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U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re W. **Wendell Smith**

Serial No. 74/**403,241**

Gordon W. Hueschen for W. Wendell Smith.
Darlene Bullock, Trademark Examining Attorney, Law Office
101(Chris Wells, Managing Attorney).

Before Simms, Cissel and Walters, Administrative Trademark
Judges.

Opinion by **Cissel**, Administrative Trademark Judge:

On June 21, 1993, applicant applied to register the words "BURLAP IS BIO-FRIENDLY!" on the Principal Register for what was subsequently identified by amendment as "unpopped popping corn," in Class 31. The application was based on applicant's claim of use of the phrase as a trademark for his goods since May 26, 1993. Applicant claimed ownership of the following registrations:
Registration No. 1,237,557, which is for the configuration of a textured bag with a tag hanging on the cord which ties it closed at its top; Registration No. 1,134,263, for the

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mark "BURLAP BAG"; and Registration No. 1,197,088, which is for the words "THE POPCORN IN THE BURLAP BAG." The goods in these registrations are identified as popcorn.

The first Office Action in the instant application was an Examiner's Amendment which made the identification of goods acceptable, but upon further review, the original Examining Attorney, who was subsequently replaced by Ms. Bullock as the examiner of this application, refused registration under Sections 1, 2 and 45 of the Lanham Act on the ground that the phrase sought to be registered is not shown to be used as a trademark on the specimens submitted with the application. He held that as it appears on the specimens, the phrase "BURLAP IS BIO-FRIENDLY!" would not be understood to indicate the source of applicant's popcorn, but instead would be understood to impart information about the packaging in which applicant's goods are sold.

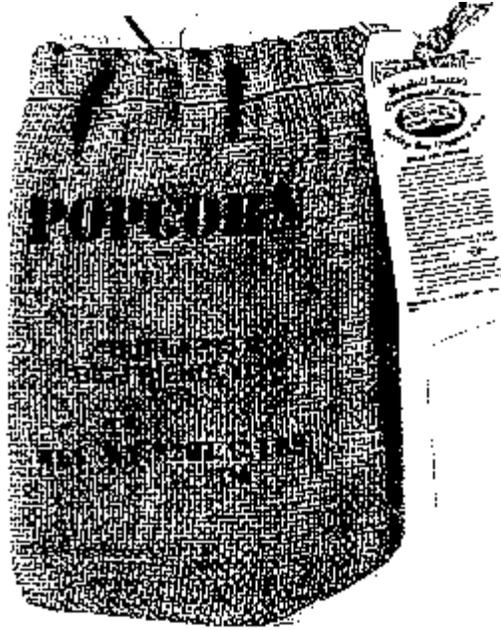
Applicant responded by disputing this issue with the Examining Attorney, and applicant also provided copies of its claimed registrations as well as photocopies of pages from several editions of the Patent and Trademark Office Official Gazette wherein different slogan marks for different kinds of products were published for opposition.

When the refusal to register was made final, applicant appealed. No oral hearing was requested, but both applicant and the new Examining Attorney filed briefs.

Sections 1 and 2 of the Lanham Act provide for the registration of trademarks under the federal law. Section 45 defines a trademark as: "...any word, name, symbol or device, or any combination thereof...used by a person...to identify and distinguish his or her goods...from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown." Trademark Rule 2.56 provides that an application based on a claim of use must include three specimens of the trademark as it is used on or in connection with the goods in commerce.

The fundamental issue in this dispute is therefore whether the specimens submitted with the application evidence use of the words sought to be registered in the manner of a mark, i.e., to identify applicant's popcorn and distinguish it from similar products which do not emanate from applicant. Based on careful consideration of the record before us in this application and the relevant legal precedents, we hold that the refusal to register is appropriate in this case.

The specimens are apparently photocopies of the front of a burlap bag in which applicant's popcorn is sold. One is reproduced in reduced size on the following page.



It is readily apparent that the effect of reading these words on the bag in which the goods are sold is that one is informed that the burlap container holding the popcorn is biologically friendly, i.e., that the burlap of which the bag is made is kind to the environment.

Support for this conclusion is found in the dictionary definitions submitted by the Examining Attorney. They show that "bio" is an abbreviation for "biological" and that "friendly" means "well disposed," "kindly," or "serving or helping." This evidence shows that purchasers of applicant's goods are likely to attribute these meanings to the words on applicant's burlap bags and understand "BURLAP IS BIO-FRIENDLY!" as an informational statement used by applicant to make customers aware of the environmental

advantage of making the container out of a biodegradable material like burlap, instead of some other material like plastic, which is not at all environmentally friendly.

This case is similar to several previous decisions wherein slogans were held to be merely informational in nature or simply ordinary laudatory phrases which would be used in particular businesses. In *In re Manco, Inc.*, 24 USPQ2d 1938, 1942, (TTAB 1992), we held "THINK GREEN" to be unregistrable for weather stripping and paper products, noting that "[r]ather than being regarded as an indicator of source, the term "THINK GREEN" would be regarded simply as a slogan of environmental awareness and/or ecological consciousness." In *In re Remington Products Inc.*, 3 USPQ2d 1714 (TTAB 1987), we held that when consumers see "PROUDLY MADE IN THE USA" on electric shavers, they would understand the phrase as information about where the products were manufactured, but that the slogan does not function as a trademark to identify the commercial source of the goods and distinguish them from similar products made by other commercial enterprises. Similarly, in *In re Tilcon Warren, Inc.*, 221 USPQ 86 (TTAB 1984), the phrase "WATCH THAT CHILD" did not function as a mark for concrete and aggregates when the only use of the words was on the bumpers of the vehicles which were used to transport the goods.

Applicant argues that its claimed registrations and the fact that it has used burlap bags as packaging for its products for nineteen years support registrability of the phrase it seeks to register with this application. The issue in the instant appeal, however, is not whether the packaging for the goods or applicant's other registered marks are well known or have become distinctive as a result of long use. Applicant has not sought registration under the provisions of Section 2(f) of the Act, so applicant's claim of extensive use of its bag is not relevant to our inquiry in this appeal. The issue in this case is whether the phrase sought to be registered is used as a trademark by applicant. The registrations applicant owns and the extent of applicant's use of its packaging have no bearing on this issue.

Applicant contends that the phrase sought to be registered "cannot be merely informational as to the goods, which is (sic) unpopped popcorn. At most, the Examiner could only consider the mark to be informational regarding the packaging of the goods, which is irrelevant." (brief, p.2). We reiterate that the refusal to register is based on the fact that the slogan is not used as a trademark for applicant's popcorn. The refusal is not based on the allegation that the phrase is merely descriptive within the meaning of Section 2(e)(1) of the Act. That the words

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provide information about the bag in which the goods are sold is most certainly relevant to this issue. As stated above, a reasonable purchaser of applicant's popcorn sold in burlap bags bearing the slogan "BURLAP IS BIO-FRIENDLY!" would understand the words to tout the ecological advantages provided by applicant's packaging. In view of its informational character, the phrase would not be viewed as a trademark indicating the commercial source of the popcorn inside the bags.

Accordingly, the refusal to register under Sections 1, 2 and 45 of the Act on the ground that the specimens do not show use of the slogan as a trademark is affirmed.

R. L. Simms

R. F. Cissel

C. E. Walters
Administrative Trademark Judges
Trademark Trial & Appeal Board

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