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U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **Dataweld, Inc.**

Serial No. 74/**421,648**

John M. Harrison for **Dataweld, Inc.**

James A. Rauen, Trademark Examining Attorney, Law Office 103
(Michael A. Szoke, Acting Managing Attorney)

Before Cissel, Seeherman and Hohein, Administrative
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Dataweld, Inc. has applied to register ACUTRAX, in the
stylized form shown below, for "computer software for
tracking compressed gas cylinders."¹

¹ Application Serial No. 74/421,648, filed August 6, 1993, and
asserting first use and first use in commerce on May 15, 1993.

Registration was finally refused pursuant to Section 2(d) of the Trademark Act, asserting a likelihood of confusion with three cited registrations, and because the specimens submitted by applicant were deemed unacceptable as evidence of actual trademark use. The Examining Attorney noted, in his brief, that two of the cited registrations were cancelled for failure to file Section 8 affidavits of use, and withdrew the refusal of registration with respect to these registrations. The Board has now ascertained that the third cited registration was similarly cancelled in May 1997. Accordingly, the only issue before us is whether the specimens submitted as acceptable to evidence use of the mark for applicant's identified computer software.

With its initial application papers applicant submitted what appears to be an advertising brochure, a single sheet of glossy paper, printed on both sides, and folded to present 4 8½ x 11-inch pages. It states that "AcuTrax is a unique cylinder tracking system for the compressed gas industry," and details the benefits that will accrue to the users of this system, which are listed under such headings as "Provide superior asset protection," "Enhance customer relations," and "Offer powerful marketing tools." The materials conclude with the following paragraph:

Acu Trax is the cylinder tracking system
that takes you into the future.

Although the Examining Attorney apparently would have found such specimens acceptable for showing use of a mark on the goods, he objected that the specimens did not evidence use of the applied-for mark, since the specimens showed the mark as "Acu Trax," and the mark shown in the drawing was in the stylized form depicted on page 1 of this opinion.

Subsequent to the filing of the appeal applicant filed yet a third set of specimens. These specimens appear to be another version of the first set, using essentially identical language. The primary difference is that these brochures are in color, and are folded to present a six-, rather than a four-, page layout. On remand, the Examining Attorney found these specimens to be unacceptable to show trademark use, asserting that they are merely advertising.

Applicant never discussed the issue of the acceptability of its specimens in its brief, presumably because it assumed that its substitute specimens would resolve the problem. Nor, when the Examining Attorney refused to accept the third set of specimens, did applicant file a supplemental brief with respect to that issue. Thus, the only argument we have with respect to applicant's position is its statement, in response to the Examining Attorney's refusal to accept the original set of specimens, that these specimens "are designed to indicate origin, as they detail the function of the software which is identified by the trademark. These specimens are the equivalent of

displays associated with the goods." Response filed Aug. 23, 1994).

We agree with the Examining Attorney that the specimens submitted by applicant are unacceptable to show trademark use of the applied-for mark on computer software for tracking compressed gas cylinders.

Section 45 of the Trademark Act states that "a mark shall be 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...." The two sets of brochures (the first and third specimens submitted by applicant) appear to be mere advertising materials. It is well established that specimens which constitute mere advertising are not acceptable as specimens of trademark use on goods. See **in re Shipley Company, Inc.**, 230 USPQ 691 (TTAB 1986). Nor, despite applicant's assertion that the first set are the equivalent of displays associated with the goods, is there any basis in the record from which we can reach such a conclusion. Applicant has not given any information about how these brochures are distributed, such that they could be considered displays associated with the goods. Cf. **In re Shipley Co. Inc.**, supra (prominent display of the trademark on a trade-show booth where product

Ser No. 74/421,648

literature is distributed and orders for the goods are taken is a display associated with the goods).

As for the second set of specimens, the asserted screen print-outs, they depict the mark as Acu Trax, rather than the special form mark ACUTRAX shown in the application drawing. Thus, these specimens do not evidence use of the stylized mark sought to be registered.

Decision: The refusal of registration is affirmed.

R. F. Cissel

E. J. Seeherman

G. D. Hohein
Administrative Trademark Judges
Trademark Trial and Appeal Board