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THE TTAB

Mailed:
March 2, 2005

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Cashflow Technologies, Inc.

Serial No. 75665000

David E. Rogers of Squire, Sanders & Dempsey L.L.P. for
Cashflow Technologies, Inc.

Curtis W. French, Trademark Examining Attorney, Law Office
115 (Tomas Vlcek, Managing Attorney).

Before Seeherman, Walters and Holtzman, Administrative
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

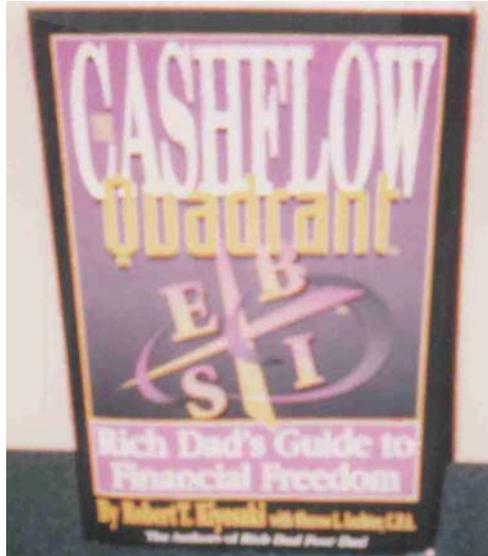
Cashflow Technologies, Inc. has applied to register
the mark shown below for "books for financial education."¹

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¹ Application Serial No. 75665000, filed March 22, 1999.

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The application was filed pursuant to Section 1(b) of the Trademark Act, based on applicant's asserted bona fide intention to use the mark in commerce. Applicant subsequently, after receiving a Notice of Allowance, filed a Statement of Use, along with the specimen shown below.



The Examining Attorney refused registration on the basis that the specimen did not support use of the mark shown in the drawing. The Examining Attorney required that applicant submit substitute specimens along with a declaration that they were in use in commerce prior to the expiration of the time allowed to the applicant for filing a statement of use. The Examining Attorney further advised applicant that it could not simply amend the drawing to conform to the specimen, as such an amendment would

constitute a material alteration of the mark.² When the refusal was made final, applicant filed the instant appeal.

The appeal has been fully briefed. Applicant did not request an oral hearing.

We affirm the refusal.

Trademark Rule 2.51(b) provides that (emphasis added):

(b) In an application under section 1(b) of the Act, the drawing of the mark must be a **substantially exact representation** of the mark as intended to be used on or in connection with the goods and/or services specified in the application, and once an amendment to allege use under §2.76 or a statement of use under §2.88 has been filed, the drawing of the mark must be a substantially exact representation of the mark as used on or in connection with the goods and/or services.

Applicant has asserted that all that is required is that the two forms of the mark shown in the drawing and the specimen create the same general commercial impression, citing Visa International Service Association v. Lifer Code Systems, Inc., 220 USPQ 740 (TTAB 1983). In fact, the language in that decision, which deals with whether an amendment to the drawing would constitute a material alteration, is that "the new form must create the impression of being

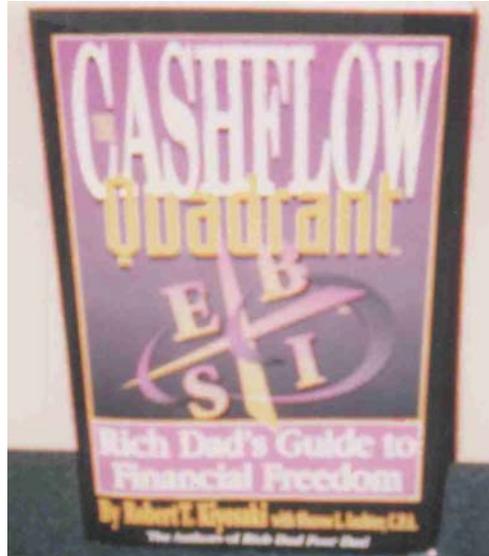
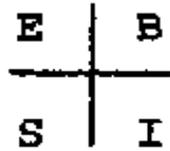
² Although applicant has couched its arguments in terms of the specimen not being a material alteration of the mark shown in the drawing, in fact, the question is whether the mark shown in the drawing is supported by the specimen.

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essentially the same mark." Id. at 743.³ See also, In re The Wine Society of America, Inc., 12 USPQ2d 1139 (TTAB 1989); In re Nationwide Industries inc., 6 USPQ2d 1882 (TTAB 1988); In re Pierce Foods Corporation, 230 USPQ 307 (TTAB 1986).

As noted above, Trademark Rule 2.51(b) requires that the mark shown in the drawing must be a substantially exact representation of the mark as used on the goods. It is obvious from just a cursory viewing of the mark shown in the drawing and the mark shown in the specimen (shown side-by-side below) that the drawing is not a substantially exact representation of the mark as used on the goods.

³ This decision involved an interpretation of Trademark Rule 2.72, which the decision stated provided that: "Amendment may not be made if the nature of the mark is changed thereby." It should be noted that Trademark Rule 2.72(b)(2) was subsequently changed to provide, in part, that the drawing may be amended only if "the proposed amendment does not materially alter the mark. The Office will determine whether a proposed amendment materially alters a mark by comparing the proposed amendment with the description or drawing of the mark filed with the original application."



There is a clear difference in the way the "plus" sign is depicted, such that this element in the specimen would not even be described as a plus sign. The orientation of the overall mark is different, with the mark in the specimen being perhaps 30° from the vertical, while the mark in the drawing is shown as a true vertical. The mark as shown in the specimen contains a ribbon design which wraps around the letters and the "plus" sign, and ties everything together. (Because of this, we disagree with applicant's assertion that the ribbon design is merely a background design.) In the mark shown in the drawing, the ribbon design is totally absent. The mark in the drawing looks like a flat, two-dimensional typeset representation, while the mark in the specimen has a three-dimensional aspect. Perhaps if there were a change in only one of these elements the mark shown in the drawing might still be

considered a substantially exact representation of the mark shown in the specimen. But when all of these differences are combined, the overall impression of the two marks is not substantially the same. The mark in the drawing has a minimalist look, with the letters being the focus of the mark. The mark as shown in the specimen, however, conveys a more lyrical impression, and the design elements have a significant presence.

Both applicant and the Examining Attorney have cited various cases that discuss whether or not an amendment to a drawing would be considered a material alteration, or whether or not a specimen supports use of the mark shown in the drawing. Although each case recites certain principles, the application of the principles varies according to how the particular marks/proposed amendments/specimens are perceived. The cases dealing with word marks, in particular, have relatively little application to the present situation, since the mark involved herein is essentially a stylized letter mark. As the Court of Appeals for the Federal Circuit observed in a different situation, "the nature of stylized letter marks is that they partake of both visual and oral indicia." In *re Electrolyte Laboratories, Inc.*, 913 F.2d 930, 16 USPQ2d 1239, 1240 (Fed. Cir. 1990).

We also note that applicant has filed applications and owns registrations for various versions of its EBSI mark.⁴ Among these are registrations for both the mark shown in the drawing in this application⁵ and for the mark as shown in the specimen (but without the ribbon design),⁶ both for "audio tapes and videos for financial education." The fact that applicant applied for and obtained registrations for both marks indicates that applicant did not regard these marks as being essentially the same. Moreover, since the USPTO does not issue registrations for the same mark, it is clear that the USPTO did not regard the marks as being the same. See *Ex parte The International Nickel Company, Inc.*, 113 USPQ 351 (Com'r Pats 1957).

Decision: We affirm the refusal of registration.

⁴ In the first Office action, the Examining Attorney refused registration on the ground that applicant's mark was likely to cause confusion with Registration No. 1907108 for the mark GROUPE EBSI. Applicant then filed a petition to partially cancel this registration (which resulted in a default judgment), and provided the Examining Attorney with a copy of the petition to cancel. The petition for cancellation lists applicant's applications and registrations.

⁵ Reg. No. 2834726.

⁶ Reg. No. 2681509.