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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Mayce Edward Christopher Webber

Serial No. 78126211

Catherine Simmons-Gill, Esq. for Mayce Edward Christopher Webber.

Linda E. Blohm, Trademark Examining Attorney, Law Office 110 (Chris A.F. Pedersen, Managing Attorney).

Before Seeherman, Holtzman, and Drost, Administrative Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

On May 3, 2002, Mayce Edward Christopher Webber (applicant) applied to register the mark CWEBB in typed or standard character form on the Principal Register for "clothing, namely, T-shirts, sweat shirts, warm up suits, jackets, head wear, tank tops, shorts, pants, socks and shoes" in Class 25. The application was originally based on an intention to use the mark in commerce, but on September 8, 2003, applicant filed a Statement of Use alleging a date of first use and a date of use in commerce of May 7, 2003.

The examining attorney has refused to register applicant's mark on the ground that the mark shown on applicant's specimen is not a substantially exact representation of the mark as shown in the drawing. Also, the examining attorney has maintained that applicant would not be permitted to file a substitute drawing showing the mark in stylized form.

After the final office action, applicant appealed to this board.

The issues in this case arose when applicant submitted the specimen with his Statement of Use. To support the registration of his mark CWEBB, applicant submitted the specimen below.



The examining attorney contends that the "letters WEBB are clearly presented thereon. After telephonic

communication with applicant's counsel, the stylized portion above[,] below and to the left of the 'W' have been indicated to be the letter 'C.' This highly stylized component could also be viewed as a stylized horseshoe set on its side... The trademark examining attorney contends that the highly stylized letter 'C' on the specimen is not immediately or easily recognizable as such, and that the specimen of record is not a substantially exact representation of the mark on the drawing page." Brief at 2.

Applicant argues that the "examining attorney states that she can perceive the 'C,' at the very least. Therefore, where, as here, the mark is recognizable on the specimen, the standard character form drawing for the mark CWEBB is appropriate." Brief at 7.

"A drawing depicts the mark sought to be registered." 37 CFR § 2.52, Trademark Rule 2.52. "[T]he 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." 37 CFR § 2.51(a)(1), Trademark Rule 2.51(a)(1). See also TMEP § 807.12(a) (4th ed. April 2005). Therefore, our initial question is whether the drawing that applicant submitted as the mark sought to be registered is a substantially exact representation of the mark on the

specimen. Applicant's standard character drawing unequivocally depicts the mark as CWEBB. The specimen submitted with applicant's statement of use shows the mark as follows:



"A special form drawing is required if words, letters or numerals are presented in a distinctive form that changes the meaning or overall commercial impression of the mark." TMEP § 807.04(b) (4th ed. April 2005). A mark cannot be shown as a typed or standard character drawing if it "is stylized or has a design element [that] engenders an uncommon or 'special' commercial impression that would be altered or lost were registration to issue based on a typed drawing." In re Morton Norwich Products, Inc., 221 USPQ 1023, 1023 (TTAB 1983) (Board held that a mark depicted in approximately the following form required a special form

drawing: LABID). The board has discussed when a special form drawing is required and a typed drawing would, therefore, be inappropriate.

In the particular instance it is our opinion that the adjective "special" must be given its ordinary meaning which would be "uncommon," "noteworthy," "extraordinary."

As we view applicant's mark as used[,] the compound term "luncheon time" is presented in an uncommon manner to the extent that a prospective purchaser's initial impression of the mark might well be other than that which applicant may intend to convey by the well understood term "luncheon time."

In re Dartmouth Marketing Co., Inc., 154 USPQ 557, 558

(TTAB 1967) (parentheticals omitted).

Obviously, there are cases where a special form drawing would be the only type of drawing that would be acceptable and there are other cases where a typed or standard character drawing would be unquestionably appropriate. In addition, we agree that the Office encourages the use of standard character or typed drawings. The issue in this case is whether applicant can submit a standard character drawing because, as applicant argues, the "mark contains only letters. The letters are listed in the Standard Characters Set provided by the USPTO. The mark does not contain a design element." Applicant's Brief at 6.

Applicant's argument overlooks the requirement that the mark in the drawing "must be a substantially exact representation of the mark" on the specimen. By submitting a standard character drawing, applicant indicated that his mark was not shown in a "distinctive form that changes the meaning or overall commercial impression of the mark." However, the specimen shows the mark as either a highly stylized mark or a mark containing a design element or as just the letters WEBB. The specimen clearly shows the letters WEBB in the same size and font. The letter "C" may be suggested by the design around the letters WEBB but to many, if not most, purchasers it would not. When it is not even clear if the mark is for four or five letters or whether the mark includes a design or another letter, a standard character drawing is not appropriate. 37 CFR § 2.52(a)(2), Trademark Rule 2.52(a)(2) (Standard character drawing appropriate if the "mark does not include a design element"). The specimen provided by applicant does not show a mark that clearly includes a stylized "C." Rather, the background element shown on the specimen creates more of a Rorschach inkblot test effect, which some people might conclude is a letter. To take the applicant's argument to its logical conclusion, in a case involving a standard character drawing for the mark "ABC," an applicant should

be allowed to submit as a specimen a depiction of an inkblot simply because the applicant asserts that the inkblot is a representation of the letters "ABC." However, even if the examining attorney agreed that some prospective purchasers may see the letters "ABC" in the inkblot, that would not mean the commercial impressions were substantially exact.

Applicant responded to the examining attorney's refusal to register by submitting evidence to show that applicant is a basketball player who has received considerable publicity in the National Basketball Association (NBA). The evidence shows that applicant is known as Chris Webber. In addition, applicant has asked us to take judicial notice that "Chris Webber's knick (sic) name is CWEBB." Brief at 7. We decline this request because we do not find that this is a fact that is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). However, the evidence that applicant submitted with his request for reconsideration supports a conclusion that CWEBB is Chris Webber's nickname. See, e.g., *Orange County Register*, July 25, 2002 ("CWebb actually accepted the \$1,155 in prize money"); *Washington Times*, May 5, 2002 ("...far cry from how Chris Webber handled

a similar situation in California a couple of years ago. 'If Sacramento troubles me about a ticket,' threatened CWebb, whose contract was soon up...").

Applicant argues that if "Chris Webber is known as CWEBB, consumers of his products will recognize the mark CWEBB on his shoes, even where the C is highly stylized." However, even if we accept that applicant's nickname is CWebb, we cannot conclude that prospective purchasers would recognize the letters WEBB with a highly stylized design as CWebb. To take a more extreme example, the shirt in the specimen appears to be a basketball jersey with the name "WEBBER" on the back. While fans of basketball may view the term "Webber" as referring to Chris Webber, the specimen would not support an application to register the mark CHRIS WEBBER. Further, although applicant does not claim that the portion of the photograph showing the shirt with the name WEBBER is a specimen of use of the applied-for mark CWEBB, we wish to make clear that the photograph of the WEBBER jersey does not support applicant's attempt to register the mark CWEBB, regardless of whether prospective purchasers recognize that the name "Webber" on a basketball jersey refers to Chris Webber or CWebb.

Moreover, we note that applicant's clothing and shoes in his identification of goods are not limited to any

specific purchasers. Even if purchasers with superior knowledge of basketball players may be able to guess that the mark on applicant's specimen includes the letter "C," ordinary purchasers would not. Further, the determination of whether specimens support the registration of a mark shown in a drawing is not a guessing game. The drawing must, as we have stated, be a substantially exact representation of the mark shown in the specimens. The standard character drawing CWEBB is clearly not.

Therefore, the examining attorney properly objected to the specimen because the mark on the specimen is not a substantially exact representation of the mark in the drawing.

The next question is whether applicant could submit a new drawing showing the mark as depicted on the specimen. Although applicant did not submit an amended drawing, the question of whether applicant could amend his drawing to depict the mark in this way was clearly discussed by applicant and the examining attorney.

Trademark Rule 72(b) (37 CFR § 2.72(b)) addresses when an applicant can submit a new drawing:

In an application based on a bona fide intention to use a mark in commerce under section 1(b) of the Act, the applicant may amend the description or drawing of the mark only if:

(1) The specimens filed with an amendment to allege use or statement of use, or substitute specimens filed under §2.59(b), support the proposed amendment; and

(2) The proposed amendment does not materially alter the mark. The Office will determine whether a proposed amendment materially alters a mark by comparing the proposed amendment with the description or drawing of the mark filed with the original application.

In this case, applicant's mark on the drawing is unequivocally for the letters CWEBB. The mark shown on the specimens, however, clearly shows only the letters WEBB; whether the letter "C" would be seen in that mark is not only debatable, it is unlikely. Thus, the mark shown in the specimens is materially different from the mark in the drawing.

We have previously held that it was a material alteration to change the mark TURBO with a tornado design shown below to a typed drawing. See In re CTB Inc., 52 USPQ2d 1471 (TTAB 1999).



The board noted that "this design is the first thing a consumer would notice when viewing the mark." CTB, 52 USPQ2d at 1473. The first thing purchasers would see when viewing applicant's mark on the specimen are the letters

WEBB not CWEBB. An amended drawing showing the mark depicted in the specimen very clearly does not convey the same commercial impression as the mark shown in the current standard character drawing. "In looking more closely at Rule 2.72(a), we note that the touchstone for permissible amendments to the mark is that the mark retains the same overall commercial impression." CTB, 52 USPQ2d at 1473.

In addition, the examining attorney has pointed out that the "highly stylized component could also be viewed as a stylized horseshoe set on its side." Brief at 2. This additional element would likely require a further search for conflicting marks, and this factor also supports the examining attorney's view that the new drawing would be a material alteration. In re Who? Vision Systems Inc., 57 USPQ2d 1211, 1217-18 (TTAB 2000).

We find that it would be a material alteration to change the mark from CWEBB in standard character form to WEBB and a design or stylization that may be a "C" or some other feature, in the manner it is depicted in the specimen. Therefore, applicant cannot submit a substitute drawing. See In re Richards-Wilcox Manufacturing Co., 181 USPQ 735, 735 (Comm'r Pat. 1974) (Commissioner held that it was a material alteration to amend mark from FYE[R-W]ALL and diamond design to FYER-WALL in block letters).

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Decision: The examining attorney's refusals on the grounds that the mark on the specimen is not a substantially exact representation of the mark in the drawing and that applicant cannot submit a substitute drawing are affirmed.