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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Mil-Comm Products Company, Inc.

Serial No. 76068249

James C. Wray of Law Offices of James C. Wray for Mil-Comm Products Company, Inc.

Tracy L. Fletcher,[1] Trademark Examining Attorney, Law Office 115 (Tomas Vlcek, Managing Attorney).

Before Seeherman, Hanak and Rogers, Administrative Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Mil-Comm Products Company, Inc. has appealed from the final refusal of the Trademark Examining Attorney to register TW25 as a trademark for "lubricants, lubricating grease and semi fluid lubricant for firearms, industrial

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[1] The application was assigned to the present Examining Attorney after the appeal was filed. Another Examining Attorney handled the examination phase.

machinery, heavy machinery, bearings, gears, metal-to-metal contact under pressure, friction and heat, hot and cold, salt water, sand and dust conditions; extreme climate semi fluid all-purpose lubricant." The application, identified above, was filed on June 12, 2000, and asserts use and use in commerce as of August 1987.

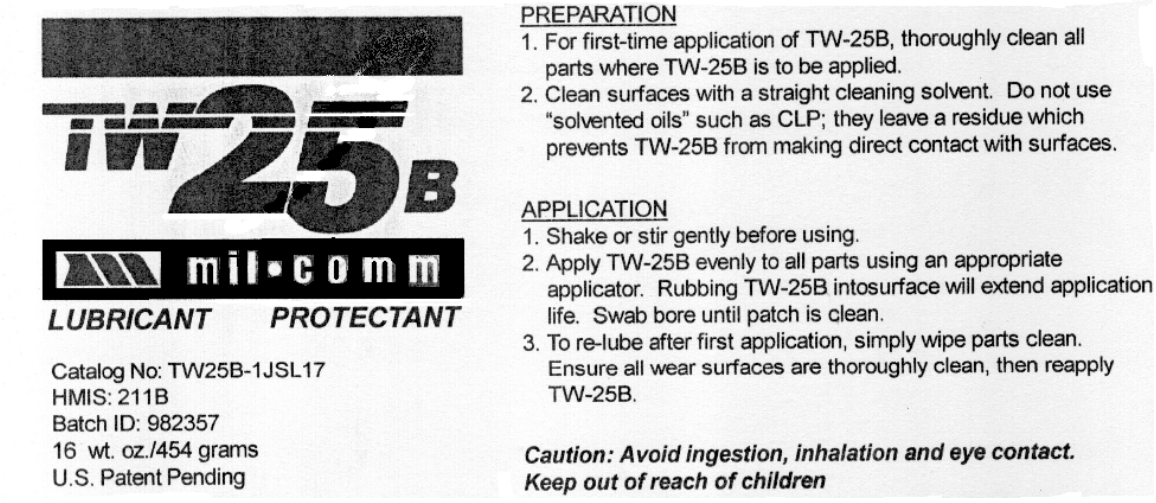
Registration has been refused because applicant has failed to comply with the Examining Attorney's requirement for acceptable specimens; the Examining Attorney contends that the specimen applicant has submitted does not show use of the mark as it appears in the drawing. Specifically, the Examining Attorney asserts that the mark shown in the specimen is for TW25B, and the mark shown in the drawing is TW25.

Applicant and the Examining Attorney have filed briefs. Applicant did not request an oral hearing.

Trademark Rule 2.51(a)(1) provides that in an application under section 1(a) of the Act, i.e., an application based on use in commerce, such as the application at issue herein, the drawing of the trademark shall be a substantially exact representation of the mark as used on or in connection with the goods. Trademark Rule 2.52(a) states, inter alia, that it is the drawing which depicts the mark sought to be registered, thus making it

clear that if there is any inconsistency between the specimen and the drawing, it is the drawing which controls. Trademark Rule 2.56(a) provides, in part, that an application under section 1(a) of the Act must include one specimen showing the mark as used on or in connection with the goods.

Accordingly, the specimen must evidence use of the mark shown in the drawing. Thus, we turn to the specimen to determine if it shows the mark TW25, the mark depicted in the drawing, and the mark which applicant seeks to register. Below is the relevant portion of applicant's label:



Applicant argues that TW25 is a substantially exact representation of the mark as used on the goods, asserting

that the "B" is a separate element because it is not "tied together with the 'TW25'," brief, p. 4. Applicant points to the horizontal lines which connect the TW25, but which are not part of the "B", to show that the latter element is visually distinct from the others. Applicant also asserts that the "orbital ring" encircling "25" "further ties 'TW' with '25' and separates the mark from the small 'B'." Brief, p. 4.[2]

We disagree with applicant's position. As the Examining Attorney points out:

> ...the letters "TW" appear immediately adjacent to the left of the numbers "25" and the letter "B" appears immediately adjacent to the right. The characters appear together, in the same font and color, spaced equidistant from one another, centered on the same margin and set apart from other text by upper and lower bars. While the letters "TW" are raised slightly and the letter "B" is lowered slightly from the numbers "25," the overall stylization clearly shows the characters set on a single diagonal within the space framed by the upper and lower bars.

Brief, p. 2.

[2] Although it does not show up clearly as depicted in this opinion, the "orbital ring" is a thin elliptical line which stretches from below the base of the number 2, across the 5, and reaches it highest point above and slightly to the right of the number 5. It is separate from all the letters in the mark.

The Examining Attorney also points out that all of the letters are consistently rendered smaller than the numbers:

> The letter "B" is presented in a smaller font size than the numbers "25" in the same fashion as the letters "TW" which are presented in a smaller font size than the numbers "25." Thus, "TW25B" projects a singular commercial impression due to the fact that the characters are shown in the same block font, in the same color and in a consistent font size scheme.

Brief, p. 4.

Moreover, the rest of the label reinforces the likely perception of the stylized presentation as that of TW25B rather than TW25. The directions for using the product consistently refer to the product as "TW-25B," e.g., "For first-time application of TW-25B, thoroughly clean all parts where TW-25B is to be applied"; "Apply TW-25B evenly to all parts using an appropriate applicator. Rubbing TW-25B into surface will extend application life." In addition, the label indicates that the catalog number for the product is "TW25B-1JSL17." Thus, anyone wishing to order the product will immediately understand that TW25B, rather than TW25, is the designation for the product.

Although an applicant may register any element of a composite mark if that element, as shown in the record, presents a separate and distinct commercial impression

which indicates the source of applicant's goods or services, see In re Miller Sports Inc., 51 USPQ2d 1059 (TTAB 1999), and cases cited therein, in this case the commercial impression of TW25B is different from the commercial impression of TW25, and therefore the mark shown in the drawing is not a substantially exact representation of the mark as used on the goods. In saying this, we point out that the "B" portion of applicant's mark cannot be considered as a grade or model designation. Applicant was specifically invited by the Examining Attorney to indicate whether the "B" was merely a model number or grade designation, and applicant did not make such a claim. Cf. In re Raychem Corp., 12 USPQ2d 1399 (TTAB 1989). Nor is there any evidence that TW25 is used by applicant as a separate trademark in other instances. Cf. In re Servel, Inc., 85 USPQ 257 (CCPA 1950).

Because the specimen submitted by applicant does not evidence use of the applied-for mark, we affirm the Examining Attorney's requirement for acceptable specimens.[3]

Decision: The refusal of registration is affirmed.

[3] We should point out that the Examining Attorney gave applicant the opportunity to change the basis for its application to intent-to-use, in which case applicant would have been able to submit specimens which were not in use as of the filing date of the application. Applicant did not avail itself of this option.