THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Hearing:
25 June 2008

Mailed:
28 August 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Brunswick Corporation

Serial No. 78875524

Catherine Ferguson of Malin, Haley & DiMaggio, P.A. for Brunswick Corporation.

John M. Gartner, Trademark Examining Attorney, Law Office 102 (Karen M. Strzyz, Managing Attorney).

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

Opinion by Drost, Administrative Trademark Judge:

On May 3, 2006, applicant Brunswick Corporation applied to register the mark AQUAPALOOZA, in standard character form, on the Principal Register for goods ultimately identified as "boats and structural parts therefor" in Class 12. The application (Serial No. 78875524) alleges that applicant first used the mark anywhere and in commerce on April 11, 2006.

The examining attorney has refused to register applicant's mark on the ground that the "specimens are not acceptable because they do not show the mark used in

connection with any of the goods specified in the application." Brief at 1.[1]

After the examining attorney made the refusal final, applicant filed two requests for reconsideration and this appeal.

The examining attorney's position is that "the fact that all of the signs, posters and tags use the mark AQUAPALOOZA solely to identify a particular boating show makes it clear that the mark is not being used in connection with the identified goods… They are solely associated with the trade show and not with the boats themselves." Brief at unnumbered pp. 7-8. In response, applicant argues that "[a]ll of the ancillary services offered by Applicant including the various forms of entertainment and the trade show displays of the Applicant's new models, all serve the purpose and function of selling Applicant's boats under Applicant's arbitrary trademark AQUAPALOOZA." Reply Brief at 10.

At this point, we will summarize the evidence that applicant has submitted to show trademark use of its mark.

---

[1] The application originally included services that were eventually classified in Class 35 as "dealership services in the field of boats." On March 22, 2007, the examining attorney withdrew the refusal to register these services and subsequently approved applicant's request to divide these services from this application. The divisional application issued as Registration No. 3405594.

We begin with the evidence that applicant submitted in its second request for reconsideration inasmuch as this evidence was submitted after the examining attorney had allowed the Class 35 services so all the evidence was presumably directed toward the Class 12 goods.

Exhibit C (Webpages from www.aquapalooza.com)

Between April 15 – May 31, Sea Ray Owners Can Refer A Friend and Reap the Rewards!

Sea Ray
AQUAPALOOZA

The Largest On Water Summer Boating Party in History!

The Biggest Bash in the History of Boating Registration begins May 1st!

Once again Sea Ray, the world's leading boating manufacturer of superior quality pleasure boats, has revolutionized the world of boating, this time with an all-summer event unlike any of its kind. In July of 2007, boaters from coast to coast will join together for Sea Ray's Aquapalooza.

The Aquapalooza festivities officially kick off in July with the signature event in Virginia at Fairview Beach on the Potomac River, hosted by Prince William Marina. This party will be action-packed with live entertainment by special guests, fireworks, giveaways and much more.

Let's Get Ready to Party! In 2007, organizers of Aquapalooza hope the biggest boat bash ever spreads even more successfully across twelve countries, 45 states and, this time around, involve more than 6,000 Sea Ray owners.

Exhibit A (Signs in a dealer showroom)
Sea Ray
AquaPalooza
2006

Summer Sales Event

Sea Ray
Owners Club
AquaPalooza
2006
All Boaters Welcome To Join In For The Largest On Water
SUMMER
BOATING PARTY
In History
July 22-23 & July 29-30, 2006

Exhibit D (advertisement apparently appearing in magazines such as SEARAY LIVING, YACHTING, BOATING LIFE, MOTOR BOATING, and BOAT DIGEST)

All Boaters Welcome to Join In
Sea Ray
Owners Club
AquaPalooza
The Largest On Water
Summer Boating Party
In History
July 22-23 & July 29-30, 2006
Presented by Sea Ray Boats
TO REGISTER FOR AQUAPALOOZA AND FOR MORE DETAILS
Visit www.searay.com or Call 1-800-243-8171

Applicant also submitted declarations from five of its authorized dealers describing how they used the AQUAPALOOZA advertising materials on "large banners and signage bearing the trademark hanging over the boats and on walls; on placards physically placed on the new boats themselves; and on hang tags directly on the boats." Second Request for Reconsideration, Ex. 6, Phillips declaration ¶ 3.

Set out below is a picture of a showroom with signs and displays with the AQUAPALOOZA mark. Response dated

January 24, 2007. *See also* Second Request for Reconsideration, Ex. A.

Finally, applicant has submitted the declaration of applicant's assistant secretary describing its marketing efforts including the fact that the circulation of the publications in which it advertised is approximately five million copies.

A "trademark" is defined as "any word, name, symbol, or device, or any combination thereof used by a person … to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of goods, even if that source is

unknown." 15 U.S.C. §1127. The Trademark Act requires that applications that are based on use must include: "Such numbers of specimens or facsimiles of the mark as used as may be required by the Director." 15 U.S.C. § 1051(a)(1). The Director has specified that applicants in this situation must "include one specimen showing the mark as used on or in connection with the goods." 37 CFR § 2.56(a). "A trademark specimen is a label, tag, or container for the goods, or a display associated with the goods." 37 CFR § 2.56(b)(1).

> An important function of specimens in a trademark application is, manifestly, to enable the PTO to verify the statements made in the application regarding trademark use. In this regard, the manner in which an applicant has employed the asserted mark, as evidenced by the specimens of record, must be carefully considered in determining whether the asserted mark has been used *as a trademark* with respect to the goods named in the application.

In re Bose Corp., 546 F.2d 893, 192 USPQ 213, 216 (CCPA 1976) (emphasis in original, footnote omitted).

"To state the obvious, any specimen submitted by applicant in this case must as a threshold matter display the designation … either standing alone or in context to show use thereof as a mark in commerce." *In re Roberts*, 87 USPQ2d 1474, 1479 (TTAB 2008). Therefore, we must look at applicant's evidence to determine if the term AQUAPALOOZA is used as a trademark for applicant's boats and structural

parts. The examining attorney has already determined that applicant's evidence showed that it was using the term as a service mark for dealership services in the field of boats. However, the examining attorney contends that the specimens do not show trademark use for applicant's boats and structural parts.

"The Trademark Act is not an act to register mere words, but rather to register trademarks. Before there can be registration, there must be a trademark, and unless words have been so used they cannot qualify." *Bose Corp.*, 192 USPQ at 215. "Thus, the mark must be used in such a manner that it would be readily perceived as identifying the specified goods and distinguishing a single source or origin for the goods." *In re Aerospace Optics Inc.*, 78 USPQ2d 1861, 1862 (TTAB 2006). "The starting point for this analysis is the specimen submitted to show use of the mark. We must determine whether the specimen is mere advertising or whether, in addition to advertising, the specimen is also a display associated with the goods." *In re Osterberg*, 83 USPQ2d 1220, 1222 (TTAB 2007).

Applicant argues that it has submitted "various examples of the Applicant's use of their trademark AQUAPALOOZA in association with its sale of boats, including posters, postcards, magazine advertisements, boat

hang tags, t-shirts, website pages and other signage."

Brief at 7.

The examining attorney responds by arguing:

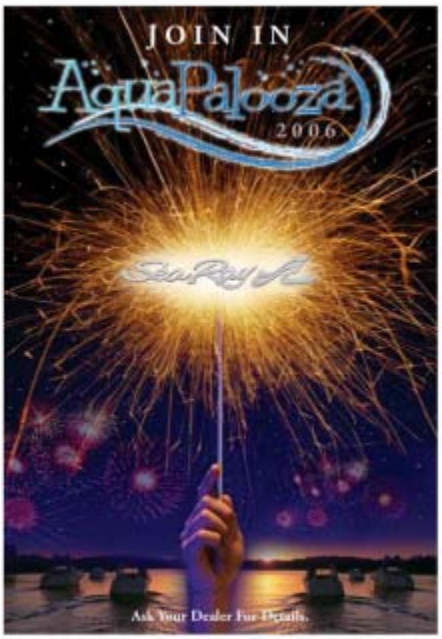
> The specimens show three posters, two smaller advertisements that appear to be postcard advertisements or tags, and copies of the covers of five different boating magazines, none of which show the mark. Again, the specimens all are in the form of advertisements. Even assuming that the smaller advertisements are tags, they advertise AQUAPALOOZA 2006, which is a "Summer Boating Party," and therefore cannot be said to be used in association with the boats themselves… Again, the posters and signs do not use the mark in association with the boats themselves but solely as the name of a particular boating party and trade show.

Brief at 5.

"To determine what the perception of a term is, we must look to the specimens of record which show how the term is used in the marketplace." *In re Walker Research, Inc.*, 228 USPQ 691, 692 (TTAB 1986). To the extent that applicant refers to some of its original and substitute specimens as "hangtags," the term AQUAPALOOZA does not appear to be used as a trademark for boats and structural parts but rather as an advertisement for an event. *See* Applicant's description and specimen below.[2]

---

[2] Other specimens are T-shirts with the term "Sea Ray AquaPalooza 2006" in the left upper corner. Use of the mark on shirts does not support applicant's claim that the term is used as a trademark for different goods, *i.e.*, boats.



DEALER POINT OF SALE / POSTER OR HANG TAG

The "point of sale/poster or hand tag" simply invites potential customers to "Join in "AquaPalooza 2006," which applicant describes in other places as "The Largest On Water Summer Boating Party in History."

"The mere fact that a designation appears on the specimens of record does not make it a trademark" for the specified goods. *Aerospace Optics*, 78 USPQ2d at 1862. Even if one trademark on a specimen demonstrates proper trademark or service mark use, it does not necessarily follow that any term used on those specimens functions as a trademark or service mark for the identified goods or services. *Walker Research*, 228 USPQ at 692 ("While it appears from the specimens of record that applicant is,

indeed, rendering the services that are recited in the application, we agree with the Examining Attorney that, as used in the specimens, the mark 'SegMentor' is not used to identify those services and distinguish them from others"). *See also In re Compagnie Nationale Air France*, 265 F.2d 938, 121 USPQ 460, 461 (CCPA 1959) ("Nothing in the advertisement pertaining to the 'SKY-ROOM' identifies the air transportation service of appellant and there is no other evidence which reveals that the public considers 'SKY-ROOM' as an identifying mark of this airline") and *In re Tilcon Warren, Inc.*, 221 USPQ 86 (TTAB 1984) (Term WATCH THAT CHILD on bumpers of trucks does not serve as a trademark for crushed stone). Here, the specimens described as "hang tags" do not identify applicant's goods, but rather they advertise an event that applicant sponsors.

The next question is whether applicant's posters and other advertisements are displays associated with the goods. The TMEP sets out factors to consider when determining whether a specimen is a display associated with the goods.

> A display must be associated directly with the goods offered for sale. It must bear the trademark prominently. However, it is not necessary that the display be in close proximity to the goods. *See In re Marriott Corp.*, 459 F.2d 525, 173 USPQ 799 (C.C.P.A. 1972); *Lands' End Inc. v. Manbeck*, 797 F. Supp. 511, 24 USPQ2d 1314 (E.D. Va. 1992).

> Displays associated with the goods essentially comprise point-of-sale material, such as banners, shelf-talkers, window displays, menus and similar devices.
>
> These items must be designed to catch the attention of purchasers and prospective purchasers as an inducement to make a sale. Further, the display must prominently display the trademark in question and associate it with, or relate it to, the goods. *In re Osterberg*, 83 USPQ2d 1220 (TTAB 2007); *In re Morganroth*, 208 USPQ 284 (TTAB 1980) (purported mark was so obfuscated on the specimen that it was not likely to make any impression on the reader). The display must be related to the sale of the goods such that an association of the two is inevitable.

TMEP § 904.03(g) (5th ed. rev. September 2007).

These specimens advertise or refer to a specific event, "AQUAPALOOZA 2006."[3] The posters refer to the dates of this "Summer Sales Event" as July 22-23 and July 29-30, 2006 and they advise that: "All boaters welcome to join in" and "To register for AQUAPALOOZA and more details visit www.searay.com or call 1-800-243-8171." Other posters refer to the event as: "The largest on water summer boating party in history." Certainly, these posters clearly refer to a specific event. Most of the specimens encourage people to register for the "The Largest Summer Boating Parting in History."

Applicant has cited numerous cases in which displays associated with the goods have been accepted as specimens,

a point that is not disputed. However, in those cases, the specimen did immediately associate the mark with the product. *See, e.g.*, *Roux Laboratories v. Clairol Inc.*, 427 F.2d 823, 166 USPQ 34, 41 n.14 (CCPA 1970) (Display featuring the slogan "Hair Color So Natural Only Her Hairdresser Knows For Sure" in beauty salons where the "hair tints have been and are being used").

Here, the specimens do not associate the term AQUAPALOOZA with applicant's goods. Instead, they promote the "summer sales event" and "the largest on water boating party." Thus, the specimens cannot be considered as displays associated with the goods. *See In re Gilbert Eiseman, P.C.*, 220 USPQ 89, 90 (TTAB 1983) ("It is established that when a designation or slogan imparts an impression of conveying advertising or promotional information rather than of distinguishing or identifying the source of goods or services, it cannot be the basis for registration"). *See also Osterberg*, 83 USPQ2d at 1224 ("[A]pplicant's webpage is simply advertising or promotional material and it does not constitute a display used in association with the goods").

---

[3] Applicant's website indicates that AQUAPALOOZA was repeated in 2007. "With the triumphant Aquapalooza 2006 put to bed, sights are now set on the upcoming oh-oh-seven version."

We previously set out a picture of a dealer's showroom in which applicant's mark is displayed on posters and advertisements. Again, these displays show AQUAPALOOZA 2006 and refer to a "Summer Sales Event." Customers entering a showroom will understand that there is a "Summer Sales Event" that is referred to as "Aquapalooza 2006." Beyond that, it is difficult to see how prospective purchasers will understand that the term AQUAPALOOZA on these specimens is a trademark for the goods. The specimens unequivocally describe a party or event that boaters can register to attend. Indeed, the USPTO has registered the mark for dealership services in the field of boats.

However, applicant insists that upon "viewing the poster bearing the Applicant's trademark prominently on it as it hangs directly above the boats, there can be no mistaking on the part of a consumer that the boats are what is being sold in the 'Sales Event.'" Reply Brief at 6. We are not persuaded by applicant's argument. Quite simply, the fact that purchasers would recognize that boats are sold at the AQUAPALOOZA event does not establish that the term AQUAPALOOZA serves as a trademark for those boats. *In re Supply Guys Inc.*, 86 USPQ2d 1488, 1495-96 (TTAB 2008) ("The mere fact that the name of a store appears on the

sign outside or inside the store does not convert the service mark into a trademark for all the goods that are sold in those stores"). While applicant may be providing an activity that is designed to increase its boat sales, the name of this sales event/boat party is not a term that applicant has shown is associated with the goods sold at the event. *Accord In re Dr Pepper Co.*, 836 F.2d 508, 5 USPQ2d 1207, 1209 (Fed. Cir. 1987) (The "board reasonably has treated promotional contests as 'routine' sales activity for a producer's goods" where applicant used the term PEPPER MAN for service of sponsoring and operating a service to promote its DR PEPPER soft drinks).

Applicant has also submitted pages from its website that describes the 2007 event as follows: "This party will be action-packed with live entertainment by special guests, fireworks, giveaways and much more… Plans are in the works to attract more sponsors, develop on-line contests and perhaps even land a movie deal. Partying prospects are limitless. So if you're looking for some fun and sun on the water this summer check out and register for Sea Ray's Aquapalooza 2007." Again, the webpages do not reference boats themselves, but rather advertise a summer entertainment event. Applicant apparently intends this event to boost its boat sales, but these webpages, like the

posters and other advertisements, are not displays associated with the goods.

The board has held in a case involving webpages that:

> [A]pplicant's specimen webpage does not provide a means of ordering the product. On the contrary, the webpage states that the study is closed to patient registration. Certainly there is nothing in the specimen which shows that one can "click" on a link to order applicant's product, nor does it explain how to order it. *Compare Lands' End Inc. v. Manbeck*, 797 F. Supp. 511, 24 USPQ2d 1314, 1316 (E.D. Va. 1992), in which the Court found specimen catalogs to be acceptable displays associated with the goods because "a customer can identify a listing and make a decision to purchase by filling out the sales form and sending it in or by calling in a purchase by phone." At most, applicant's web page indicating how one can obtain "more information on personalized immunotherapy and our product" may be seen as promotional material, but advertising is not acceptable to show trademark use on goods. See Section 45 of the Trademark Act; *In re MediaShare Corp.*, 43 USPQ2d 1304 (TTAB 1997). Similarly, the company name, address and phone number that appears at the end of the web page indicates only location information about applicant; it does not constitute a means to order goods through the mail or by telephone, in the way that a catalog sales form provides a means for one to fill out a sales form or call in a purchase by phone.

In re Genitope Corp., 78 USPQ2d 1819, 1822 (TTAB 2006).

Here, applicant's webpages do not provide any means to order applicant's goods. Indeed, the webpage concludes with a sentence that says "if you're looking for some fun and sun on the water this summer check out and register for Sea Ray's Aquapalooza 2007." Other buttons offer readers the option of "Attend" and "Find a Local Event." We

recognize that advertising, in general, is intended to eventually induce a sale. However, that does not make advertising an acceptable specimen of trademark use for goods. Here, applicant's webpage does not provide people viewing that page with the opportunity to order the goods beyond that of most advertising. Therefore, this specimen is similar to ordinary advertising. It is not at all like the catalog or website in *Lands End* or *In re Dell, Inc.*, 71 USPQ2d 1725 (TTAB 2004), which provided a means to order the goods.

In this case, we find that the specimens that applicant has submitted do not show use of the mark on applicant's goods identified as boats and structural parts. Nor can the specimens be viewed as displays associated with those goods. Even when considered in their totality, the specimens would not result in an inevitable association between the mark and the goods. The only "inevitable" association with applicant's specimens is with the "world's largest on water summer boat party" and sales event. Therefore, we affirm the examining attorney's refusal to register on the ground that applicant's specimens do not show use of the mark on boats or their structural parts.

Decision: The refusal to register is affirmed.