

**THIS DISPOSITION
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6/6/01

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **Handler Textile Corporation**

Serial No. 75/544,959

Myron Amer of Myron Amer, P.C. for Handler Textile Corporation.

Scott M. Oslick, Trademark Examining Attorney, Law Office 108 (David Shallant, Managing Attorney).

Before Simms, Walters and Bottorff, Administrative Trademark Judges.

Opinion by Simms, Administrative Trademark Judge:

Handler Textile Corporation (applicant), a New York corporation, has appealed from the final refusal of the Trademark Examining Attorney to register the mark POSSIBILITY PANELS for custom quilting services.¹ Applicant and the Examining Attorney have submitted briefs but no oral hearing was requested.

We affirm.

Essentially, it is the Examining Attorney's position

¹ Application Ser. No. 75/544,959, filed August 28, 1998, based upon applicant's alleged bona fide intention to use the mark in commerce. After this application was published for opposition and a Notice of Allowance was issued, applicant filed a statement of use asserting use and use in commerce since January 4, 1999. Pursuant to request, applicant submitted a disclaimer of the word "PANELS."

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that the specimen submitted with applicant's statement of use (see below) does not show use of applicant's mark in connection with the services of custom quilting.

Rather, the Examining Attorney contends that the specimen shows use of this mark for goods in the nature of kits for use in quilting. Because applicant's specimen does not show use of the mark for the services identified in applicant's amended application, in the notice of allowance and in the amended statement of use, the Examining Attorney has refused registration, and required that applicant submit a specimen showing use of the mark for the services identified in the amended application, supported by an appropriate affidavit or declaration.

A brief review of the procedural history of this case is in order. In the original application, applicant indicated that it had a bona fide intention to use the mark for "crafting of quilts, in International Class 24." The applicant also indicated that the mark "will be used on labels affixed to the goods, and in other ways customary to the trade." Because the application was filed under Section 1(b) of the Act, a specimen of use was not filed with the application. Following a telephone conversation with applicant's attorney, the Examining Attorney amended the application to list the services as "custom quilting," in Class 40. The mark was thereafter published in the Official Gazette, and applicant then filed a statement of use with a specimen showing the mark used in connection with "Pre-Printed Creative Blocks for Easy Foundation Piecing." The

Examining Attorney rejected the specimen on the ground that it did not show use of the mark in connection with custom quilting services. The Examining Attorney therefore required that applicant submit a substitute specimen showing use of the mark in connection with applicant's services. This appeal then followed.

As the Examining Attorney has argued in his brief, the suggested amendment to the recitation was based upon a rewording of the description "crafting of quilts," and apparently was the result of a discussion between the Examining Attorney and applicant's attorney. The Examining Attorney indicates that the wording "crafting of quilts" indicated to him that applicant sought registration of the mark for services rather than goods. Upon entry of the amendment by the Examining Attorney, a copy of the Examiner's Amendment was sent to applicant. Applicant did not request further amendment to the description or to the classification of services. Thereafter, applicant was notified, by a Notice of Publication, that its mark was being published for custom quilting services in Class 40. Then, in the Notice of Allowance, applicant was notified that the mark was allowed for the services of custom quilting in Class 40.

We agree with the Examining Attorney that applicant's description of services indicates that applicant is involved in the making or selling of made-to-order quilts.

It is clear that applicant's specimen does not show use of the mark for custom quilting services. Whether a specimen is acceptable as evidence of service mark use depends upon the use reflected in that specimen. The use must be of such a nature that potential purchasers would perceive the mark as identifying and distinguishing applicant's services. See TMEP Section 1301.04, and In re El Torito Restaurants Inc., 9 USPQ2d 2003 (TTAB 1988). Applicant's specimen is a kit used by purchasers to create their own quilts. The specimen indicates that applicant's goods are "Perfect for Crafters and Quilters of Any Skill Level." Another example of use shows use of the mark for patterns used to design quilts, and not in connection with any custom quilting services performed by applicant.

Applicant argues, however, that the materials out of which a quilt is created or "customized" are supplied by applicant.² Applicant argues that the supplying of these materials is a service. However, as the Examining Attorney contends, the service of custom quilting must be performed by the applicant to the order or specification of others.

² Applicant's attorney states, Response, filed July 21, 2000, p. 2:

What is involved is a "custom quilt" in a

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From the specimen of record, it does not appear that applicant is performing a service such as the constructing of a quilt for a purchaser. The provision of the kit by which the customer performs the activity of creating a quilt is not a custom quilting service performed by applicant. Moreover, the specimen of record clearly shows use of the mark sought to be registered as a trademark for the kit and not as a mark for custom quilting services. Applicant's kits are intended for the use by a consumer in making his or her own quilt.

Decision: The refusal of registration is affirmed.

preliminary state as a "Kit."