

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB

MARCH 9, 99

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Reese Brothers, Inc.

Serial No. 74/668,052

Russell D. Orkin of Webb Ziesenheim Bruening Logsdon Orkin
& Hanson, P.C. for Reese Brothers, Inc.

Kelley L. Wells, Trademark Examining Attorney, Law Office
105 (Thomas G. Howell, Managing Attorney)

Before Seeherman, Hanak and Chapman, Administrative
Trademark Judges.

Opinion by Chapman, Administrative Trademark Judge:

Reese Brothers, Inc. filed an application to register
the mark shown below

for "fundraising for charitable purposes".¹

¹ Application Serial No. 74/668,052, filed May 1, 1995, alleging
a bona fide intention to use the mark in commerce. Applicant
disclaimed the word "club".

Registration has been finally refused pursuant to Trademark Rules 2.51 and 2.72(a) on the ground that the specimens submitted with applicant's statement of use do not show use of the applied-for mark. Applicant attempted to avoid this refusal by amending the drawing, but the Examining Attorney has refused to accept applicant's proposed amendment to conform the drawing to the display on the specimens of record, on the basis that such an amendment constitutes a material alteration of the mark under Trademark Rule 2.72(a).

Applicant has appealed. Both applicant and the Examining Attorney have filed briefs, but an oral hearing was not requested. We affirm.

Although the technical basis for the refusal is that the specimens do not support the applied-for mark in the drawing, in fact, the issue before us is whether applicant's proposed amendment to change the drawing to the mark shown below²

constitutes a material alteration of the mark and is not permissible under Trademark Rule 2.72(a).³

² We note that the words, THE RED KETTLE CLUB, appear in two different styles of lettering on the specimens, neither of which is the style as set forth in the amended drawing.

³ For ease of discussion, we will refer to the involved marks simply in typed form.

Applicant contends that amendments to conform the drawing to the actual use shown on the specimens is permitted pursuant to the case of *In re ECCS*, 94 F.3d 1582, 9 USPQ2d 2001 (Fed. Cir. 1996); and that inasmuch as applicant's application is internally inconsistent, applicant merely seeks to remove the ambiguity. In its reply brief, applicant argues that the proposed amendment is not a material alteration of the character of the mark because the word KETTLE is the dominant portion of both marks; that the addition of the words "the" and "red" merely adds a color to the overall impression, which remains "an image of a club for kettle users"; and that the proposed amendment to the drawing would require neither a new search by the Examining Attorney, nor re-publication of the mark.

In the ECCS case, supra, the Court identified two distinct categories of proposed amendments to drawings. The first category involved a situation like that then before the Court, where the use-based application contained an internal ambiguity or inconsistency between the mark shown in the drawing and the mark shown on the specimens. The Court found that removing the ambiguity by correcting the drawing was authorized under Trademark Rules 2.51(a)(1) and 2.72(b). The second category of proposed amendments to

drawings are those which involved proposed changes to a mark as originally filed when there is no ambiguity or inconsistency between the specimens and the drawing. In these cases the proper inquiry is whether the proposed amendment materially alters the character of the mark under Trademark Rule 2.72(a).

In the case now before us, applicant filed its application based on intent to use [Section 1(b) of the Trademark Act]. Because no specimens accompanied the application, there was no ambiguity or internal inconsistency in the original application, and therefore this situation falls into the second category of amendments to drawings as set forth in the ECCS case, supra.

Trademark Rule 2.72(a) reads as follows:

Amendments may not be made to the description or drawing of the mark if the character of the mark is materially altered. The determination of whether a proposed amendment materially alters the character of the mark will be made by comparing the proposed amendment with the description or drawing of the mark as originally filed.

In the case of *In re Vienna Sausage Manufacturing Co.*, 16 USPQ2d 2044, 2046 (TTAB 1990) the Board set forth the following general test for determining whether the change is a material alteration:

The old and new forms of the mark must create the same general commercial impression or create the impression of being essentially the same mark.

See also, In re Finlay Fine Jewelry Corp., 41 USPQ2d 1152 (TTAB 1996); In re Nationwide Industries Inc., 6 USPQ2d 1882 (TTAB 1988); and Visa International Service Assn. v. Life-Code Systems, 220 USPQ 740 (TTAB 1983).

We agree with applicant that the addition of the word "THE" is insignificant. However, we do not agree that the addition of the word "RED" is "only" the addition of a color which does not change the overall impression of the mark. The addition of the word "RED" in fact changes the commercial impression of the mark. For example, a party with rights in the mark RED CUP might have chosen not to oppose the mark KETTLE CLUB, but might oppose the mark THE RED KETTLE CLUB. Thus, the proposed amended mark THE RED KETTLE CLUB would require a different search by the Examining Attorney, and would require re-publication to afford fairness to potential opposers.

In view of our conclusion that the commercial impression of the original mark, KETTLE CLUB, is changed by the proposed amendment of the mark to THE RED KETTLE CLUB, we hold that the proposed amended mark is a material alteration of the original mark, and that the Examining

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Attorney was correct in refusing to accept the new drawing. We further find that the specimens do not show use of the mark depicted in the drawing.

Decision: The refusal to register on the ground that the specimens do not evidence use of the applied-for mark is affirmed.

E. J. Seeherman

E. W. Hanak

B. A. Chapman
Administrative Trademark Judges,
Trademark Trial and Appeal Board