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OF THE TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Brainbow, Inc.

Serial No. 78223210

David B. Dort of Dort Patent, P.C. for Brainbow, Inc.

James T. Griffin, Trademark Examining Attorney, Law Office 103
(Michael Hamilton, Managing Attorney).

Before Bucher, Holtzman and Rogers, Administrative Trademark
Judges.

Opinion by Holtzman, Administrative Trademark Judge:

Applicant, Brainbow, Inc., seeks to register the mark WARP
(in typed form) for goods ultimately identified as follows:¹

Computer software for searching, compiling, indexing and
organizing information within individual workstations,
personal computers or computer networks; computer software
for creating indexes of information, indexes of web sites
and indexes of other information resources, in Class 9.

¹ The application also originally included services in Class 42 which
class was subsequently divided out of this application.

The application was filed on March 7, 2003 based on applicant's assertion of a bona fide intention to use the mark in commerce. Following publication of the mark for opposition and issuance of a notice of allowance on December 28, 2004, applicant, on June 21, 2005, filed a statement of use together with a specimen of use, alleging dates of first use of the mark and first use in commerce on June 1, 1996.² In subsequent filings, applicant submitted three other distinct specimens.

The examining attorney refused registration of the mark on the ground that the specimen submitted with the statement of use is unacceptable to show use of the mark in connection with the identified goods as required by Trademark Rules 2.56 and 2.88(b)(2). Nor did any of the three subsequently submitted additional specimens, according to the examining attorney, show use of the mark in connection with the goods. Further, according to the examining attorney, none of the three additional specimens was supported by the required verified statement that "the specimens were in use in commerce prior to the expiration of the time allowed to the applicant for filing a statement of use" as required by Trademark Rule 2.59(b).

When the refusal was made final, applicant appealed. Briefs have been filed.

² Applicant's previously filed amendment to allege use on December 9, 2003 was later withdrawn on July 21, 2004.

Trademark Rule 2.56(b)(1) provides:

A trademark specimen is a label, tag, or container for the goods, or a display associated with the goods. The Office may accept another document related to the goods or the sale of the goods when it is not possible to place the mark on the goods or packaging for the goods.

Trademark Rule 2.88(b)(2), applicable to this application because applicant filed its specimen with its statement of use, requires a specimen of the mark as actually used in commerce, and specifically refers to Rule 2.56 for the requirements for specimens.

Further, Section 45 of the Trademark Act states that a mark is deemed to be in use in commerce:

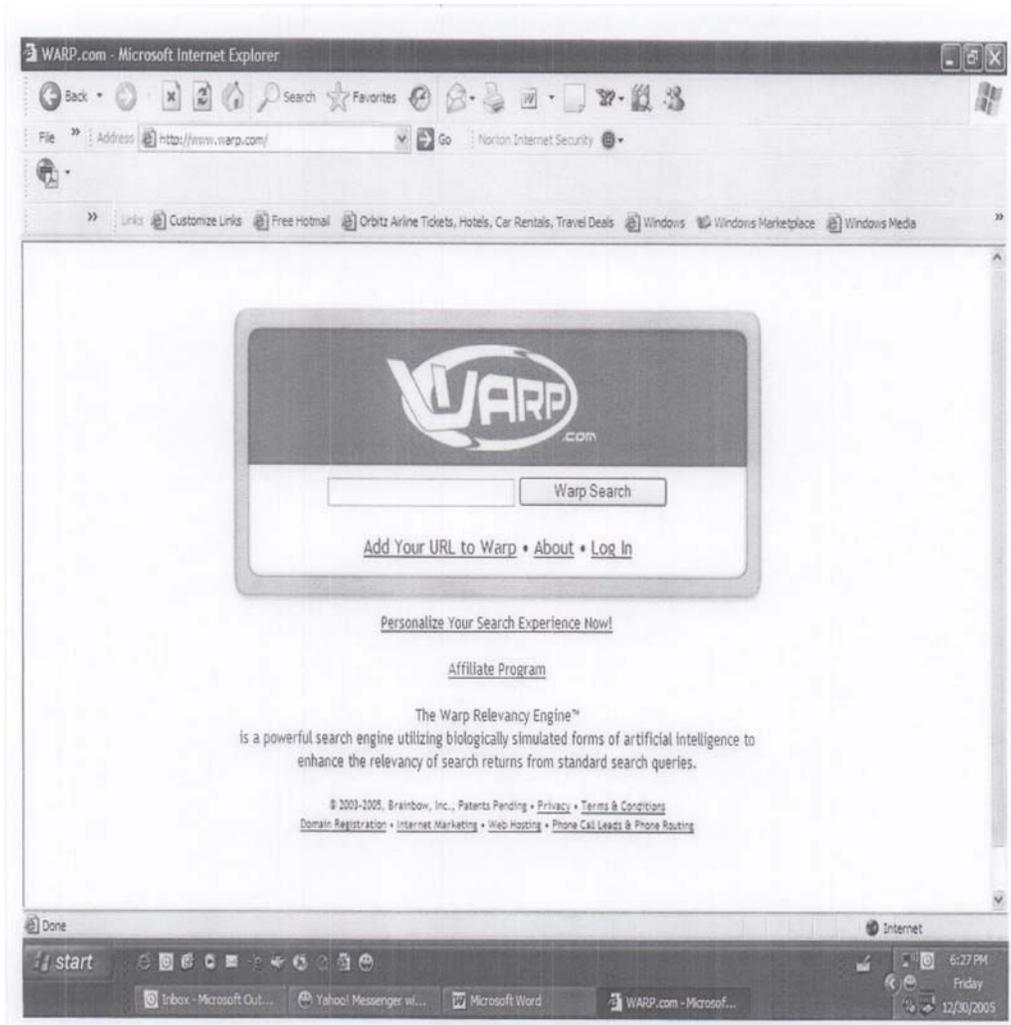
- (1) on goods when—
 - (A) it is placed in any manner on the goods or their containers or the displays associated therewith or on the tags or labels affixed thereto, or if the nature of the goods makes such placement impracticable, then on documents associated with the goods or their sale, and
 - (B) the goods are sold or transported in commerce.

The original specimen submitted with the statement of use is not acceptable. As shown below, it consists merely of a graphic depiction of the mark and there is nothing in the statement of use itself or anywhere else in the record to indicate whether or how this mark is actually used on or in connection with the goods. Applicant describes the specimen in its statement of use only as "The word 'warp.'"



The next specimen, as reproduced below, was submitted with applicant's January 4, 2006 "Revised Amendment to Allege Use." In this specimen, the mark WARP appears on a web page which, as described by applicant "shows the Applicant's internet promotions with the mark in connection with the goods." As the examining attorney explains, this specimen only shows the mark used on a web page and running in a web browser. In fact, as used on this specimen the mark appears to identify a search engine, not a software program. However, this specimen also shows use of WARP in the nature of a service mark, and the examining attorney notes that the specimen was considered acceptable to show use in connection with applicant's services of providing online software in Class 42.

Furthermore, applicant did not include the required verified statement that this first of the three additional specimens was in use in commerce prior to the expiration of the time allowed for filing the statement of use.



The third specimen, which was submitted with applicant's first request for reconsideration, dated January 23, 2007, is reproduced below. Applicant describes this specimen as a "screenshot of the software when it is run on a computer by a consumer of the product." However, we agree with the examining attorney that this does not appear to identify a software product. Instead, the specimen clearly shows a website which appears to be operated by "WARP.com" as it includes "Ads by

Ser No. 78223210

Goooooogle," links to "Advertise on this site" and various other links.

The screenshot shows the WARP.com advertising interface. At the top, there are two banners for "Free Website Traffic". Below the banners is a search bar and a navigation menu. A yellow box highlights a message: "Add funds to activate your campaigns. You have 12 campaigns that are on hold due to lack of funds." The main section is titled "Update Advertisement: IUD" and contains a form for "Enter Bid Amounts".

	Minimum	Average	Suggested **
Daily Budget: \$ 5 . 00			
Pay Per Click: \$ 0 . 20	\$ 0.30	\$ 0.30	\$ 0.36 - 0.45
Pay Per Call *: \$ 1 . 00	\$ 1.00	\$ 1.00	\$ 1.20 - 1.50

Bid as little as \$ 1.00 per call. Only calls of 20 seconds or more are considered billable.

* Calls will be charged \$0.15 per minute in addition to your bid.
** Suggested bid amounts are calculated at 20% - 50% above the averages.
Higher bids get better placement on search results.

Navigation: back, Enter bids amounts, then click 'next' to enter content and copy for your ad., next

Progress bar: Categories, Location(s), Contact Info, Create Ad, Keywords, Make Bids (active), Content, Review

Buttons: cancel, save

Footer: © 2003-2006, Brainbow, Inc., Patents Pending
[Domain Registration](#) • [Internet Marketing](#) • [Web Hosting](#) • [Phone Call Leads & Phone Routing](#) • [Privacy](#) • [Terms & Conditions](#) • [Affiliate Program](#)

We do find, however, that this specimen was properly verified inasmuch as applicant has more or less consistently referred to its "statement of use" as an "amendment to allege use" and has averred that "The substitute specimen(s) was in use in commerce prior to the filing of the Amendment to Allege Use."

The fourth and last specimen, shown below, was submitted with a "revised amendment to allege use" along with applicant's second request for reconsideration, on May 22, 2007. Applicant contends that its software has a "stand-alone" component and that the new specimen consists of "documentation of the on-screen algorithm" of the stand-alone software.

```
taken from results.php

WARP Relevancy Algorithm

/

ifactor_k = RELEVANCY_K;
ifactor_ktp = RELEVANCY_KTP;
ifactor_ktw = RELEVANCY_KTW;
ifactor_kuw = RELEVANCY_KUW;
ifactor_kkw = RELEVANCY_KKW;
ifactor_kdw = RELEVANCY_KDW;

ifactor_index = 1;

ifactor_neural = 1;

iwarp_search_phrase =
ddslashes tep_db_prepare_input($HTTP_GET_VARS['keywords']);

iwarp_search_words = addslashes tep_db_prepare_input($search_kw);

f($error == 0) {

iorderby_str = "((MATCH (warp_title) AGAINST (" . "" .
iwarp_search_phrase . "" . " IN BOOLEAN MODE)) * " . $factor_ktp .
)";

iorderby_str = "((MATCH (warp_title) AGAINST (" .
iwarp_search_words . "" IN BOOLEAN MODE)) * " . $factor_ktw . ")";

iorderby_str = "((MATCH (warp_url) AGAINST (" .
iwarp_search_words . "" IN BOOLEAN MODE)) * " . $factor_kuw . ")";

iorderby_str = "((MATCH (warp_keywords) AGAINST (" .
iwarp_search_words . "" IN BOOLEAN MODE)) * " . $factor_kkw . ")";

iorderby_str = "((MATCH (warp_description) AGAINST (" .
iwarp_search_words . "" IN BOOLEAN MODE)) * " . $factor_kdw . ")";

ilisting_sql = "select warp_id, warp_paid, warp_url, warp_title,
warp_description from warp " . $where_str . " order by warp_paid DESC,
(warp_relevancy* " . $factor_k . ") + " . $orderby_str . ") DESC,
warp_relevancy DESC";

f (isset($HTTP_GET_VARS['keywords']) &&
ep_not_null($HTTP_GET_VARS['keywords'])) {

f (!isset($HTTP_SESSION_VARS['kw']) or
isset($HTTP_SESSION_VARS['kw']) &&
!HTTP_SESSION_VARS['kw'] <> $HTTP_GET_VARS['keywords']) {

f ($listing_numrows > 0) {

no_match = 0;
```

Applicant states that this documentation is displayed to consumers of the product, and applicant asserts that this "specification" is the equivalent of "printed matter included with the goods." It can be seen that the document consists of a page of computer code with the typed words "WARP Relevancy Algorithm" displayed at the top. However, as the examining attorney points out, this is simply a page of printed matter, and applicant has provided no evidence that it appears on a screen. Furthermore, it is unclear how this documentation, i.e., these printed lines of computer code, would otherwise be seen by purchasers or users of applicant's software. Merely because a document includes the mark, does not necessarily mean the document is an appropriate specimen.

In any event, this specimen is unacceptable because it was not accompanied by any form of verified statement as required by Trademark Rule 2.59(b).

In view of the foregoing, we find that the specimens do not show the applied-for mark in use in commerce as a trademark for the identified goods.

Decision: The refusal to register is affirmed.