

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB FEB. 24, 99
U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **Scott G. Miller**

Serial No. 74/335,461

S. Martin Keleti of Cohen and Cohen for **Scott G. Miller**

Lesley LaMothe, Trademark Examining Attorney, Law Office
108 (**David Shallant**, Managing Attorney)

Before **Sams**, **Hanak** and **Wendel**, Administrative Trademark
Judges.

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

Scott G. Miller (applicant) seeks registration of
ADRENALINE ACTIONWEAR and design in the form shown below
for "sportswear, namely, t-shirts, sweatshirts, jackets,
shorts, caps and hats." The application was filed on
November 30, 1992 with a claimed first use date of February
1, 1992.



The Examining Attorney has refused registration pursuant to sections 1, 2 and 45 of the Lanham Trademark Act "because the proposed mark is merely ornamental as used on the goods." (Examining Attorney's brief page 1).

When the refusal was made final, applicant appealed to this Board. Applicant and the Examining Attorney filed briefs. Applicant did not request a hearing.

The Examining Attorney contends that applicant's mark would be perceived as mere ornamentation because it "appears prominently and occupies a major portion of the cap and shirt [the specimens of use]." (Examining Attorney's brief page 3).

While it is true that in two of the three specimens of use applicant's mark appears in a prominent fashion, it does not begin to occupy a majority of the surface area of these two specimens. Moreover, in the third specimen of use applicant's mark appears to occupy a very minor portion of the surface area.

Thus, we have, at a minimum, serious doubts as to the validity of one of the reasons as to why the Examining

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Attorney contends that applicant's mark would be perceived as mere ornamentation, namely, that said mark "occupies a major portion of the cap and shirt."

However, even if we were to accept the factual premises advanced by the Examining Attorney, what the Examining Attorney fails to address is the fact that applicant has depicted its mark in a manner such that the mark would be perceived as a source identifier. To elaborate somewhat, applicant has depicted the arbitrary portion of its mark (ADRENALINE) in large lettering and the descriptive portion of its mark (ACTIONWEAR) in decidedly smaller lettering. In this regard, we note that in Office Action No. 1, the Examining Attorney argued that the word ACTIONWEAR was descriptive of applicant's goods. This practice of depicting the arbitrary portion of a mark in large lettering and the descriptive or generic wording in subordinate lettering is a suggested manner of trademark depiction. See E. Rogers, Some Suggestions to Publishers About Trade-marks, 36 TMR 131, 137 (1946). To the extent that there may be some question as to whether consumers would perceive applicant's mark as a mark, applicant's manner of depicting its mark would, in our judgment, eliminate any lingering doubts.

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In her brief, the Examining Attorney discusses In re Dimitri's, 9 USPQ2d 1666 (TTAB 1988) and In re Pro-Line Corp., 28 USPQ2d 1141 (TTAB 1993). Both cases are readily distinguishable from this case.

In Dimitri's, the "mark" did occupy a majority of the front of the t-shirt and the "mark" did not include a descriptive or generic term.

In Pro-line, the "mark" (BLACKER THE COLLEGE SWEETER THE KNOWLEDGE) was held to be primarily a "phrase [that] essentially conveys a message or opinion about the value of education" and not about the source of the goods, especially because the goods (t-shirts) also displayed PRO-LINE, the true "source indicator." 28 USPQ2d at 1142.

Decision: The refusal to register is reversed.

J. D. Sams

E. W. Hanak

H. R. Wendel
Administrative Trademark
Judges, Trademark Trial
and Appeal Board

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