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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Anabec, Inc.

Serial No. 76397303

Howard M. Ellis of Simpson & Simpson, PLLC for Anabec, Inc.

Michael H. Kazazian, Trademark Examining Attorney, Law Office
113 (Odette Bonnet, Managing Attorney).

Before Hohein, Bucher and Drost, Administrative Trademark
Judges.

Opinion by Bucher, Administrative Trademark Judge:

Anabec, Inc. seeks registration on the Principal Register
of the design shown below:



for services recited as "environmental services, namely architectural decontamination, indoor air quality improvement and surface remediation,"¹ in International Class 40.

The Trademark Examining Attorney has refused registration of applicant's mark based upon the ground that it does not function as a service mark for applicant's recited services under Sections 1, 2, 3 and 45 of the Trademark Act, 15 U.S.C. §§1051, 1052, 1053 and 1127, and that despite applicant's submission of substitute specimens, applicant has still failed to submit acceptable specimens demonstrating this matter being used as a service mark.

¹ Application Serial No. 76397303 was filed on April 18, 2002 based upon applicant's allegation of use in commerce at least as early as May 1998.

Applicant argues that the refusal is based on mere "conjecture and speculation" on the part of the Trademark Examining Attorney. Applicant alleges that the Trademark Examining Attorney has failed to analyze this matter fairly in the context of its advertising brochures and post card.

Applicant and the Trademark Examining Attorney have fully briefed this case, but applicant did not request an oral hearing before the Board.

We affirm the refusal of registration.

Based upon this entire record, it is clear that applicant is involved in cleaning and treating air quality and building surfaces in buildings suffering from poor indoor air quality. Buildings contaminated in this way are sometimes referred to as having "Sick Building Syndrome."

The refusal to register herein is grounded in the basic statutory definition of a "service mark." The function of a service mark includes a device used by a person "to identify and distinguish the services of one person, including a unique service, from the services of others and to indicate the source of the services" 15 U.S.C. §1127. A mark is deemed to be in use on services "when it is used or displayed in the sale or advertising of services." *Id.*

As argued by the Trademark Examining Attorney, the manner of use on the specimens must be such that potential purchasers

would readily perceive the subject matter as identifying and distinguishing the applicant's services and indicating their source, even if that source is unknown. See Section 45 of the Trademark Act, 15 U.S.C. §1127.

In support of his refusal to register under Sections 1, 2, 3 and 45 of the Act, the Trademark Examining Attorney argues as follows:

... [P]otential consumers are not likely to regard the mark as a source indicator because the mark as used on those specimens does not show proper service mark use. Not all words, designs, symbols or slogans used in the sale or advertising of goods or services function as marks, even though they have been adopted with the intent to do so. A designation cannot be registered unless ordinary purchasers would readily perceive the mark as an indicator or origin for the services identified in the application. ... For instance, in the pamphlet entitled "The Anabec System," the design appears directly above some text labeled "Resulting symptoms for each of us" which explains that "eventually we all inhale these contaminants ... Small wonder that we are plagued by nasal congestion, sore throat, wheezing, asthma ... and rashes." The sick building design directly above the text is thus likely to be viewed as nothing more than a funny, cartoon illustration of the symptoms described. Thus, purchasers are likely to conclude that the sick-building logo² is merely a fanciful depiction of "unhealthy buildings and not as a source indicator."

(Trademark Examining Attorney's appeal brief, unnumbered pages 5 - 6)

By contrast, applicant states its case as follows:

² Throughout the prosecution of this application, applicant has characterized the cartoon as being a "logo," which characterizations was subsequently adopted by the Trademark Examining Attorney. However, since the word "logo" suggests an identifying symbol, we find such a description of this matter, in the context of this decision, to be inaccurate.

Applicant submits, the sick building logo³ is much more than merely a decorative cartoon character, as asserted by the Examining Attorney, because the specimen establishes a direct relationship between the copy and the mark itself...

(Applicant's brief, p. 10, emphasis in original)

In each of the three specimens of record, applicant's design is depicted as a color cartoon. In the two brochures, it is column width and preceded and followed by text. This first brochure was submitted as the original specimen of record:

³ *Id.*



Safe, Cost-Effective Indoor-Air-Quality/Surface Remediation

TAKE A DEEP BREATH . . . AND READ THIS!

IS MY BUILDING "SICK"?

The World Health Organization states that one in three buildings in America - including hospitals and schools - is "sick".

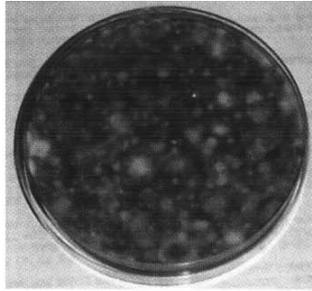
DO IAQ PROBLEMS COST YOU MONEY?

The American Medical Association reports that poor indoor air quality (IAQ), also known as "Sick Building Syndrome", costs American employers \$60 billion annually.



CAUSES OF POOR IAQ

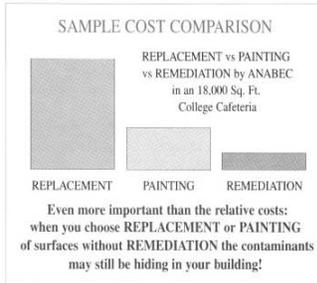
Age-old buildings have accumulations of dust, odors, and dampness. In 1970, in an effort to reduce energy costs, builders began to erect "air-tight" buildings. This virtually eliminated the circulation of fresh outdoor air. Thus, now more than ever, airborne particles of dust, and organisms such as fungi, yeast, bacteria, and mold and mildew are trapped in our heating ducts, carpets, walls, and ceiling tiles. These can cause both economic and aesthetic problems such as spoilage, fouling, or offensive odors.



Lab cultures of fungi which are known contributors to poor IAQ - Untreated petri dish (left) - Petri dish treated with the Aegis bacteriostatic component of the 2-part Anabec System (right)

OUR SOLUTION IS "THE" SOLUTION

The Anabec System provides a new and effective tool for the cleaning and treatment of environmental building surfaces. The System is a two stage process that utilizes a proven cleaning product - the Anabec Advanced Surface Prep Cleaning Solution - followed by a bacteriostatic agent - the Aegis Microbe Shield™. When your indoor building surfaces are cleaned and treated, our Advanced Remediation System has proven to be one of the most effective and least expensive tools of its kind on the market today, providing an intelligent, proactive answer at a fraction of building material replacement costs.



ANABEC and AEGIS: Unprecedented Results

Because of the compatibility of the Anabec Advanced Surface Prep Cleaning Solution, and the Aegis Microbe Shield™, microbial contamination can be cleaned and inhibited for an extended period with the results being guaranteed by Certified Applicators.

WHY THE ANABEC ADVANCED SURFACE

The Anabec Cleaner does not simply lie dormant. Using a process similar to "washing and waxing" your car, once the surface has been cleaned the Aegis Microbe Shield™ can then be applied where it will render that surface virtually free of dirt and organisms that cause spoilage, fouling, and offensive odors. The Anabec System is not only effective, but it can last for years.

WHY A "SYSTEM" APPROACH?

Effectively cleaning and treating building surfaces is a difficult job. It takes a careful and comprehensive program to insure success and long lasting results. Anabec provides a two part system that is designed to first pre-clean troublesome, difficult-to-reach environmental surfaces, making certain that the secondary component, a registered bacteriostatic agent, will have effective and long lasting results.

- 1.) Anabec will consult with you to examine the complete building envelope. A detailed IAQ Assessment is performed to help pinpoint problem areas.
- 2.) Using any independent lab you choose, testing is then done to identify which environmental surface contaminants are present, and at what levels.
- 3.) If corrective measures are necessary, Anabec will work with the customer to develop a detailed plan of action.
- 4.) After application of the 2-part Anabec System, post-testing is done on the treated areas to document results.

Normal housekeeping and cleaning of the treated surfaces can now be done without deterioration to the continuing action of the

In an attempt to meet the objections of the Trademark Examining Attorney to the registration of applicant's design, based upon the usage shown on the original specimen of record, applicant submitted two more substitute specimens - a second brochure and a promotional post card.



Safe, Cost-Effective Indoor-Air-Quality/Surface Remediation

Take a deep breath . . . and read this!

The World Health Organization states that one in three buildings—including hospitals and schools—in America is "sick."

The American Medical Association reports that poor Indoor Air Quality (IAQ), also known as "Sick Building Syndrome," costs American employers annually \$60 billion in sick leaves and \$1 billion in additional medical expenses.

The American College of Allergists states that 50% of illnesses are either caused by or aggravated by polluted indoor air.

Causes of poor IAQ. Age-old buildings have, of course, age-old accumulations of dust, germs, odors, and dampness. In 1970, in an effort to reduce energy costs, builders began to erect "air-tight" buildings, virtually eliminating fresh outdoor air. Thus, now more than ever, the airborne particles of dust mites, fungi, bacteria, viruses, algae, and amoebae lodge and incubate in our heating ducts, carpets, walls, and ceiling tiles.

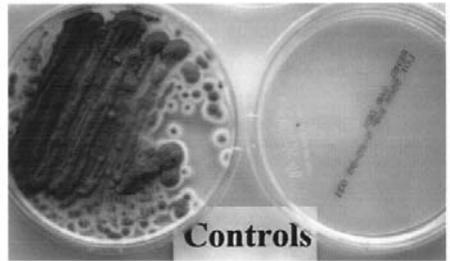
Add to this: the aerosols, the tobacco smoke, the formaldehyde emitted by carpets and office equipment; the toxins in petroleum fuels, degreasing agents, lubricants; the dusts produced by plants, pets, insects, construction, insulation, and processes of all kinds.



Resulting symptoms for each of us. Eventually we all inhale these contaminants in our homes, businesses, schools, and hospitals. Small wonder that we are plagued by nasal congestion, sore throat, wheezing, asthma, eye irritation, nausea, headache, lethargy, fatigue, fever, and rashes. Perhaps the most significant bioaerosol is the legionella bacteria which causes Legionnaires' Disease.

Our Solution is *the* Solution

The ANABEC System gives you a new, safe, effective way to remediate building surfaces. Sprayed onto such surfaces as acoustical ceiling tiles, painted brick, and carpeting, our Advanced Remediation SolutionSM is proven to be the most effective and least expensive on the market—at a fraction of replacement costs.



Lab cultures of fungi which are known contributors to poor IAQ before (left) and after (right) our Advanced Remediation Solution was applied.

Effective! Lab tests demonstrate that our Solution achieves virtually 100% "kill" of specified contaminants (see chart on next page). Testing is ongoing as further microbial contaminants are identified.

Safe! Lab tests further demonstrate that our Solution is environmentally friendly: non-toxic, biodegradable, odorless, and completely harmless to carpeting, ceiling tiles, outdoor building materials, signage, and landscaping.

New! Our Advanced Remediation SolutionSM is protected by a U.S. Patent Pending.

Cost-effective? You bet.

Building surface remediation by The ANABEC System not only eliminates harmful microbials before they reach people, but at the same time improves your building's aesthetics. With ceiling tile replacement averaging up to \$1.00 or better per square foot, and painting averaging 50 cents or more per square foot, ANABEC is the clear choice—at as low as 19 cents per square foot. That's a 60% to 80% savings! Your building's surfaces—inside or out—will look like new, and, if you remediate with ANABEC on a regular basis, those surfaces will "last a lifetime."

In the post card promotional piece, the sick building image covers the entire picture side of the card. The lower half of the following image is the reverse side of the post card, containing promotional text, applicant's mailing address,

the postage information, and a space for the addressee's mailing address:



Anabec did it again. Actually, we've done it many times. With our new technology for cleaning and treatment of severe strains of mold and bacteria associated with the Indoor Air Quality issue.

The innovative, affordable Anabec System approach has proven to be one of the most effective, long-lasting tools found today for the mold and bacteria found in porous building materials. Our water-based products go beyond bleach with extensive contact time to effectively treat environmental building surfaces.

A major university had high microbial contamination levels in its dormitories. The problem was solved over a weekend, with no relocation of students and no building downtime, at a fraction of the cost of removal and replacement of materials. After two years, the areas treated have remained at acceptable levels.

Want to know more?

Visit our website at www.Anabec.com, or call toll free at 1-800-369-8463 for complete information including references and field testing.

The Anabec System
9393 Main Street
P.O. Box 433
Clarence, NY 14031

FIRST CLASS MAIL
AUTO
U.S. POSTAGE PAID
Buffalo, NY
4388

Perhaps applicant did expect that its color cartoon image would distinguish its services from similar services advertised by others. On the other hand, having chosen a cartoon image of "sick buildings," and then having employed it within the text of brochures advertising services dealing with improving indoor air quality, applicant accepted the risk that the color cartoon may not function as a source indicator for its services. See *In re The Standard Oil Company*, 275 F.2d

945, 125 USPQ 227 (CCPA 1960) [GUARANTEED STARTING for winterizing automobile engines].

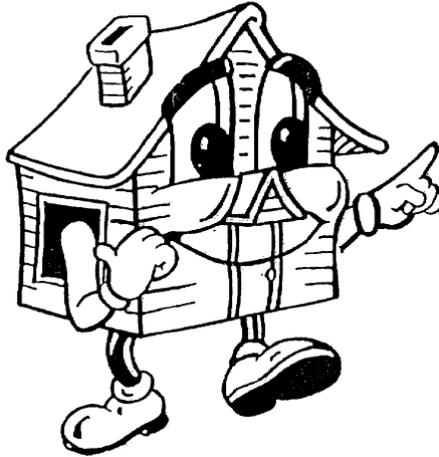
The Trademark Examining Attorney's refusal to register herein is clearly premised on the statutory language "to identify and distinguish the services of one person, including a unique service, from the services of others and to indicate the source of the services" If the involved cartoon image does not identify and distinguish applicant's services, then it is simply not functioning herein as a service mark.

We begin our analysis of the imagery applied for herein by agreeing with applicant that cartoon images may be registered as service marks. However, a determination in any given case depends upon the manner in which the imagery is used in advertising the services. Caricatures and cartoon-like images can be inherently distinctive source indicators provided that they are presented in a technical service mark manner and employed in close association with a clear reference to the services to be performed.

In making a determination as to whether or not the imagery involved herein serves as an indication of origin, we are faced with an inquiry not unlike that of ornamental matter on goods. That is, to the extent that the matter is clearly educational, illustrative, entertaining or ornamental, we must look to the size, location, dominance, and significance of the

alleged mark as applied to the services. Cf. In re Astro-Gods Inc., 223 USPQ 621 (TTAB 1984) ["ASTRO GODS design" would not be perceived as anything other than part of the thematic whole of the ornamentation of applicant's T-shirts].

As to the inherent nature of the applied-for matter, we note a contrast between applicant's imagery and a third-party service mark - a "Homer" character - placed into the record by applicant.⁴ The image on this registration, described by applicant herein as a "building design having embedded facial caricature features" (applicant's appeal brief, p. 8), is that of a separable character:



However, applicant's imagery is a tableau of three adjacent building with human-like facial features. The first building has a fever, the second is sneezing and reaching for

⁴ Reg. No. 2422650 issued on January 23, 2001 to Peoria Siding and Window Company, Inc. of Peoria, IL. for the installation of siding and windows and for retail store services featuring siding and windows.

a tissue, while the third suffers from watering eyes. The scene is set out in a rectangular panel reminiscent of the newspaper comic pages. The look and feel is more of a story or a set piece rather than that of a single cartoon character. Of the two, Peoria Siding's single "Homer" character is more likely to be perceived as a service mark.

An even more critical component of the determination as to "size, location, dominance, and significance" of the alleged mark has to do with exactly how the imagery is used on the specimens of record, i.e., do the specimens of use filed with the application demonstrate that the matter is being used as a service mark?⁵ Does the matter appear in such a manner that its function as an indication of origin may be readily perceived by persons encountering the goods or services in connection with which it is used? See In re Whataburger Systems, Inc., 209 USPQ 429, 430 (TTAB 1980).

As noted by the Trademark Examining Attorney, in order to be recognized as a valid service mark, a designation must create a separate and distinct commercial impression. A design does not function as a service mark unless it is used

⁵ For example, continuing our comparisons with the Peoria Siding registration, while applicant has not made the specimens supporting that registration a part of this record, how the registered mark was shown on the specimens (e.g., shown in a prominent manner, close to registrant's trade name, or as a separable, distinct feature removed from other textual materials) would have played a critical role in the decision to register that mark.

in a manner that projects to purchasers a single source of the services to the customers.

In this context, we note that applicant's brochures and other promotional matter incorporate other cartoon-like images. Similar to the involved matter, they also serve an instructional purpose. Those images (e.g., of ventilation driven air flows in hospitals, air handling units and the spread of microorganisms from the carpet of school classrooms, etc.) are drawn and colored in a style quite similar to the applied-for mark.

As used in all three specimens of record, applicant's imagery fails to create a separate and distinct commercial impression. The various cartoons are not qualitatively different from each other, and the involved image is totally blended in with the other informational and promotional matter on the brochures, as was the case in the APPLE PIE TREE decision:

There is nothing in either [specimen] which separates the matter sought to be registered [APPLE PIE TREE] from the other elements shown on the specimens and informs the viewer that this term identifies a service. It is not that the subject matter must be more prominent than everything else on the specimens. We agree with applicant on that point. On the other hand, it must not blend so well with other matter on the specimens that it is difficult or impossible to discern which element is supposed to be the service mark. A commercial impression of a service mark must be readily

apparent from the use of the term. If purchasers are put in the position of having to choose between a number of elements to decide which is intended to be the service mark, it is clear that there is no service mark use. Mere intent that a name or character be a service mark is insufficient if there is no acceptable use as such.

In re McDonald's Corp., 229 USPQ 555, 556 (TTAB 1985)

Given the similarity to the specimens herein (i.e., the brochures and the picture post card), the language in an earlier Board decision is particularly appropriate to the facts of this case:

In the instant case, it is clear beyond peradventure that the particular representation in applicant's drawing ... is neither used as nor functions as a service mark for applicant's services. That is to say, this representation is not used any differently than the many other pictures or illustrations which are contained in applicant's brochures, form the subject matter of applicant's picture postcards, or are exhibited in vitrines at the Spanish Riding School. Under such circumstances, purchasers or potential purchasers of applicant's services would have no reason to perceive this particular representation (as distinguished from the many others in applicant's brochure, postcards, etc.) as an indication of origin for such services. That is, said representation, as presently used by applicant, has no readily apparent and recognizable nature and function as a service mark.



In re Republic of Austria Spanische Reitschule, 197 USPQ 494, 499 (TTAB 1977)

Accordingly, whether designed to help in the education process or even to entertain, we find that applicant's visual imagery is not going to be perceived as a source indicator for applicant's services.

Applicant argues repeatedly that there is a direct association between the applied-for imagery and the recited services. Applicant's arguments notwithstanding, we fail to see a direct association. The cartoon appears in proximity to a discussion of applicant's services, but given the nature of the image and the way it blends into the informational portions of the brochures, and functions as the picture on a picture post card, it will not readily be perceived as a service mark.

In support of its registration, applicant cites to In re Hechinger Investment Co. of Delaware Inc., 24 USPQ2d 1053 (TTAB 1991). There, applicant's retail hardware and household services were rendered under the primary mark HECHINGER, but the Board found that "no verbal or visual connotation or physical connection, exist[ed] between the surname and the fanciful dog character." Hechinger, *supra* at 1057. In drawing on the teachings of the Hechinger case, much as was argued by the Trademark Examining Attorney herein, the issue

is whether the appearance of the alleged mark in advertisements and other promotional materials creates a direct association between the alleged mark and the services offered. All of the specimens of record show ANABEC as the "primary mark" for the recited services. However, as in the Hechinger case, we find such an association between the design and the recited services is not created herein.

In conclusion, we find that the applied-for matter, in the context of applicant's brochures and other advertising materials, does not function as a source indicator for the recited services.

Decision: The refusal to register is hereby affirmed.