

THIS DECISION IS NOT
CITABLE AS PRECEDENT
OF THE TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Amera Wildflower Rizk

Serial No. 75537891

Amera Wildflower Rizk, pro se.

Martha Santomartino, Trademark Examining Attorney, Law
Office 112 (Janice O'Lear, Managing Attorney).

Before Quinn, Hohein and Drost, Administrative Trademark
Judges.

Opinion by Quinn, Administrative Trademark Judge:

An application was filed by Amera Wildflower Rizk,
also known as Wildflower, to register the mark shown below



for services ultimately identified as "modeling for
advertising or sales" (in International Class 35) and

"entertainment: music, drama and modeling for artists" (in International Class 41).¹

The Trademark Examining Attorney refused registration on three grounds, namely, (i) that the proposed mark fails to function as a service mark under Sections 1, 2 and 45 of the Trademark Act; (ii) that applicant's substitute drawing constitutes a material alteration, and that applicant failed to comply with the requirement to reinstate the original drawing; and (iii) that applicant failed to submit acceptable specimens showing use of the mark sought to be registered for the services identified in the application.

When the refusal and the requirements were made final, applicant appealed. Applicant and the Examining Attorney have filed briefs. Although applicant requested an oral hearing, a hearing was not held due to the Board's inability to contact applicant to schedule a hearing. In an order dated January 14, 2004, mailed to applicant's address of record (the order was not returned to the Board as undeliverable), the Board indicated that several attempts to contact applicant to schedule an oral hearing were unsuccessful. The Board therefore indicated that the case was submitted for decision on the briefs.

¹ Application Serial No. 75537891, filed June 29, 1998, alleging first use in 1982 and first use in commerce in June 1990.

Before proceeding to the merits of this appeal, a few brief comments are in order. This application evidences a protracted prosecution history, due, in large part, to the fact that applicant has acted pro se. Applicant's correspondence tends to show a relative lack of understanding of trademark law and of the Office's role in the process of Federal registration of a trademark. Although applicant may possess certain trademark/service mark rights, we must decide the registrability of the specific mark applied for (and not of any other marks to which applicant may have rights), and we make this assessment based on the record submitted during prosecution.

Failure to Function as a Service Mark

Applicant's mark, as originally sought to be registered, is the one reproduced above in this decision. The mark consists of a pictorial representation of a walking/posing female, apparently the likeness of applicant, standing on top of a box (which appears to be lined for color) containing the wording, in stylized form, "Amera Wildflower Rizk."

Over the course of the prosecution of her application, applicant submitted numerous materials which were characterized as "specimens" showing "the mark" as actually

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used in commerce. Not a single specimen shows the specific mark sought to be registered. The specimen showing the closest approximation of the mark is a publicity photograph/flier. This photograph/flier shows three different photographs of applicant, along with certain information about applicant. One of the photographs shows applicant striking a pose, with a leather jacket dangling from her left hand, with the name "Wildflower" immediately below the photograph. Inasmuch as it is this use which comes closest to showing the mark sought to be registered, we will focus on this use to determine whether the purported mark is being used in the manner of a service mark.

To function as a service mark, a designation must be used in a manner that would be perceived by purchasers as identifying and distinguishing the source of the services recited in the application. Further, the name or design of a character or person does not function as a service mark unless it identifies and distinguishes the services in addition to identifying the character or person. See: TMEP § 1301.02(a)(3rd ed. 2003).

Under Section 45 of the Trademark Act, the term "service mark" means any word, name, symbol, or device, or any combination thereof used by a person to identify and

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distinguish the services of one person, including a unique service, from the services of others and to indicate the source of the services, even if that source is unknown. Thus, as noted above, a name or design of a person or character does not function as a service mark unless it identifies and distinguishes services in addition to identifying the person or character. TMEP § 1301.02(b). If the name or design is used only to identify the person or character, it is not registrable as a service mark. In re Hechinger Investment Co. of Delaware Inc., 24 USPQ2d 1053 (TTAB 1991). Similarly, personal names (actual names and pseudonyms) of individuals function as marks only if they identify and distinguish the services recited and not merely the individual. In re Mancino, 219 USPQ 1047 (TTAB 1983). The name or design of a person or character is registrable as a service mark if the record shows that it is used in a manner that would be perceived by purchasers as identifying the services in addition to the person or character. In re Florida Cypress Gardens Inc., 208 USPQ 288 (TTAB 1980).

In the present case, we believe that the proposed mark, as used on the specimens, would not be perceived as a service mark for any of the services rendered by applicant, namely modeling or entertainment services. Rather, the

proposed mark would be seen only as a publicity or promotional photograph of the applicant. The photograph only serves to identify applicant herself as a personality. There is no reference to any of the services recited in the application. Simply put, the applied-for mark would not be perceived as anything more than a publicity photo of applicant herself; consumers would not perceive the design as identifying and distinguishing applicant's modeling and entertainment services from those of others.

Inasmuch as the applied-for mark fails to function as a service mark for the services listed in the application, the refusal to register on such ground is affirmed.

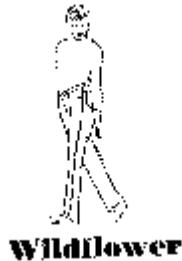
Drawing

In an application filed under Section 1(a) of the Trademark Act, the drawing of the mark must be a substantially exact representation of the mark as used in connection with the services, as shown by the specimens. Trademark Rule 2.51(a). When the mark on the drawing does not agree with the mark on the specimens, the applicant cannot amend the drawing of the mark if the amendment would materially alter the mark on the original drawing. Trademark Rule 2.72(a).

In the present case, the original drawing of the mark did not constitute a substantially exact representation of

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the mark as used in connection with the services. The original drawing consisted of the pictorial representation of applicant and her entire name, "Amera Wildflower Rizk," whereas the specimen showed use of the female figure along with the name "Wildflower." Further, applicant's attempt to amend the drawing, showing the same pictorial representation together with the name "Wildflower" only (in a different form of stylization as shown below), in order to conform the drawing with the specimen, constitutes a material alteration of the original drawing.



An amended drawing of a mark must contain what is the essence of the original mark, and the new form must create the impression of being essentially the same mark. The general test of whether an alteration is material is whether the mark would have to be republished after the alteration in order to fairly present the mark for opposition. If republication would be required, then the amended mark would be tantamount to a new mark appropriate for a new application. In re Hacot-Columbier, 105 F.3d

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616, 41 USPQ2d 1523, 1526 (Fed. Cir. 1997). Here, we find that the amended mark would require republication.

Accordingly, the refusal to accept the amended drawing is affirmed.

Specimens

An application for registration under Section 1(a) of the Trademark Act must include one specimen showing use of the mark in the sale or advertising of the services in commerce. Trademark Rule 2.56(a). Specimens provide part of the basis for examination because they show the manner in which the mark is seen by the public. Trademark Rule 2.56(b)(2).

The simple fact herein is that not a single specimen among the numerous ones filed by applicant shows use of the mark sought to be registered. Although applicant may be providing the services listed in the application, the specimens fail to show use of the specific mark sought to be registered.

Accordingly, the requirement to submit acceptable specimens showing use of the mark as actually used in commerce is affirmed.

Decision

Because the applied-for mark fails to function as a service mark for the services recited in the application, the refusal to register is affirmed.

The refusal to accept the amended drawing because it is a material alteration of the original drawing is affirmed.

The requirement to submit acceptable specimens showing use of the mark sought to be registered is affirmed.