

THIS OPINION IS NOT A
PRECEDENT OF THE
TTAB

Mailed:
13 November 2009

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Advanced Pavement Technology Inc.

Serial No. 77145880

Jeffrey N. Fairchild of Wood, Phillips, Katz, Clark &
Mortimer for Advanced Pavement Technology Inc.

Bernice Middleton, Trademark Examining Attorney, Law Office
106 (Mary I. Sparrow, Managing Attorney).

Before Grendel, Holtzman, and Drost, Administrative
Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

On April 2, 2007, Advanced Pavement Technology Inc.
(applicant) filed an application to register the mark
ECOLOGICAL PAVER SYSTEMS, in standard character form, on
the Principal Register for paving contractor services in
Class 37. The application is based on applicant's
assertion of a bona fide intention to use the mark in
commerce and it contains a disclaimer of the words "Paver
Systems."

The examining attorney has refused to register applicant's mark on the ground that the mark is merely descriptive under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1). The examining attorney argues (Brief at unnumbered page 2) that the mark describes a feature of applicant's services because they "would be regarded by consumers as providing paver services featuring environmentally-friendly and sound paving products." Applicant argues that, given "the shortcomings of the evidence, and that multi-stage reasoning and/or the use of imagination are required to discern the nature of the services associated with the mark, the refusal should be withdrawn." Brief at 7.

After the examining attorney made the refusal final, applicant appealed to this board.

"A term is merely descriptive if it immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used." *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007). See also *In re MBNA America Bank N.A.*, 340 F.3d 1328, 67 USPQ2d 1778, 1780 (Fed. Cir. 2003). "Descriptiveness of a mark is not considered in the abstract. Rather, it is considered in relation to the particular goods [or services] for which

registration is sought, the context in which it is being used, and the possible significance that the term would have to the average purchaser of the goods because of the manner of its use or intended use." *Bayer*, 82 USPQ2d at 1831. See also *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978).

We begin by looking at the evidence in this case. We note that applicant has disclaimed the term "Paver Systems." Applicant "notes that the wording 'PAVER SYSTEMS' is commonly used in the relevant market, as evidenced by" its submitted documents. Response dated January 28, 2008 at 2 and attachments: A (Registration No. 2677462, "Paver Systems" disclaimed); B (Appian Way Paver Systems); and C (Interlocking Paver Systems). We agree that the term "Paver Systems" is at least merely descriptive of applicant's paving contractor services.

The key issue in this case is whether the term "ecological" is merely descriptive of applicant's services. The examining attorney relies on the following evidence (emphasis added).

Land developers, architectural engineers, and building owners are recognizing *ecological paving systems* as important elements to their new projects, according to Taylor. They find these systems *ecological*, as they improve a site's water quality because they allow rainwater infiltration and natural ground water recharge...

Public work officials are recognizing the *ecological benefits...*

Press release dated 01 February 2005

www.idswater.co.in.¹

The Concrete Producer, February 2005 (similar article about the same project discussed above)

...ecological paving systems... Previous pavers were selected for their *ecological advantages*.

The Mayor communicated these accomplishments...

II. Fourth Street Parking Lot - Using sustainable construction methods, the 4th Street Parking Lot project was completed through a partnership... The project far exceeded the City's original concept of a typical asphalt parking lot designed for 100 spaces. By using *ecological pavers* with advanced construction methods the City now has a beautiful 131 space, lighted parking facility. The parking lot is sustainable and *ecologically* sound.

www.ci.lacenter.wa.us (La Center City Council January 24, 2004 meeting)

Retailers

Tieco - Tile & Stone Distributors

Advanced Pavement Technology - *Ecological Pavers*,
Pavers Cleaning, Sealing, Maintenance, Pavers Stones
www.gbvcv.org (Green Builders Council Ventura County)²

Warrenville may opt for what is described as a more *ecological solution* to reconstructing a major village thoroughfare... The council voted unanimously Monday

¹ Applicant argues that both of these articles "could have been generated by the same copy writer, which makes it quite reasonable to assume that the articles are exactly as asserted by Applicant, i.e., careless copy writing in an attempt to paraphrase the Applicant's use of its mark." Brief at 3. We note that the author of the articles has used the term descriptively. Also, while applicant is apparently mentioned in the article, the article is dated more than two years prior to the intent-to-use application's filing date. The articles also use the word "ecological" separately to describe the benefits of these paving systems.

² Applicant again points out that this website "references Applicant" and that this "one time misuse of Applicant's mark ... is hardly persuasive that 'ecological pavers' is a commonly used or accepted term in the marketplace." Brief at 3.

night to spend \$6,000 for additional engineering to consider a *paver stone system* instead of asphalt... The permeable paver stones sit on a thick bed of stone and filter rainwater that would wash off traditional surfaces causing erosion and pollution, its backers said. The *paver system* is used at some parking lots around DuPage County.

Chicago Tribune, October 25, 2006.

Expert speakers and panelists from 17 countries will address "Design for Environmental and Social Sustainability" at the Eighth International Conference on Concrete Block Paving - "Sustainable Paving for Our Future"... [The conference] will focus on segmental concrete pavements and their ability to address total environmental design, including *ecological*, energy, safety, and visual design needs for the 21st century. *Business Wire*, September 18, 2006.³

The world is going green and Westcom's answer to the environmental movement is S.F. Rima, a permeable pavement system the company introduced last year. "S.F. Rima pavers are installed on an engineered granular base that is designed to handle runoff water, making it perfect for residential and commercial sites," says Hart. This *ecological paver system* allows water filtration through the base, reduces runoff and allows for development cost savings due to a reduction in storm sewers and drainage infrastructure.

Canadian Business and Current Affairs, June 2002.⁴

³ See *In re Cell Therapeutics Inc.*, 67 USPQ2d 1795, 1798 (TTAB 2003) (The board can consider newswire stories as evidence).

⁴ See *In re Remacle*, 66 USPQ2d 1222, 1224 n.5 (TTAB 2002) ("[I]t is reasonable to assume that professionals in medicine, engineering, computers, telecommunications and many other fields are likely to utilize all available resources, regardless of country of origin or medium. Further, the Internet is a resource that is widely available to these same professionals and to the general public in the United States... [I]t is reasonable to consider a relevant article from an Internet web site, in English, about medical research in another country, Great Britain in this case").

The examining attorney also included a definition of "ecological" as "the study of the detrimental effects of modern civilization on the environment, with a view toward prevention or reversal through conservation." The examining attorney argues (brief at 5) that applicant's mark "conveys that use of the services is friendly rather than unfriendly or 'detrimental' to the environment."

Applicant argues (brief at 5) that:

[N]one of the definitions in those attachments support the assertion that Applicant's mark "conveys that applicant's services utilize environmentally friendly methods and/or products" because none of the definitions say anything about environmentally friendly methods or products. Rather, the descriptions are absolutely neutral with respect to any friendliness or unfriendliness with respect to the environment, and do not in any way say anything about methods or products.

We note from the definition above that "ecological" is the study of detrimental effects of modern civilization on the environment with a view toward preventing or reversing these effects. As the evidence indicates, a paving system that is ecological "allows water filtration" and it permits "natural ground water recharge." www.idswater.co.in. This type of system "is described as a more ecological solution." *Chicago Tribune* article. There appears to be nothing incongruous in using the word "ecological" with paving services that are environmentally friendly because,

e.g., they permit natural ground water recharge. These types of services are included within applicant's identification of services.

Applicant also argues that the examining attorney's evidence "illustrates that the term 'ecological pavers' is not a commonly used or accepted term in the marketplace" and that there is "a lack of usage in the marketplace." Reply Brief at 4. However, we point out that the refusal in this case is based on the mark being merely descriptive of the services, not that it is the generic name of the services. As indicated earlier, to be merely descriptive, a term need only described a quality, feature, function, or characteristic of the services. There is no requirement that the term be in common usage or an accepted term in the industry. Indeed, even if applicant were "the first and possibly the only one to utilize this notation in connection with its services cannot alone alter the basic descriptive significance of the term and bestow trademark rights therein." *In re Gould*, 173 USPQ 243, 245 (TTAB 1972). See also *In re Sun Microsystems, Inc.*, 59 USPQ2d 1084, 1087 (TTAB 2001); *In re Acuson*, 225 USPQ 790, 792 (TTAB 1985).

Of course, "in determining whether a mark is merely descriptive, we must consider the mark in its entirety."

Grand Canyon West Ranch LLC v. Hualapai Tribe, 88 USPQ2d 1501, 1505 (TTAB 2008). We must also view the mark in relation to the services. Ultimately here, the question is whether the mark ECOLOGICAL PAVER SYSTEMS is merely descriptive for paving contractor services. We conclude that it is. The evidence shows that the term "ecological" is used to refer to construction solutions that benefit the ecology. A paving system can have ecological benefits because, inter alia, it is asserted that permeable paver stones "filter rainwater that would wash off traditional surfaces causing erosion and pollution." For example, the City of Warrenville was reported to be considering using a paver stone system even though it would raise the cost of a road project by \$740,000 because it was "a more ecological solution." *Chicago Tribune* article. The evidence shows that various municipal officials and others, who are actual or potential purchasers of paver systems, would understand that the term "ECOLOGICAL PAVER SYSTEMS" merely describes paving contractor services that are environmentally beneficial.

Decision: The refusal to register applicant's mark ECOLOGICAL PAVER SYSTEMS under Section 2(e)(1) of the Trademark Act is affirmed.