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THE TTAB**

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Ashley O'Rourke¹

Serial No. 77093617

Roberta Jacobs-Meadway of Eckert Seamans Cherin & Mellot for
Ashley O'Rourke.

Jennifer J. Vasquez, Trademark Examining Attorney, Law
Office 113 (Odette Bonnet, Managing Attorney).

Before Quinn, Walters and Mermelstein, Administrative
Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

Ashley O'Rourke is the applicant in an application to
register on the Principal Register the standard character
mark VINTAGE PINK for "jewelry, namely, bracelets, ankle
bracelets, necklaces, earrings, rings and pins," in
International Class 14, and "women's clothing, namely,
dresses, shirts, pants, jeans, jackets, coats, vests,

¹ The application was filed originally by ADG, LLC and subsequently
assigned to Ashley O'Rourke.

sweaters, knit tops, skirts, blouses, socks, stockings, t-shirts, sweat shirts and lingerie," in International Class 25.²

The examining attorney has issued a final refusal to register, under Section 2(e)(1) of the Trademark Act, 15 U.S.C. 1052(e)(1), on the ground that applicant's mark is merely descriptive in connection with its goods.

Applicant has appealed. Both applicant and the examining attorney have filed briefs. We reverse the refusal to register.

While admitting that some of her identified goods will be pink in color and will follow a "retro style," applicant contends that neither the color pink nor the "retro style" of some of her goods is a significant attribute of those goods. In support of her position that color is not a significant feature of clothing or jewelry, applicant submitted nine third-party registrations for various clothing marks that include a color, although without a disclaimer.³

Applicant argues that "pink" connotes femininity and that "vintage" is incongruous in her mark because, while the

² Serial No. 77093617, filed January 29, 2007, based on an allegation of a bona fide intention to use the mark in commerce in connection with the goods identified in each International Class. Applicant amended its application in its response of October 16, 2007, to enter a disclaimer of "vintage" as previously required by the examining attorney. However, applicant withdrew the disclaimer in its response of March 18, 2009.

term suggests clothing originating in a previous era, applicant's goods are new products of her own design. Applicant argues that the two terms together are "in stark contrast to each other" because "'vintage' connot[es] an enduring quality and 'pink' connot[es] something fresh, new, pure, and innocent." (Brief, p. 10.) Finally, applicant concludes that VINTAGE PINK is a unitary term that merely "suggests an emotion or feeling in the relevant purchasing public, namely a classic and enduring quality combined with a fresh feminine style." (Id., p. 13.)

Applicant submitted the following evidence, in addition to that noted above, in support of her position:

- Photos of a white blouse and a pink blouse that applicant intends to sell;
- Excerpt from www.inthepinkonline.com showing some pink clothing items for sale, but the vast majority of clothing items listed are not pink in color;
- Three third-party clothing registrations and one third-party footwear registration for marks including the word "pink" without a disclaimer, although Registration No. 3245586 for the mark PINK PONY includes a Section 2(f) claim;

³ The third-party registered clothing marks include CASCADE BLUE, CORAL BLUE, RACING GREEN, TOO BLUE, GREEN, STEEL BLUE.]

- Definition of "vintage clothing" from www.wikipedia.com as "... new or secondhand garments originating from a previous era" and excerpts from www.wikipedia.com listing colors, none of which include "vintage pink";
- Google search results for "vintage clothing" indicating over 3.4 million "hits";
- Two similar definitions of "vintage" - we note the definition from www.merriamwebsteronline.com of "vintage" as "*noun*, 3. a. period of origin or manufacture b. length of existence: age" ... *adjective* 2. of old, recognized, and enduring interest, importance, or quality: classic 3. a. dating from the past ...";
- Nine third-party registrations⁴ for marks including the term "vintage" without a disclaimer thereof for clothing and other goods;
- Excerpts from two websites indicating the symbolic nature of the color "pink - in particular, www.designmeltdown.com, which states "the color pink primarily symbolizes love and beauty ... [i]t can also be very stylish and is currently a very trendy color."

The examining attorney contends that "vintage pink" is a recognized pale pink color used in connection with at

⁴ Examples of the registered marks include VINTAGE IMPERIAL with design, VINTAGE FAITH, and VINTAGE VAQUERO with design.

least some of the identified goods in both classes; and that each word in the mark is also individually merely descriptive, noting that the identified goods could be pink in color and that applicant has admitted that she sells vintage clothing and jewelry. In support of her position, the examining attorney has submitted the following evidence:

- 18 active third-party clothing registrations for marks including the disclaimed term "vintage";
- Excerpts from ten Internet websites, each showing an item for sale and using the words "vintage" and "pink," submitted with the September 18, 2008 office action including, for example, the following:

www.emitations.com - "Belen's Vintage Pink Flower Cuff Bracelet - "Craving some vintage charm? The ... bracelet ... shines with bursts of iridescent pink rhinestones."

www.fashionjewelryforeveryone.com - "vintage pink crystals jewelry adorned lite and dark fuchsia pink crystals..."

www.etsy.com - "small vintage pink depression glass cherry blossom plate - this is a really nice piece of pink depression glass from the 1930's."

- Six additional excerpts from Internet websites submitted with the denial of the request for reconsideration including, for example, the following:

www.etsy.com - "vintage looking hat in vintage pink color ..."

www.caboodle.com - "retro 1950's style pinup nylon panties in rose with black lace panels on the sides. Color is a true vintage-pink color."

www.flickr.com - photo description - "The room is painted in a soft, vintage pink color that is peeling ..."

The examining attorney admits that, as argued by applicant, "pink" may be used in the jewelry and clothing fields to signify femininity. However, the examining attorney notes that "pink" is also widely used as a color of such goods. The examining attorney discounts applicant's evidence of third-party registrations for clothing that includes in the mark either "pink" or "vintage" without disclaimer by arguing that the whole term "vintage pink" is merely descriptive of a particular color.

Applicant notes that the vast majority of the Internet website excerpts submitted by the examining attorney use the word "vintage" to refer to the item offered for sale, not in connection with "pink" to connote a specific color. Applicant admits that six website excerpts submitted by the examining attorney do use the term "vintage pink" to describe the color of the product; but applicant argues that this evidence is not "significant enough to demonstrate that 'vintage pink' is used to refer to a specific shade of pink or is a common commercial color." (Id., p. 12.) In particular, applicant notes that "the examining attorney has not provided any evidence from a major publication or source for the fashion industry, such as Vogue or Elle magazines, ...

and has not provided any objective evidence such as color charts or definitions ... that 'vintage pink' is a specific color." (Reply Brief, p. 3.)

The test for determining whether a mark is merely descriptive is whether it immediately conveys information concerning a quality, characteristic, function, ingredient, attribute or feature of the product or service in connection with which it is used, or intended to be used. *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007); *In re Engineering Systems Corp.*, 2 USPQ2d 1075 (TTAB 1986); *In re Bright-Crest, Ltd.*, 204 USPQ 591 (TTAB 1979). On the other hand, a term which is suggestive is registrable. A suggestive term is one which suggests, rather than describes, such that imagination, thought or perception is required to reach a conclusion as to the nature of the goods. *See, In re Gyulay*, 820 F.2d 1215, 3 USPQ2d 1009 (Fed. Cir. 1987). There is but a thin line of distinction between a suggestive and a merely descriptive term, and it is often difficult to determine when a term moves from the realm of suggestiveness into the sphere of impermissible descriptiveness. *See, In re Recovery, Inc.*, 196 USPQ 830 (TTAB 1977).

The Office bears the burden of setting forth a prima facie case in support of a descriptiveness refusal. *See In re Gyulay, supra*, (when the Examining Attorney sets forth a

prima facie case, the applicant cannot simply criticize the absence of additional evidence supporting the refusal and must come forward with evidence supporting its argument for registration).

Considering, first, the word "pink" in the mark, there is nothing in the identification of goods that limits applicant's clothing and jewelry to pink items nor excludes such items. Obviously, clothing may be made in many colors and patterns. While the color of clothing and jewelry is clearly significant from a style perspective, except in a limited number of situations, from a trademark perspective the use of a color word in a mark for clothing or jewelry is unlikely to be perceived as descriptive of a significant aspect of those goods. For example, without a showing that all or most of applicant's clothing is pink, in which case one might be able to conclude that the color word in the mark identifies a significant and "signature" aspect of applicant's clothing and jewelry, we find that the "pink" portion of applicant's mark is, at most, suggestive of one color that could be used on clothing and jewelry. Further, both applicant and the examining attorney agree that "pink" is suggestive of femininity. The word "pink" in this mark is more likely to suggest femininity, particularly in connection with non-pink clothing and jewelry. The nine clothing registrations submitted by applicant wherein the

color word in the mark is not disclaimed support this finding, and the examining attorney has not rebutted this evidence.

Considering, second, the word "vintage" in the mark, the dictionary definition of the word "vintage" and the various evidence submitted by both applicant and the examining attorney about the word "vintage" in the context of clothing and jewelry clearly refers to something old or of old and/or classic style.⁵ There is nothing in the identification of goods that either limits applicant's clothing and jewelry to vintage items or excludes vintage items, and applicant has admitted that some of her clothing and jewelry are "retro" in style. Applicant and the examining attorney have submitted copies of third-party registrations that either do or do not include a disclaimer of the word "vintage" in the mark. Thus, we draw no conclusions from this evidence other than that USPTO disclaimer practice is inconsistent and/or that whether or not a disclaimer is required is specific to the facts of each case. Most of the Internet websites submitted by both

⁵ The examining attorney objects to the Wikipedia evidence submitted by applicant on the ground that it is unverifiable because entries may be constantly edited by anyone. It is unnecessary for us to consider the Wikipedia definition of "vintage" as there is ample other evidence of its meaning in this record. Moreover, in the context of descriptiveness, we consider the Wikipedia evidence regarding whether the Wikipedia color list includes "vintage pink" as a color, not for the truth of whether "vintage pink" is a recognized color, but merely as one indication that the public viewing and editing this Wikipedia entry would not see "vintage pink" listed.

applicant and the examining attorney suggest that "vintage" connotes the age, style and/or feeling of clothing or jewelry, as well as other items. This falls short of establishing that "vintage" is merely descriptive of a significant aspect of clothing or jewelry.

Considering, finally, the mark in its entirety, we find that, in the face of all of the contrary or ambiguous uses of the phrase "vintage pink" submitted by applicant and the examining attorney, the examining attorney has not met her burden of establishing that a significant number of the relevant public would readily view "vintage pink" as a specific color or, even if this had been established, that, for the same reasons discussed above in connection with the individual words comprising the mark, the relevant public would view this color as merely descriptive of a significant aspect of the identified goods. Moreover, we agree with applicant's contention that the juxtaposition of the two words, which may have slightly contradictory connotations, adds something more to the mark than just the meanings of the individual words.

When we consider the record and the relevant descriptiveness factors, and all of applicant's and the examining attorney's arguments relating thereto, including those arguments not specifically addressed herein, we conclude the examining attorney has not established that the

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term VINTAGE PINK immediately describes, without conjecture or speculation, a significant feature or function of applicant's identified clothing and jewelry. We readily admit that our determination on this issue is not free from doubt. However, where there is doubt on the question of mere descriptiveness, that doubt is to be resolved in applicant's behalf and the mark should be published for opposition. See, *In re Rank Organization Ltd.*, 222 USPQ 324, 326 (TTAB 1984) and cases cited therein.

Decision: The refusal under Section 2(e)(1) of the Act is reversed.