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Paper No. 11
Bottorff

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re *Grow Company, Inc.*

Serial No. 76487502

Myron Amer of Myron Amer, P.C. for *Grow Company, Inc.*

Raul Cordova, Trademark Examining Attorney, Law Office 114
(*Margaret Le*, Managing Attorney).

Before *Walters, Bottorff and Drost*, Administrative
Trademark Judges.

Opinion by *Bottorff*, Administrative Trademark Judge:

On February 3, 2003, applicant filed the above-
captioned application seeking registration on the Principal
Register of the mark QX, in typed form, for Class 42
services recited in the application as

analytical services, namely, method development
and validation, raw material testing, amino
acid analysis, vitamin analysis, mineral
testing, residue testing, dissolution and
disintegration testing, accelerated stability
testing/shelf life studies, trace analysis, ph
moisture content, melting point, and optical

rotation, microbiological testing, qualitative and quantitative analysis of fats and oils, hydrocarbon, solvent, and wax analysis, and advising on usage of instrumentations, namely, fourier transform infrared, atomic absorption, ultra violet/vis, gas chromatography, flame ionization, high performance liquid chromatography and thin layer chromatography.

The application is based on use in commerce under Trademark Act Section 1(a), 15 U.S.C. §1051(a), and November 15, 2002 is alleged as the date of first use of the mark anywhere and the date of first use of the mark in commerce.

At issue in this appeal is the Trademark Examining Attorney's final refusal to register applicant's mark on the ground that the mark is not a substantially exact representation of the mark as it appears on the specimen of record. See Trademark Rule 2.51(a)(1), 37 C.F.R. §2.51(a)(1).

Applicant and the Trademark Examining Attorney filed main appeal briefs, but applicant did not file a reply brief, and applicant did not request an oral hearing. We affirm the refusal to register.

Applicant's specimen of use consists of a two-sided, 8.5" x 11" three-panel brochure, both sides of which are reproduced below (in reduced form).

study and collaborate on several peer reviewed scientific articles with Dr. Olah. He is co-author of more than three dozen scientific articles, reviews and patents published in several major peer reviewed American and European Journals. His continuing research efforts are concentrated in the areas of health, nutrition, food flavors, natural products, bio-fermentation, peptide, DNA/RNA synthesis, super acidic systems, toxicity, environmental, and biotechnology products. He is a member of American Chemical Society, Institute of Food Technologists, and American Herbal Products Association.

Ferial K. Arvanaghi, M.S.

Ferial Arvanaghi received her Master's degree in Polymer Science from University of Akron in 1986. Since then she has worked in a number of chemical industries including Fertilizer, Pharmaceutical, and personal care products. She has significant experience in QA/QC, direct research and analytical method development. Ferial has hands on experience in the areas of controlled release technology, enzyme purification & analysis, characterization of polymeric builders, synthesis & characterization of UVA/UVB active monomers & polymers, analysis of benefit agents including oils, sunscreens, alpha-hydroxy acids, proteins, surfactants, and insect repellents. During her career, Ferial has

published articles in peer reviewed journals, and has also filed and granted more than ten US Patents. She is a member of American Chemical Society.

Halleema N. Ahmed, B.S.

Halleema Ahmed obtained her bachelor's degree in analytical chemistry in 1983 from Nagarjuna University in India. She has great insight and hands-on experience with all analytical methods and is well versed in utilizing state of the art analytical instruments. Halleema has worked as a quality control and analytical chemist for the past eighteen years. Her education, training and experience provide solid expertise in developing and validating analytical protocols.

Magda L. Peck, B.S.

Magda Peck received her training in biochemistry in her birthplace of Romania at the Institute Polytechnic of Timisoara. After coming to USA in 1978, through significant positions, she gained valuable insight into the manufacturing, quality assurance and quality control parameters. In 1982, she joined a nutraceutical company as quality control chemist. Her hands on activities in all the facets of manufacturing, quality control, quality assurance and analytical method development make her a valuable asset to the team.

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ABOUT QUALIMAX, LLC

QUALIMAX, LLC is a new name but our alliances with multinational companies represent trust and success. We are an independent private analytical testing laboratory offering all facets of analytical services to specialty chemical, pharmaceutical, nutraceutical, natural product, food, functional food, dietary supplement, and consumer product companies. Our mission is to deliver analytical service with the utmost quality, accuracy, reliability and speed. Our highly skilled technical staff provides the finest quality analytical service with absolute confidentiality to our clients. We offer cost-effective routine analyses as well as state of the art analysis, method development and validation to support our client's R&D as well as, QC needs. Our laboratory complies with Good Laboratory Practices (GLP) mandated by the FDA and EPA. Good Laboratory Practices, including sample tracking, instrument calibration, maintenance and written documentation of the analytical methods, is the measure of our commitment. Our clients benefit from our flexible data reporting, on-time

ANALYTICAL SERVICES

- ☞ Method Development and Validation
- ☞ Raw Material Testing
- ☞ Amino Acid Analysis
- ☞ Vitamin Analysis
- ☞ Mineral Testing
- ☞ Residue Testing
- ☞ Dissolution and Disintegration Testing
- ☞ Accelerated Stability Testing/Shelf Life Studies
- ☞ Trace Analysis
- ☞ pH, Moisture Content, Melting Point, and Optical Rotation
- ☞ Microbiological Testing
- ☞ Qualitative and Quantitative analysis of Fats & Oils
- ☞ Hydrocarbon, solvent, and wax Analysis

INSTRUMENTATIONS

- ☞ Fourier Transform Infrared (FT-IR)
- ☞ Atomic Absorption (AA)
- ☞ Ultra Violet/Vis (UV)
- ☞ Gas Chromatography (GC) / Flame Ionization
- ☞ High Performance Liquid

KEY STAFF

Dr. Andrew Szalay

Andrew Szalay received his Pharmacist degree from Szege University in Hungary, where the renowned Nobel Laureate Albert Szent-Györgyi conducted his research leading to the discovery of vitamin C. Later on, Andrew moved to the United States and for the past forty years his research efforts have encompassed the areas of nutrition, botanical extracts, study of medicinal plants, herbs, and development of different analytical protocols. Andy is well versed in developing exclusive analytical methods for analysis of unique ingredients.

Massoud Arvanaghi, Ph.D.

Massoud Arvanaghi received his B.S. Degree in Chemistry/Biology in 1978 from Arya-Mehr University of Technology (Iran), and a Ph.D. in physical Organic Chemistry in 1982 from University of Southern California under the tutelage of the 1994 Nobel laureate professor George A. Olah. He also received postdoctoral training in the study of advanced molecular science applications utilizing extreme

Trademark Rule 2.51(a) provides that "[i]n an application under section 1(a) of the 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." We find that the mark applicant seeks to register, i.e., QX (in typed form) is not depicted on the specimen of record, and that the Trademark Examining Attorney's refusal therefore is proper.

First, it is apparent that the mark QX does not appear on the first page of the specimen brochure. The letters Q and X appear, in highly stylized form, as the first and last letters of the stylized word QUALIMAX, but such usage does not constitute service mark use of QX, per se, either in typed form or special form.

As for the second page of the brochure, applicant contends that the letters QX, in stylized form, appear in the middle panel as paragraph "bullets" next to each of applicant's types of analytical services. The middle panel is reproduced below at actual size, followed by a greatly enlarged reproduction of two of the "bullets" themselves:

ANALYTICAL SERVICES

- Q&A Method Development and Validation
- Q&A Raw Material Testing
- Q&A Amino Acid Analysis
- Q&A Vitamin Analysis
- Q&A Mineral Testing
- Q&A Residue Testing
- Q&A Dissolution and Disintegration Testing
- Q&A Accelerated Stability Testing/Shelf Life Studies
- Q&A Trace Analysis
- Q&A pH, Moisture Content, Melting Point, and Optical Rotation
- Q&A Microbiological Testing
- Q&A Qualitative and Quantitative analysis of Fats & Oils
- Q&A Hydrocarbon, solvent, and wax Analysis

INSTRUMENTATIONS

- Q&A Fourier Transform Infrared (FT-IR)
- Q&A Atomic Absorption (AA)
- Q&A Ultra Violet/Vis (UV)
- Q&A Gas Chromatography (GC) / Flame Ionization
- Q&A High Performance Liquid Chromatography (HPLC)
- Q&A Thin Layer Chromatography (TLC)

 **Trace Analysis**
 **pH, Moisture C**

However, we agree with the Trademark Examining Attorney's contention that these "bullets" are so highly stylized that purchasers will not perceive them to be the letters QX. As noted by the Trademark Examining Attorney, it appears that the bullets consist of the stylized Q and the stylized X that also appear as the first and last letters of the word QUALIMAX, which is depicted in stylized lettering on the first page of the brochure. The X is depicted as a highly stylized stick figure human, who is standing on a "platform" created by the extended tail of the Q. We find that this highly stylized manner in which the letters are depicted is an essential feature of the commercial impression created by the mark as it appears on the specimen. It is unlikely that purchasers will readily understand, or even notice, that the "bullets" are comprised of the letters QX, per se. Those letters, per se, do not create a separate and distinct commercial impression as they appear on the specimen, and they therefore do not function as a trademark in and of themselves. See, e.g., *In re Chemical Dynamics Inc.*, 839 F.2d 1569, 5 USPQ2d 1828 (Fed. Cir. 1988); *In re Miller Sports Inc.*, 51 USPQ2d 1059 (TTAB 1999); and *In re Boyd Coffee Co.*, 25 USPQ2d 2052 (TTAB 1993).

In essence, applicant is attempting to register in typed form what is indisputably a special form mark. Trademark Rule 2.52(a)(2), 37 C.F.R. §2.52(a)(2), provides that a typed form drawing may only be used if "the mark does not include a design element." Because the design element or stylization of the letters QX is so inextricably integrated into the mark as it is displayed on the specimen, we find that the mark may not be registered in typed form. See *In re Morton Norwich Products, Inc.*, 221 USPQ 1023 (TTAB 1983); *In re Mango Records*, 189 USPQ 126 (TTAB 1975); and *In re United Services Life Insurance Company*, 181 USPQ 655 (TTAB 1973).¹

For the reasons discussed above, we find that the specimen of record does not evidence use of the mark depicted on the drawing page, and that the application therefore does not comply with Trademark Rule 2.51(a)(1). Relatedly, we also find that the mark, as it is used on the specimen of record, inextricably includes a design element,

¹ Applicant has offered to submit an amended drawing which depicts the mark in the special form in which it appears on the specimen. We agree, however, with the Trademark Examining Attorney's contentions that (a) no such amended drawing was ever submitted, and (b) even if it had been submitted, such an amendment would constitute a material alteration of the mark and would therefore be impermissible under Trademark Rule 2.72(a)(2), 37 C.F.R. §2.72(a)(2).

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and that it therefore may not be registered in typed form.
Trademark Rule 2.52(a)(2).

Decision: The refusal to register is affirmed.