed thereto, or the nature of the goods makes such placement impracticable, then on documents associated with the goods or their sale ....” See Trademark Rule 2.56(b)(1), 37 C.F.R. § 2.56(b)(1) (“A trademark specimen is a label, tag, or container for the goods, or a display associated with the goods. The Office may accept another document related to the goods or the sale of the goods when it is impracticable to place the mark on the goods, packaging for the goods, or displays associated with the goods.”).

In assessing the specimens, consideration must be given not only to the information provided by the specimen itself, but also to any explanations offered by an applicant clarifying the nature, content, or context of use of the specimen that are consistent with what the specimen itself shows. *See e.g., In re Osterberg*, 83 USPQ2d 1220, 1224 (TTAB 2007) (finding that applicant’s mere statement in a signed declaration that copies of the web page were distributed at sales presentations lacked sufficient detail to transform the web page from an advertisement into a display

associated with the goods). Thus, in assessing the acceptability of materials which have been submitted as specimens of use, the facts and surrounding circumstances must be fully evaluated to determine the acceptability of the preferred specimens.<sup>3</sup>

A specimen showing use of the trademark on a vehicle in which the goods are marketed to the relevant purchasers may constitute use of the mark on a container for the goods, if this is the normal mode of use of a mark for the particular goods. Trademark Manual of Examining Procedure (TMEP) Section 904.03(c) (October 2018). In *E.A. Miller & Sons*, the Board found that

[T]he trademark purpose is fulfilled when the wholesaler accepts delivery of appellant's beef from the refrigerated trailer plainly marked MILLER'S OF UTAH BLUE RIBBON BEEF on the exterior panel of the trailer. Both the function of identifying source and the guarantee function of the trademark are fulfilled in the transaction at this point in the same way as terms function as trademarks when placed on exterior packages of products ordered out of a mail order catalogue. The attachment by means of painting on the exterior panels of the trailer is reasonably permanent, visible, and placed so that the purchasers of appellant's goods can readily identify the origin of the butchered beef. . . . There is little question that appellant's refrigerated trailers serve primarily as transportation and secondarily as storage of its goods under refrigeration, . . . where the container, the refrigerated trailer, is an essential part of the total marketing transaction between appellant and the purchasers of its butchered beef.

225 USPQ at 597-99.

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<sup>3</sup> Although Applicant mentions the approval of other applications showing use in connection with trailer wrap, each case must be decided on its own set of facts. *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001). Prior determinations of registrability by Examining Attorneys, involving different marks for the same or similar goods, are not controlling in this case.

The Examining Attorney's evidence shows that common packaging for fruits and vegetables is a label or wrapper on the produce itself, and Applicant has not established that a trailer with a wrap is a common manner of use of a trademark for fresh vegetables or fresh peas. Moreover, Applicant indicates that it stores, maintains, and delivers the goods, but it does not take ownership of the goods, which always remain the property of the growers or their customers.

Applicant's dominion over the goods is that of a bailee confined to the specific task to store, maintain and transport the goods, without title passing to Applicant. Such use of the mark in connection with the refrigerated trailer with a wrap would not be trademark use in connection with the goods because the container used for transportation has no part to play in the trade or marketing of the produce. This informs the analysis, and differs considerably from the situation in *E. A. Miller & Sons* 225 USPQ at 598-99 (valid trademark usage for container for goods where the transportation was deemed part of the marketing transaction between seller and purchaser).

Therefore, we conclude that Applicant's trailer wrap specimen is not acceptable to show trademark use on fresh vegetables and fresh peas.

B. The specimen and the drawing do not match.

Applicant's mark and the submitted specimen are shown below:



The Examining Attorney has refused registration on the basis that “the specimen does not match the drawing of the mark” “as the lettering on the far right of the drawing does not actually appear on the specimen” and is not a substantially exact representation of the mark.

The Examining Attorney states that

The drawing displays the mark as JUST SAY PEAS! OK PRODUCE with a stylized design of peas. The specimen displays the mark as JUST SAY PEAS! with a stylized design of peas. The mark on the specimen includes the letter “O,” and the letters “PRO,” but the remaining letters on the specimen image are not legible as the specimen image has been cut-off. The mark on the specimen does not match the mark in the drawing because the OK PRODUCE wording has been partially omitted on the specimen. Examining Attorney’s brief, 8 TTABVUE 6-7.



In its brief, Applicant acknowledges that the wording was “inadvertently cut off in the picture of the specimen that was submitted.” Applicant’s brief, 5 TTABVUE 4. Applicant sought to correct this omission by submitting a substitute specimen at the appeal stage, but as previously indicated, this submission was untimely.

Thus, the question presented is whether the mark as used on the specimen is a “substantially exact representation” of the mark in the drawing. Trademark Rule 2.51(a), 37 C.F.R. § 2.51(a), provides that, in an application under Section 1(a) of the Trademark 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.” The term “substantially” in the trademark rule permits only inconsequential variation from the mark as it appears on the drawing (e.g., nonmaterial informational matter). *In re Hacot-Colombier*, 105 F.3d 616, 41 USPQ2d 1523, 1526 (Fed. Cir. 1997).

Due to a portion of the wording in the mark being omitted from the photograph of the specimen submitted showing use of the mark, the specimen is not a substantially

exact representation of  , the mark sought to be registered.

**Decision:** The Section 1 and 45 specimen refusals are affirmed.