

8/22/01
13

GDH/gdh

**THIS DISPOSITION
IS NOT CITABLE AS PRECEDENT
OF THE T.T.A.B.**

Paper No.

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re MCP Industries, Inc.

Serial No. 74/731,440

John J. Connors of Connors & Associates for MCP Industries, Inc.

Teresa Rupp, Trademark Senior Attorney, Law Office 106 (Mary Sparrow, Managing Attorney).

Before Simms, Hohein and Bottorff, Administrative Trademark Judges.

Opinion by Hohein, Administrative Trademark Judge:

MCP Industries, Inc. has filed an application to register the matter shown below, which is described as a "mark [which] consists of a rectangular shaped reddish orange label," as a trademark for "non-metallic pipe fittings, namely, couplings, bushings, and adapters".¹

¹ Ser. No. 74/731,440, filed on September 20, 1995, which alleges dates of first use anywhere and in commerce of January 1968; states that the drawing of the mark is lined for the color orange; and

Registration has been finally refused under Sections 1, 2 and 45 of the Trademark Act, 15 U.S.C. §§1051, 1052 and 1127, on the ground that, as shown by the manner of use thereof on the labels which were submitted as specimens of use, the matter which applicant seeks to register does not function as a trademark. Such matter appears on the specimens of use, which consist of three identical labels, as illustrated below.

Specifically, while applicant seeks registration pursuant to the provisions of Section 2(f) of the Trademark Act, 15 U.S.C. §1052(f), the Senior Attorney contends, as stated in her final refusal, that "[b]ecause the record lacks both evidence that the applicant promotes the color reddish orange used on a rectangular label as a mark and evidence of recognition of the color by those in the industry, the applicant has failed to

disclaims the exclusive right to use the rectangular shape of the label apart from the mark as shown.

meet its burden of establishing acquired distinctiveness under Section 2(f)."

Applicant has appealed. Briefs have been filed, but an oral hearing was not requested. We affirm the refusal to register.

Applicant, in support of its position that the matter sought to be registered has acquired distinctiveness and hence functions as a mark, has made of record the declaration of David M. Vansell, who avers that he is "the vice-president of sales of the Mission Rubber Company, a division of the Applicant, MCP Industries, Inc." With respect to applicant's "Orange-Red Color Miscellaneous Design," as its asserted mark is identified in the caption of the declaration signed on September 20, 1996, Mr. Vansell declares that he is "familiar with the usage of the above-identified mark as a label"; that "the above-identified reddish orange color mark has been in use in commerce since before 1968 in connection with specialty transition series pipe couplings that connect two different pipe materials together"; that such mark "has become distinctive due to its long term use and the promotional efforts by the Applicant"; and that "Applicant's customers, mainly plumbers, recognize the mark as indicating the pipe couplings originate with the Applicant and comply with building codes."

Mr. Vansell further declares that, "since adopting the mark, over \$250,000 has been spent by the Applicant in promoting the mark, including informational seminars to indoctrinate plumbers and plumbing inspectors that this reddish orange label indicates that the pipe coupling is a product made by the Applicant"; that "due to this promotional effort, major national building code agencies recognize that the reddish orange label stands for the Applicant's pipe couplings and that Applicant's products as indicated by this label are acceptable and meet building codes"; that "Applicant only uses the reddish orange label in connection with the goods identified in the ... application"; that "there are no competitors who use this reddish orange label nor is this color recognized in the industry in any particular fashion except as a trademark of the Applicant"; and that "Applicant distributes the pipe coupling bearing the mark (1) to plumbers through wholesale plumbing distributors, and (2) to the consumers through mass merchandisers, who do not remove Applicant's distinctive label mark so that building inspectors will recognize that the products meet building codes."

Applicant maintains that, "[i]n view of the above facts, Applicant is entitled to registration on the Principal Register of the orange red colored rectangular label." We agree with the Senior Attorney, however, that applicant's

evidence is insufficient to establish acquired distinctiveness and that its "rectangular shaped reddish orange colored label is used merely as a background design on the labels and as such does not function as a trademark for the goods."

As the Senior Attorney persuasively observes in her brief, the issue of registrability in this appeal is analogous to that presented in two other cases decided by this Board. Specifically, as she correctly points out:

The ... Board in *In re Benetton Group S.p.A[.]*, 48 USPQ2d 1214 (TTAB 1998) was faced with determining the registrability of a mark similar to the mark herein. In *Benetton*, the Board found that a green label, used as background for ... various words, did not function as a trademark. The Board stated, "where, as here, an applicant seeks to register a background design that is used in connection with a word and/or design mark, that background design may be registered as a trademark only if it creates a commercial impression separate and apart from the word and/or design mark in conjunction with which it is used". 48 USPQ2d at 1215.

Likewise, in *In re Anton/Bauer Inc.*, 7 USPQ2d 1380 (TTAB 1988), the Board refused to register a [parallelogram used as a] background design [for presentation of the word mark "ANTON/BAUER"] because the applicant did not show that the design alone was a designation of source rather than a mere background for the applicant's mark. The Board found that there was no evidence of promotion of the background design in a way that would set it apart from the word mark for which it served as a background. 7 USPQ2d at 1383.

Here, as the Senior Attorney accurately notes, the declaration from Mr. Vansell contains "no evidence that shows how the applicant uses, promotes or advertises the rectangular reddish orange label apart from the wording on the label" and "there are no declarations from the applicant's customers that would support the ... statements that the matter presented for registration identifies goods coming solely from the applicant." The sole basis of applicant's claim of acquired distinctiveness, therefore, is the conclusory statements in Mr. Vansell's declaration,² but absent supporting examples of how applicant advertises and promotes its design as a trademark for its goods, it is simply not possible to assess the accuracy of such statements. In view thereof, and since there is nothing to show that a layman like Mr. Vansell is even acquainted with trademark law in general and is

² Although we note, as does applicant, that it has also made of record a statement by it and a third-party, Homer TLC, Inc., which was submitted in order to avoid a possible refusal under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), in the event that the latter's earlier filed application "for registration of the 'Color Orange'" for a variety of goods and services matured into a registration, such statement does not constitute evidence of acquired distinctiveness. Instead, such statement merely provides that, after having inspected a copy of the "'Red-Orange Color Rectangular Label' sought to be registered" by applicant, "Homer TLC, Inc. does not believe that there exists any actual or likelihood of confusion between its 'Color Orange' and the 'Red-Orange Color Rectangular Label' because, among other things, of the differences in color and the differences in the type of goods and services, and because MCP Industries' mark is directed to a rectangular label" and that the parties, "in consideration for this Statement, mutually agree that they will not file an opposition" to their respective applications nor "file a petition to cancel any registration issuing" therefrom.

knowledgeable as to the legal concept of what constitutes acquired distinctiveness in particular, we concur with the Senior Attorney that his declaration "is not persuasive because it does not prove that the purchasers perceive the reddish orange label as a mark."

Specifically, while applicant, as further pointed out by the Senior Attorney, "has also attested to promotional expenditures in excess of \$250,000, which were used to indoctrinate plumbers and plumbing inspectors that the reddish orange label indicates that the pipe coupling is a product made by applicant," the record does not contain "any samples of ... promotional materials which would show how the purchasers are 'indoctrinated'." We also observe that, on average, such expenditures have amounted to less than \$9,000 annually over a 36-year period, which suggests that, even if applicant does in fact promote its reddish orange rectangular label as a mark for its goods, as asserted by Mr. Vansell, its efforts have been exceedingly modest and not likely to have had the claimed effect of establishing distinctiveness for the matter which it seeks to register. A rectangular label is, of course, a commonly used geometric design for the display of whatever matter, including a mark or wording, happens to appear thereon and a bright, reddish orange color would

obviously serve to call attention to such matter, but it does not follow therefrom that a rectangular reddish orange label functions as a mark for the goods to which it is applied, especially where, as shown by applicant's specimens, the sole manner of use thereof is as a background for the display of the marks and informational wording thereon.

Accordingly, while we additionally note that no competitor of applicant uses a reddish orange rectangular label in connection with non-metallic pipe couplings or other fittings, we agree with the Senior Attorney that, "[b]ecause of the nature of the proposed mark, applicant's exclusive use, even exclusive use since 1968, is insufficient to support a claim of acquired distinctiveness." Applicant, as the Senior Attorney tellingly observes, "has failed to supply any actual evidence that the matter presented [for registration] is perceived as a mark" by the relevant purchasing public. Nothing in this record demonstrates that customers for applicant's goods have come to regard its rectangular reddish orange label as an indicator of source.

Decision: The refusal to register is affirmed.