

I. INTRODUCTION

Section 404(e) of Title 39 of the United States Code directs the Postal Regulatory Commission (Commission) to determine which nonpostal services should continue to be offered by the Postal Service and to classify those continuing services on the Mail Classification Schedule (MCS). In Phase I of this proceeding, the Commission found that the record needed further development before it could determine the scope of the Postal Service's licensing program as it relates to postal operations. Based on the evidence submitted in Phase II, the Commission should limit the Postal Service's licensing program to those activities related to the Postal Service's postal operations in the manner discussed below.

II. ARGUMENT

A. Prior Briefing on Trademark Law

In Order No. 154, the Commission found that the Postal Service could continue its licensing program with respect to promotional products and services, namely, those products and services not related to postal operations. In that order, the Commission reasoned that the typical consumer would not purchase those products believing that the quality of the product is somehow enhanced because it contains the Postal Service logo (e.g., the cotton quality of a t-shirt containing the Sonic Eagle is not perceived to be better than a t-shirt containing another emblem). However, the Commission appears to be concerned that commercial licensing relating to postal operations may suggest to a consumer that the perceived quality of the Postal Service's branded good or service is enhanced since it is within an area upon which the Postal Service dominates.

In Phase I of this docket, the Public Representative filed a brief relating to licensing agreements in general. In that Brief, the Public Representative discussed (1)

the underlying purpose of trademark law (which is to protect consumers from confusion and deception, not to create property rights); (2) trademark law's requirement that the Postal Service exercise control over its licensees' uses of its trademarks; (3) the fact that the public may perceive a licensee as the Postal Service engaging in a nonpostal service; (4) the Postal Service's liability for harm caused by a licensee's products that bear the Postal Service's trademarks; (5) that Postal Service licensing of its trademarks for use in nonpostal services may hinder competition; (6) the differences between leasing real estate or personal property and licensing trademarks; and (7) suggestions for effective Commission oversight of the Postal Service's trademark licensing arrangements. These concerns are magnified with respect to licensing arrangements related to postal operations since the public is more likely to believe that the Postal Service is the actual manufacturer of the product or its brand somehow enhances the quality of those products. Accordingly, the Public Representative hereby incorporates the arguments made in that brief by reference. See Public Representative Response to Order No. 126: Supplemental Briefing on Licensing Agreements, November 24, 2008 (Brief).

B. The Commission Should Ensure That the Postal Service's Licensing Program Does Not Confuse or Deceive Consumers

The Commission should ensure that the Postal Service's Licensing Program does not confuse or misled consumers. As shown in Library Reference PB-LR-1, the Postal Service-branded replacement postage meter ink cartridge does not display the actual manufacturer anywhere on the cartridge or its packaging. All of the product listings submitted as attachments to witness Wragg's testimony refer to the ink cartridges as Postal Service cartridges.¹ The only potential hint that the branded

¹ Declaration of Peter Wragg in Response to Presiding Officer's Ruling No. 5, May 12, 2009, at Exhibit 1.

cartridge conveys that it may not be manufactured by the Postal Service is underneath the product's UPC symbol. There, the packaging notes that the product was manufactured in China. However, the fact that the cartridge was made in China does not necessarily mean that the Postal Service is not the actual manufacturer of the product. That statement only denotes the country of origin and does not necessarily equate to a company's actual location. Mattel, for example, a leading U.S. toy company, has many manufacturing plants located in China.² The mere fact that the toy says "Made in China" may mean that it was manufactured by a Mattel factory located in China, that the toy was produced under a license from Mattel, or that it was produced by some other toy company.

The Postal Service branded ink cartridge and packaging does not contain any basic contact information of the manufacturer (such as name, mailing address, e-mail address, or website). Such information allows a consumer to know to whom to direct complaints in the case of quality control issues.³ Additionally, the package notes that the cartridge contains "Our 100% Product Guarantee." However, the package does not state who is backing that guarantee – whether it is the actual manufacturer or the Postal Service.

In effect, the consumer may be deceived into believing that the Postal Service is the actual manufacturer of this product and other products related to postal operations. While this result may be acceptable under licensing and trademark law,⁴ 39 U.S.C. 404(e) does not allow the Postal Service to enter into these types of licensing agreements if the effect of those arrangements is for consumers to believe that the Postal Service is the actual manufacturer of these products. To hold otherwise would

² Toymaking in China, Mattel's Way, N.Y. Times, July 26, 2007, at A1, *available at* http://www.nytimes.com/2007/07/26/business/26toy.html?_r=4&pagewanted=1.

³ The packaging does contain a phone number that a consumer can call for "technical support." However, the recording that answers this technical support line does not identify the manufacturer or any other company name.

⁴ Subject to certain conditions. See Brief at 1-10.

allow the Postal Service to indirectly participate in any activity that 39 U.S.C. 404(e) would prohibit the Postal Service from participating in directly.

C. The Commission Should Not Allow the Postal Service to Enter into Licensing Agreements that Provide Goods or Services that the Postal Service Would Not be Able to Provide Directly

Section 404(e)'s proscription against any new nonpostal services would be rendered meaningless if the Postal Service could circumvent this proscription simply by leveraging its brands through licensing arrangements. This concern is heightened for licensing activities relating to postal operations where consumers are more likely to believe that the Postal Service brand enhances the quality of the manufactured product. The Postal Service concedes as much. It states that "with respect to mailing and shipping supplies, customers will likely assume a certain level of quality and expertise with respect to products that bear the Postal Service's widely recognized and respected brand." Postal Service Response to POIR No. 1, Question 11(g).⁵ With respect to licenses dealing with postal operations, in essence, the public will not perceive a difference between items that are manufactured and sold by the Postal Service and those sold by licensees using the Postal Service's brand or trademarks. Given this public perception, the Commission should not allow Postal Service branded products to avoid Commission oversight and accountability by allowing the Postal Service to enter into licensing agreements to engage in nonpostal activities that it would not be able to provide directly.

⁵ The Postal Service also states that "[c]ertainly licensees perceive that having the Postal Service brand placed on their products will have a positive effect on consumers' views." *Id.*

D. For Licensed Activities Related to Postal Operations, the Commission Should Follow its Eight Part Test With Respect to the Underlying Activity Being Licensed

In Order No. 154, the Commission set forth an eight step process to determine if the Postal Service should be allowed to offer certain services. For nonpostal services, the Commission found that the term “service” means: “Any ongoing commercial activity offered to the public for the purpose of financial gain.” Order No. 154 at 15. The Commission should apply this test and definition to the underlying licensed activity to determine if the license is appropriate. In other words, if the Postal Service proposes to license certain goods or services related to postal operations, the Commission should look beyond the “shell” activity (licensing) and instead review the actual activity associated with the Postal Service’s brandname and trademarks.

For example, if the Postal Service wishes to license its brandname to Clover Technologies Group to make Postal Service branded ink cartridges, the Commission should review whether the Postal Service could enter into the ink cartridges market itself under the Commission precedent set forth in Order No. 154, rather than reviewing whether the Postal Service could license its brandname at all.⁶ In the ink cartridges example, section 404(e) would bar licensing such activities since the Postal Service was not offering itself or licensing ink cartridges prior to January 1, 2006.⁷

Viewing licensing in this light ensures that the Commission follows the Congressional intent of section 404(e), and only licensed activities that are allowed as grandfathered nonpostal services are eligible to continue under the section 404(e). Accordingly, with respect to licensing activities related to postal operations, the

⁶ Licensing the Postal Service’s brandname and trademarks is the “shell” activity; producing ink cartridges is the underlying, actual activity.

⁷ This example would fail the fifth element of the Commission’s eight step process. See Order No. 154 at 2.

Commission should only allow the Postal Service to enter into licensing arrangements that the PAEA would permit the Postal Service to provide itself.

E. Suggested Framework for Commission Oversight of Postal Service Licensing Arrangements Related to Postal Operations

The Commission's distinction between licensing agreements that are promotional in nature as opposed to commercial in nature (relating to postal operations),⁸ will undoubtedly raise categorization issues. The Postal Service, the Commission, and the mailing public may, at least preliminarily, find it difficult to determine whether a particular licensing arrangement is promotional in nature or related to postal operations. For example, are moving supplies such as moving boxes or packaging tape "related to postal operations?"⁹ These boxes can be used for moving or they can be entered into the mailstream. Whether or not a particular licensing agreement is ultimately approved by the Commission may give rise to uncertainty and could make it difficult for the Postal Service to find willing licensees.

Therefore, if the Commission finds that the Postal Service should be allowed to enter into licensing arrangements related to postal operations, the Commission should set forth procedures for ensuring that the Postal Service does not run afoul of the Commission's determination that certain licensing arrangements are outside the scope of 39 U.S.C. 404(e). This section addresses the Public Representative's suggested framework for dealing with those issues.

The Commission should require pre-implementation review of Postal Service licensing arrangements similar to its pre-implementation review of contracts that the Postal Service enters into with respect to rates not of general applicability for competitive products under 39 CFR 3020 subpart B and 39 CFR part 3015. This type of

⁸ See Commission Order No. 171, January 16, 2009, at 2-4.

⁹ See Consolidated Supplemental Statement of Gary Thuro, April 22, 2009 at 2. While the intended purpose of the boxes may be for moving, such boxes can also be used for shipment.

review will benefit all interested persons and allow the Commission to fulfill its statutory mandate with respect to oversight, accountability, and transparency.

First, such pre-implementation review will allow the Postal Service and the potential licensee to know whether the licensing activity is permitted well before the parties commit significant resources to effectuating the licensing arrangement. Second, such review will help alert the public to the fact that the Postal Service is not the actual manufacturer of the licensed product. This could help reduce consumer confusion and deception. Finally, it would allow the Commission to fulfill its oversight responsibilities by ensuring that the Postal Service does not enter into licensing arrangements that run afoul of 39 U.S.C. 404(e). The Commission's expeditious handling of those licensing arrangements will ensure that there is no undue delay from the process.

III. CONCLUSION

For the reasons set forth above, the Public Representative respectfully requests that the Commission limit the Postal Service's licensing program to only those activities related to postal operations in the manner discussed above.

Respectfully Submitted,

/s/ Robert Sidman

Robert Sidman

Public Representative for
Docket No. MC2008-1 (Phase II)

901 New York Avenue, N.W., Suite 200
Washington, DC 20268-0001
(202) 789-6827; Fax (202) 789-6891
e-mail: robert.sidman@prc.gov