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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **Petcraft, Inc.**

Serial No. 75/380,120

Robert J. Schaap for **Petcraft, Inc.**

Kim Saito, Trademark Examining Attorney, Law Office 109
(**Ron Sussman**, Managing Attorney).

Before **Simms**, Cissel and Bottorff, Administrative Trademark
Judges.

Opinion by **Simms**, Administrative Trademark Judge:

Petcraft, Inc. (applicant), a California corporation,
has appealed from the final refusal of the Trademark
Examining Attorney to register the mark DOG BAGGIES for
goods originally described as disposable bags specifically
adapted to enable pick up and ready disposal of animal
feces.¹ The Examining Attorney has refused registration
under Section 2(d) of the Act, 15 USC §1052(d), and has

¹ Application 75/380,120, filed October 27, 1997, based upon an
allegation of a bona fide intent to use the mark in commerce.

issued a requirement that applicant further identify its goods, as well a requirement to disclaim the word "DOG" apart from the mark as shown. Applicant and the Examining Attorney have submitted briefs, and applicant requested an oral hearing. However, applicant's attorney did not appear for the oral argument, so no hearing was held.

We affirm.

Identification of Goods

Initially, the Examining Attorney required applicant to indicate whether its disposable bags were made of paper or plastic. In response, applicant amended its goods to the following:

Hand-held devices capable of being fitted upon a hand of a user for engaging, picking up and temporarily holding animal feces for later disposal and which are formed of flexible and bendable sheet material.

In response, the Examining Attorney stated that the proposed amendment was unacceptable because the wording designates goods which are not within the scope of the identification set forth in the original application. More particularly, the Examining Attorney stated that the terms "devices" and "engaging and temporarily holding animal feces for later disposal" have expanded the scope of the goods set forth in the original application. Thereafter, applicant submitted another proposed amendment as follows:

Hand-held disposable, hand-insertable receptacles made of plastic or paper and specifically adapted to enable pick up and ready disposal of animal feces.

With respect to this proposed amendment, it is the Examining Attorney's position that the word "receptacles" is indefinite and not within the scope of the original description of goods.

Applicant contends that its goods are not merely bags.

The goods under which the instant mark is used may initially adopt the form of a disposable plastic bag, similar to a sandwich bag, but they are modified beyond that of a sandwich bag. Each of the goods are [sic] actually adapted to be worn on the hand of a user. Admittedly, a user could insert his or her hand into a disposable plastic sandwich bag. However, the bag devices of the instant application are readily turned inside out and are provided with a material, such as a gauge-like material², at a lower end adapted to engage and pick-up the animal feces. In this way, the user will not experience the rather objectionable experience of actually engaging an animal feces. Moreover, this gauge-like material actually holds the animal feces, such that when the bag is turned inside out, the feces are retained on the inside and held by the gauge-like material. Moreover, any moisture which is contained in the animal feces is not imparted to the user's hand.

In addition to the foregoing, the device of the present application can adopt other forms, such as glove-like devices and the like. Consequently, it is urged that the

² It is not clear to the Board what this means. We presume that applicant intended "gauze-like material."

device is not merely a bag as the Examining Attorney would appear to suggest.

Amendment filed September 21, 1998, p. 4.

The Examining Attorney's requirement for a more definite description of goods and his holding that the amended goods are beyond the scope of the originally described goods are well taken for the reasons given by the Examining Attorney. See pp. 6-8 of Examining Attorney's appeal brief. See also TMEP §804.09. This requirement is affirmed. For the purposes of our decision, we will consider applicant's goods to be disposable bags made of either paper or plastic specifically adapted to enable pick up and ready disposal of animal feces.

Disclaimer

The Examining Attorney has taken the position that the word "DOG" should be disclaimed because it is merely descriptive of the purpose or use of applicant's goods. With respect to this requirement, we note that applicant failed to address this requirement in its appeal brief. We view applicant's failure to brief this issue as a concession of the matter in question. See *In re Big Daddy's Lounges Inc.*, 200 USPQ 371, 373 (TTAB 1978). We hasten to add, however, that even if we considered this issue on brief, we would nevertheless affirm the

requirement because this word is merely descriptive of the function or use of applicant's goods. Accordingly, the requirement for a disclaimer of this word is also affirmed.

Likelihood of Confusion

The Examining Attorney has refused registration under Section 2(d) of the Act on the basis of Registration No. 613,322, issued October 4, 1955 (second renewal) covering the mark BAGGIES for "bags made of flexible transparent sheeting, for general utility wrapping and storing purposes." It is the Examining Attorney's position that applicant's mark merely adds the descriptive word "DOG" to the registered mark, which addition is not sufficient to overcome the likelihood of confusion. With respect the goods, it is the Examining Attorney's position that registrant's goods are not limited to food storage uses but may be used for the same purpose as applicant's goods. In this regard, the Examining Attorney has made of record numerous excerpts from the Nexis computer database which show that both plastic and paper bags have been used for the purpose of disposal of animal feces.

Applicant argues, on the other hand, that there will be no confusion between applicant's mark and registrant's "strong and distinctive" mark. Appeal brief, p. 8. Concerning the goods, applicant contends that registrant's

goods are bags used for general purpose wrapping and the temporary storage of food, while applicant's goods are for the disposal of animal feces and may have a cloth or fabric element to them. Moreover, applicant contends that its goods are or will be sold with other pet supplies to different purchasers.³ Accordingly, applicant contends that the goods of applicant and registrant are sufficiently different to avoid any likelihood of confusion.

Upon careful consideration of this record and the arguments of the attorneys, we agree with the Examining Attorney that confusion is likely. Concerning the marks, applicant has merely added the descriptive word "DOG" to what applicant admits is registrant's "well-known" mark. There is no question that the term BAGGIES in applicant's mark DOG BAGGIES is the more dominant and significant origin-indicating feature of the mark. In re National Data Corp., 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). Also, applicant has acknowledged the renown of the registered mark, which is entitled to more protection in view of its strength. Kenner Parker Toys Inc. v. Rose Art Industries Inc., 963 F.2d 350, 22 USPQ2d 1453 (Fed. Cir. 1992). While the applicant's bags may be specifically adapted to pick up

³ Applicant does admit, however, that homeowners may use both applicant's and registrant's goods.

Serial No. 75/380,120

and dispose of animal feces, the evidence demonstrates that plastic bags, or goods very similar to registrant's bags for storage and wrapping, may be used for the same purpose. Also, these goods are relatively inexpensive and may well be purchased by the same ordinary consumers. In this regard, there is no limitation on the channels of trade of applicant's goods, and they may be sold in the same grocery stores and other retail stores as registrant's goods. A purchaser, aware of registrant's well-known BAGGIES brand bags, who then encounters applicant's DOG BAGGIES disposable bags intended for the disposal of animal feces, is likely to believe that these goods come from the same source, because of the similarities of the marks.

Serial No. 75/380,120

Decision: The refusals of registration on the basis of the requirements of the Examining Attorney are affirmed; the refusal of registration under Section 2(d) is also affirmed.

R. L. Simms

R. F. Cissel

C. M. Bottorff
Administrative Trademark
Judges, Trademark Trial
and Appeal Board