

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Express Mail Label No. EL 920508658 US

In re Application of: TRAVELPRO)
INTERNATIONAL, INC.)

Law Office: 115

MARK: FLIGHT CREW)

Examiner: Curtis French

SERIAL NO.: 76/030904)

FILING DATE: April 19, 2000)

EXHIBITS

BOX TTAB

NO FEE

Assistant Commissioner for Trademarks
2900 Crystal Drive
Arlington, Virginia 22202-3513

BRIEF FOR APPELLANT

I. INTRODUCTION

Applicant hereby appeals from the Examiner's final refusal to register the above-identified mark dated May 15, 2002, and respectfully requests that the Trademark Trial and Appeal Board reverse the Examiner's decision. This Brief is submitted herewith in triplicate.

II. APPLICANT'S TRADEMARK

Applicant seeks registration on the Principal Register of its mark: **FLIGHT CREW** for use in connection with "Luggage" in International Class 18.

III. BASIS OF REFUSAL

The Examiner refused registration of Applicant's mark contending that the mark

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TRADEMARK TRIAL AND
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"FLIGHT CREW" as applied to luggage is merely descriptive. In Office Action No. 4, the Examiner states:

The term FLIGHT CREW is merely descriptive of applicant's goods, namely, compact luggage with long handles and wheels popularized by FLIGHT CREWS, which have become known in the relevant industry as FLIGHT CREW bags or cases. The mark immediately names the exact nature of the goods and does nothing else. Accordingly, the mark is refused registration on the Principal Register under Section 2(e)(1).

IV. ISSUE PRESENTED

The sole issue presented by this appeal is whether the mark "FLIGHT CREW" is merely descriptive under Section 2(e)(1) of the Lanham Act when applied to luggage.

V. ARGUMENT

The mark "FLIGHT CREW" is not descriptive when applied to luggage because: (i) the Applicant has shown that, in fact, the designation is not understood by the relevant industry to refer to a particular type or style of luggage; (ii) it requires imagination, thought or perception for the consumer to reach a conclusion regarding the nature of the goods and the term does not identify the exclusive user of the goods; and (iii) a competitor's need analysis does not support a finding of descriptiveness.

I. Consumer Understanding of the Designation "FLIGHT CREW"

The Examining Attorney has refused registration of the mark "FLIGHT CREW" on the Principal Register asserting that the mark has "become known in the relevant industry" as a name for luggage. This statement is inaccurate.

In any descriptiveness analysis, it is essential that the meaning of the designation to the buying public be determined. A term should be characterized as "descriptive" only if a

substantial portion of prospective customers recognize it as such. *Blisscraft of Hollywood v. United Plastics Co.*, 294 F.2d 694 (CCPA 2d Cir. 1961). Applicant's customers include the general public and retail outlets, as well as airline personnel. *See Exhibits F and G.* As demonstrated by the evidence submitted herewith, Applicant's customers do not refer to luggage by the designation "flight crew." *See Exhibits E, F & G.*

A. Applicant's Evidence of Consumer Understanding

The Applicant has found substantial evidence that soft-sided suitcases with built-in wheels and handles are known by consumers, and within the industry, as "rolling luggage" or "rolling uprights," or "wheelies," not "flight crew bags." *See Exhibits E, F & G.* Several industry representatives, including senior buyers for United Airlines, the purchasing coordinator for Delta's company store, "Flight Station," and an advisory consultant to the International Luggage Association, have submitted statements and declarations to the effect that the designation "flight crew" is understood in the industry to refer to the flight attendants and pilots on an aircraft, and does not refer to a particular style of luggage. *See Exhibits E, F, G & I.* In addition, they have indicated that "luggage with wheels and telescoping handles is commonly referred to by persons in the retail luggage industry as "rolling luggage," "rolling uprights," "wheelies" or "carry-on luggage." *Id.*

Their statements provide crucial insight into the perception of the term by the consuming public. All have substantial contact with consumers of luggage products. *See Exhibits E, F & G.* In their experience, each has found that consumers of luggage products do not understand or use the term "flight crew" to refer to rolling luggage or carry-on luggage, as submitted by the Examiner. *See Exhibits E, F & G.* Instead, consumers use the terms "rolling luggage," "rolling

uprights" or "carry-on luggage" to refer to luggage with wheels and handles. Consumer perception may also be inferred from the lack of retail luggage websites that use the designations "flight crew bag" or "flight crew luggage." *See Composite Exhibit I.*

Finally, a listing of manufacturers by category from a leading industry show for travel goods, the "*Travel Goods Show*," held in March 2002, includes numerous categories of products including, backpacks, business accessories, computer cases, luggage, luggage carts, etc. *See Exhibit H.* Notably absent is a category for "flight crew bags" or "flight crew luggage." Applicant submits that such catalog is representative evidence that manufacturers, retailers and distributors of travel goods do not refer to any products as "flight crew bags" or "flight crew luggage."

B. Examiner's Evidence of Consumer Understanding is Outdated and Mischaracterized by Examiner's Argument

In Office Action No. 4, the Examiner submits additional evidence that purportedly demonstrates the descriptive nature of the designation "FLIGHT CREW." Such evidence consists of: (i) a Yahoo search results page including references to "Flight -crew luggage" from *Consumer Reports* magazine; (ii) abbreviated printouts from various newspaper articles incorporating the terms "Consumer Reports" and "Flight-crew"; (iii) a printout from "*The Travelite FAQ*" website; (iv) an article dated May 15, 2002 from *Aviation Today*, entitled "United States Aviation Security Requirements: an Agenda for Action"; (v) a printout from Wireless Data Systems, Inc.'s website regarding luggage tracking systems; and (vi) a web page printout allegedly from Applicant's website.

1. The Consumer Reports Evidence

In his refusal, the Examiner suggests that he has found nine (9) news articles incorporating the terms "flight crew" for use in connection with luggage. While Applicant does not dispute that these articles may use the term, it is important to note that each of the referenced articles gathered by the Examiner, as well as the first Yahoo search results page, refer back to the exact same 1995 *Consumer Reports* article in which that publication used the term in rating luggage.¹ While the Examiner portrays this evidence as nine separate examples of use of the term, in actuality, all of these references derive from one nearly seven-year old article featured in *Consumer Reports* magazine. The same problem exists with the "Travelite FAQ" printout which references the identical *Consumer Reports* article. Interestingly, other text in this same article clearly supports Applicant's position that the commonly used designation for luggage with handles and wheels is "rolling upright":

In fact, your odds of tripping over someone's *rolling upright* [are] probably as high as your walking into someone representing a religious cult who wants to convert you or sell you magazines. Nowadays, every luggage company has its own version of the *rolling upright* . . . *The Travelite FAQ*, p.1. *Emphasis added.*

Applicant's substantial evidence of current consumer perception of the term should not be discounted by virtue of a single *Consumer Reports* article published many years ago. The fact

¹See Yahoo Search results, Items 3 & 8, stating "Don't know what to look for when choosing a rolling upright? Read "Flight-crew luggage" from *Consumer Reports* (December 1, 1995 v. 60, n. 12); "Consumer Watch: Buyer Beware," *The Atlanta Constitution*, June 27, 1996, referring to "flight-crew" bags and cross-referencing *Consumer Reports* magazine; "Accent; *Consumer Reports* Column," *The Orange County Register*, March 29, 1996 referring to "flight-crew bags" with a by-line indicating that the author is *Consumer Reports*; "New-style Luggage Makes Travel Less of a Strain on Your Back," *The Gazette*, January 20, 1996, citing to *Consumer Reports* December 1995 issue; and "Wagons Ho! . . .," *Calgary Herald*, January 16, 1996, also citing to *Consumer Reports* December 1995 issue.

that *Consumer Reports* apparently chose to adopt the term in connection with a single article published years ago to refer to rolling luggage, and that several other publications then in turn used it in reporting on the *Consumer Reports* investigation, is by no means evidence of consumer understanding of the terms in the year 2002.

2. Evidence Showing Nominative and Other Use

The Examining Attorney has also submitted Internet references that purportedly show use in a descriptive sense. In reality these references use the terms "Flight Crew" in connection with luggage in a nominative sense, *i.e.*, to refer to the owner of the luggage. For example, the reference from Wireless Data Systems, Inc.'s website refers to the special loading abilities of its luggage tracking system for unique items. It reads:

"Bag Loading (Below Wing Activities via RF Portable Terminals) - Directed Bag Placement into ULD (per segregation) - Random Placement (with flight validation) - Special Loading (flight crew bags, handicapped, standbys and re-flighted bags)."

When read in context, it is clear that the author is not referring to a type or style of luggage, rather he is referring to luggage owned by a flight crew member. The passage communicates that special loading is available for luggage belonging to members of the flight crew, handicapped persons, standby passengers or for bags that have been interrupted in transit and re-flighted. It cannot be understood as saying that special loading is used for bags with wheels and handles, as would be the logical extension from the Examiner's allegation that the reference identifies a type or style of luggage.

The same is true of the *Aviation Today* article which includes the following passage in a discussion on proposed security protection measures for the protection of U.S. commercial aviation:

A. Restrict Number and Size of Carry-on Articles

Action: Restrict carry-on articles to one per person, e.g., a briefcase, computer bag, etc., and restrict size of carry-on articles to 9" by 14" by 22" (Exceptions for: Flight Crew Bags and required articles; small children items, e.g., safety seats; disabled passenger items: . . .

Again the reference is a nominative use to refer to bags on an aircraft that are brought on or owned by the flight crew, not a style of luggage with wheels and handles. It cannot be read to say that any bag with wheels and handles will be an exception to the 9" by 14" by 22" proposed rule. When read in context, the author is identifying luggage belonging to special persons, such as children, disabled passengers and the flight crew, that should be made exceptions to the general rule.

Lastly, the Examiner cites a reference to a company selling a "C-130 Flight Crew Bag (Military Flight Crew)." This reference does not support a finding that the terms is descriptive of luggage with long telescoping handles and wheels. The pictured item is a duffle-style bag "especially made for military flight crews" with headset pockets, a radio pouch, and pockets for pens and a calculator. The bag in no way resembles a rolling upright. The fact that this bag is called a "Flight Crew Bag" has no relevance to determining the understanding of the relevant consuming public, the majority of which are not military personnel, with respect to the term "FLIGHT CREW" in connection with luggage.

3. Advertisement by Applicant

The Examining Attorney has asserted that Applicant's own advertisement uses the mark "FLIGHT CREW" descriptively. *See Office Action No. 4, page 2.* This is untrue. Apparently, the Examiner is referring to the website entitled "<http://dellepro.dellhost.com/vbentley/tvlproplus.html>." This is not a website owned, affiliated or connected with the

Applicant. Instead, it is operated by an independent business that sells repair and replacement parts for Applicant's luggage. Even so, it is clear that the references to "FLIGHT CREW" on this website are used in a trademark sense and are not descriptive.

Examples of such trademark use appear in the following excerpts: "Blade Bag Wheel Kit for the CrewSeries Plus, Crew3, Crew4 and Flight Crew Rollboards," and "Order and Pricing Details - The Blade Bag Wheel Kit for Travelpro's newest Rollboards (the CrewSeries Plus, Crew 3/4 and Flight Crew) is just \$18.75 plus \$4 shipping and handling (s/h)." The website is selling wheel kits for the foregoing models of luggage, all of which are trademarks for luggage sold by the Applicant, Travelpro International, Inc. *See Exhibit J Attached showing Applicant's pending applications for two of these marks.* Accordingly, contrary to the Examiner's assertion that this is a descriptive use, the advertiser is actually using the designation "FLIGHT CREW" in a true trademark sense to identify luggage marketed and sold by Applicant. This is supported by the fact that the website is filled with references to Travelpro.

Applicant has submitted a substantial body of current marketplace evidence demonstrating that neither the general consuming public who purchase its products from retail outlets, nor its airline personnel or airline industry customers, understand the designation "FLIGHT CREW" to refer to luggage, or use that designation when referring to soft-sided suitcases with built-in wheels and long handles for pulling. This substantial and persuasive evidence cannot be overcome by the limited distinguishable references submitted by the Examiner. Consequently, the examiner's conclusion that the term "FLIGHT CREW" is commonly understood within the relevant industry and by consumers to refer to a type of luggage is incorrect.

II. The Mark "FLIGHT CREW" is at Most Suggestive, not Merely Descriptive

The Examining Attorney has refused registration of the mark "FLIGHT CREW" on the Principal Register on grounds that the mark allegedly "merely describes" a style of luggage, namely, "soft-sided suitcases with built-in wheels and a long handle for pulling." *See Office Action No. 1, p. 2.* In Office Action No. 4, the Examining Attorney also asserts the objection that the mark describes "the intended user of the goods." *See Office Action No. 4, p. 3.*

A. Applicant's Mark is at Most Suggestive of Luggage

The Applicant's mark is at most suggestive, not merely descriptive. A designation is suggestive if it requires imagination, thought or perception to reach a conclusion as to the nature of the goods. On the other hand, it is descriptive if it forthwith conveys an immediate idea of the ingredients, qualities or characteristics of the goods. *Stix Products, Inc. v. United Merchants & Mfrs., Inc.*, 295 F.Supp. 479, 488 (S.D.N.Y. 1968). Applicant submits that a certain degree of imagination is required by the consumer of the goods to determine their nature.

The examining attorney has cited examples of what he believes to be descriptive use as a result of a database search. However, the Applicants's own search shows references to "flight crew" to refer to the pilots and flight attendants, or crew on an aircraft, and not as a style of luggage. *See Composite Exhibit A.* Thus, the Examiner's evidence does not establish that the term is understood by customers of the Applicant as referring to luggage. *See In re Societe Generale*, 3 U.S.P.Q.2d 1450, 1452 (Fed. Cir. 1987).

Consumers are not able to discern the nature of the product in question based on the limited information conveyed by the designation "flight crew." The term "flight crew" refers to the captain, pilots and flight attendants on an aircraft. Accordingly, this designation calls to mind

for the consumer the image of flight personnel, not luggage. It then takes a certain degree of imagination, thought or cogitation to reach a conclusion that the product being sold is luggage.

The situation presented is similar to the following two cases. The use of "PHYSICIAN'S FORMULA" in connection with hypoallergenic skin creams and lotions sold and promoted by a medical doctor was found by the court to be suggestive because the "consumer is able to identify the genre of product only by using 'imagination, thought and perception.'" *Physicians Formula Cosmetics, Inc. v. West Cabot Cosmetics, Inc.*, 857 F.2d 80 (2d Cir. 1988). Applicant submits that the consumer is not able to discern the nature of the goods from the designation "FLIGHT CREW." Similarly, the term "PLAYBOY" in connection with a men's magazine was found only suggestive in "evoking the aspirations" of its readers, rather than its intended audience. *Playboy Enterprises, Inc. v. Chuckleberry Publishing, Inc.*, 486 F.Supp. 414 (S.D.N.Y. 1980).

Moreover, the Applicant's research reveals that the term "flight crew" is subject to several different meanings. The term is used in connection with aerospace travel to refer to the "flight crew" on a space shuttle. *See Composite Exhibit B*. It is unlikely that any person familiar with this use would envision the space shuttle crew wheeling luggage behind them onto the spacecraft. The designation is also used to refer to the medical and flight staff on a helicopter providing emergency medical care and helicopter transport to severely injured and ill patients. *See Exhibit C*. Finally, the term is used regularly by the armed forces to refer to the flight staff on a military or air force mission incorporating air travel. *See Exhibit D*. Accordingly, the designation "flight crew" is not limited to use in connection with airline travel. The mixture of usages shown by the present record contradicts the Examining Attorney's conclusion that purchasers view and use the term "FLIGHT CREW" as a descriptive term for luggage. Rather, it is subject to multiple

interpretations and refers to several different "crews."

"There is a thin line between a suggestive and a merely descriptive designation, and where reasonable men may differ, it is the Board's practice to resolve the doubt in applicant's favor and publish the mark for opposition." *In re Intelligent Medical Systems, Inc.*, 5 U.S.P.Q. 2d 1674, 1675 (TTAB 1987)(citations omitted). Applicant submits that its mark, at most, should be found suggestive, not descriptive, with respect to the products it sells.

B. Applicant's Mark Does not Describe the Type of Individuals to Whom The Goods are Directed

The Examiner has raised an objection in Office Action No. 4 that Applicant's mark describes an intended user of the goods, namely, flight crews. While it is true that some of the purchasers of Applicant's goods are flight crew members, Applicant's goods are not exclusively marketed to airline personnel. Instead, Applicant's purchasers include the general consuming public who obviously have a wide-variety of occupations unrelated to airline travel. A mark is merely descriptive if it describes the type of individuals to whom an *appreciable number or all* of party's goods or services are directed. *In re Camel Manufacturing Co., Inc.*, 222 U.S.P.Q. 1031, 1032 (TTAB 1984). Applicant asserts that such is not the case here where Applicant's marketing and sales efforts are directed to, and a substantial number of its consumers are, the general public. *See Exhibits E, F & G.*

In addition, Applicant believes that the cases cited by the Examiner on this issue are distinguishable. They include cases in which the mark "MOUNTAIN CAMPER" was found descriptive of retail store services featuring camping gear, and "HOMEMAKERS" was found descriptive of calendars specifically designed to appeal to those interested in the art of homemaking. *See Office Action No. 4, p. 3.* In both cases, the designations referred to a specific

intended audience, *i.e.*, in the case of "MOUNTAIN CAMPER," to persons who go camping in the mountains; and, in the case of "HOMEMAKERS," persons "that make a home" or "whose occupation is household and family management." *In re Camel*, 22 U.S.P.Q. at 1031; *Shaw-Barton, Inc. v. John Baumgarth Co., Inc.*, 313 F.2d 167, 168 n. 1 (TTAB 1963).

These situations are not comparable to the present circumstances where the term "FLIGHT CREW" is a broad general, rather than specific, designation with many different interpretations. First, the term is used to designate flight attendants, pilots, co-pilots, navigators and other personnel on board an aircraft, rather than one specific class of user such as a homemaker or a mountain camper. Second, as shown above, the terms "flight crew" have many different meanings, including the crew on a space mission, the crew on emergency medical helicopters and the crew on a military aircraft. Accordingly, Applicant submits that facts presented are distinguishable from these cases and requires a different holding.

Applicant further submits that this case is analogous to that of *Cheesebrough-Ponds, Inc.* in which the Board found that the mark "MANICURIST by CUTEX" suggested that the product would give professional results in the care of fingernails rather than suggesting the intended user of the product. *In re Cheesebrough-Ponds, Inc.*, 163 U.S.P.Q. 244, 245 (TTAB 1969). The Board based its holding on its determination that an average woman upon encountering the mark in ordinary trade channels would not conclude that the mark signified a nail polish specifically for use by manicurists. *Id.* A similar suggestiveness is present here such that normal consumers are not likely in the context of a retail luggage environment to understand the designation "FLIGHT CREW" to mean that the luggage is only intended for use by flight crew members.

III. Applicant's Competitor's Do Not Need to Use the Term "Flight Crew" to Communicate the Nature of Their Products

One last factor to be considered in assessing the descriptiveness of the designation "flight crew" is the extent to which competitors use the term to describe or refer to their own products, or have a need to do so. *Firestone Tire & Rubber Co. v. Goodyear Tire & Rubber Co.*, 186 U.S.P.Q. 557 (TTAB 1975) (finding "BIASTEEL" not descriptive of tires constructed using belts of steel cord placed on a bias because there was no evidence showing that such products were referred to by said term). Applicant's competitors do not use the designation "flight crew" to describe suitcases with built-in wheels and long handles, and Applicant believes that there is no such need.

The evidence submitted by Applicant herewith is replete with references to the terms used by Applicant's competitors to refer to luggage generally, as well as more specifically, luggage with built-in wheels and long handles for pulling. *See Composite Exhibit I*. Applicant's search of Internet luggage retailer websites revealed no websites using the designation "flight crew" to refer to a style of luggage incorporating wheels and telescoping handles. Instead, there are numerous other terms being used by Applicant's competitors and retailers to describe soft-sided suitcases with built-in wheels and long handles for pulling. These include, among others: "upright suiter," "rolling luggage," "trolley," "rolling carry-on," "wheeled suiter," "under-the-seat carry-on," "carry-on pullman," and "upright pullman." *See Composite Exhibit I*. Accordingly, in terms of a competitor's need, there are numerous alternatives available.

Moreover, from a competitor's actual use standpoint, there is extensive evidence of third-party usage demonstrating that the terms "rolling luggage," "rolling uprights," and/or "carry-on luggage" are the most commonly used descriptive terms used by the trade and the public to refer

to luggage with wheels and telescoping handles, not "FLIGHT CREW." See Exhibits E, F, G, H & I. It is clear that this term is not being used by Applicant's competitors to refer to a particular style of luggage and that there are numerous conventional terms available and employed by Applicant's competitors to refer to rolling luggage with handles. The foregoing competitor's need and use analysis clearly supports a finding that the mark is not merely descriptive.

V. CONCLUSION

On the basis of the foregoing arguments, Applicant submits that its mark is not merely descriptive within the meaning of Section 2(e)(1) of the Trademark Act. Accordingly, Applicant's mark is entitled to registration; and the Board is respectfully requested to reverse the Examiner's decision refusing registration.

Respectfully submitted,



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TRANSMITTAL LETTER



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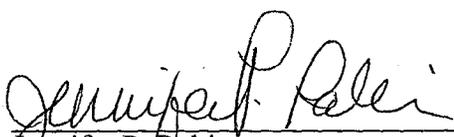
Sir:

- Appeal Brief, with Exhibits, in triplicate
- One (1) postcard

This transmittal letter is submitted in duplicate. Please charge any deficiency or credit any excess in fee payment to Deposit Account No. 50-0951.

Respectfully submitted,

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