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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Intellectual Property Development Corporation Pty
Ltd.

Serial No. 77206766

Michelle D. Kahn of Sheppard, Mullin, Richter & Hampton for
Intellectual Property Development Corporation Pty Ltd.

Doritt Carroll, Trademark Examining Attorney, Law Office
116 (Robert Lorenzo, Managing Attorney).

Before Quinn, Hairston and Zervas, Administrative Trademark
Judges.

Opinion by Quinn, Administrative Trademark Judge:

Intellectual Property Development Corporation Pty Ltd.
filed, on June 14, 2007, an intent-to-use application to
register the mark SCENT STRIPES for "bags for microwave
cooking; garbage bags of paper; garbage bags of plastic;
garbage bags of plastics; general purpose plastic bags;
grocery bags; merchandise bags; microwave cooking bags;
paper bags; paper bags and sacks; paper bags for packaging;
paper for bags and sacks; paper garbage bags; paper gift

bags; paper party bags; paper refuse bags; paper shopping bags; plastic bags for disposable diapers; plastic bags for disposing of pet waste; plastic bags for packaging; plastic bags for packing; plastic bags for undergarment disposal; plastic disposable diaper bags; plastic food storage bags for household use; plastic garbage bags; plastic or paper bags for household use; plastic oven cooking bags; plastic sandwich bags; plastic shopping bags; plastic trash bags; rubbish bags (made of paper or plastic materials); sandwich bags; trash bags; trash can liners; plastic wrap; food wrapping plastic for household use."

The trademark examining attorney refused registration 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 of the goods.

When the refusal was made final, applicant appealed. Applicant and the examining attorney filed briefs.

Applicant argues that its mark is, at worst, just suggestive because it requires imagination and thought to reach a conclusion that the goods are bags for household use. Applicant also asserts that the goods do not have "scented stripes," but rather the bags contain "scent" deposited throughout the entire bag, and the bags may or may not have a "stripe" or "stripes." (Brief, p. 2). In

any event, according to applicant, "the presence of a scent and/or stripe of a scent on applicant's goods is clearly not the sole or main purpose of applicant's goods."

(Brief, p. 6). Nevertheless, applicant has offered to disclaim the word "scent." In urging that the refusal be reversed applicant submitted third-party Principal Register registrations of marks that include the word "SCENT," contending that the registrations create doubt about the descriptiveness of applicant's applied-for mark. Applicant also submitted a statement from its Director that the mark has no significance or meaning in the trade; a dictionary definition of "stripe"; and a sample of its product packaging.

The examining attorney maintains that the terms "scent" and "stripes" are well-known terms with clear definitions and that the combined term SCENT STRIPES is merely descriptive of applicant's bags. Of particular significance, according to the examining attorney, is applicant's product packaging touting that applicant's bags feature scented stripes. The examining attorney also relied upon excerpts retrieved from the Internet showing the term "scent stripes" used in connection with fragrances.

A term is deemed to be merely descriptive of goods or services, within the meaning of Section 2(e)(1), if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services. *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828 (TTAB 2007); and *In re Abcor Development*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). A term need not immediately convey an idea of each and every specific feature of the applicant's goods or services in order to be considered merely descriptive; rather, it is sufficient that the term describes one significant attribute, function or property of the goods or services. *In re H.U.D.D.L.E.*, 216 USPQ 358 (TTAB 1982); and *In re MBAssociates*, 180 USPQ 338 (TTAB 1973). Whether a term is merely descriptive is determined not in the abstract, but in relation to the goods or services for which registration is sought, the context in which it is being used on or in connection with the goods or services, and the possible significance that the term would have to the average purchaser of the goods or services because of the manner of its use. *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979). Contrary to the gist of a portion of applicant's arguments, it is settled that "[t]he question is not whether someone presented with only the mark could

guess what the goods or services are. Rather, the question is whether someone who knows what the goods or services are will understand the mark to convey information about them." *In re Tower Tech Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002). The "average" or "ordinary" consumer is the class or classes of actual or prospective customers of applicant's goods or services. *In re Omaha National Corporation*, 819 F.2d 1117, 2 USPQ2d 1859 (Fed. Cir. 1987).

The examining attorney, in her brief, requested that we take judicial notice of online dictionary definitions of the words "scent" and "stripe." The Board takes judicial notice of online dictionaries that are available in printed format or have regular fixed editions. *See In re Hotels.com L.P.*, 87 USPQ2d 1100, 1103 (TTAB 2008); and *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006). There is no indication, however, that the examining attorney's dictionary evidence meets either of these criteria.

Nevertheless, we can take judicial notice of the following dictionary definitions that appear in a printed dictionary: "scent": "a distinctive, often agreeable odor"; and "stripe": "a long narrow band distinguished, as by color or texture, from the surrounding material or surface." The American Heritage Dictionary of the English Language (4th ed. 2009).

Based on the commonly recognized and understood terms comprising applicant's mark, we find that SCENT STRIPES is merely descriptive of applicant's bags for disposal of garbage, diapers, pet waste and the like. The mark immediately informs prospective customers that such bags have scented stripes that help to eliminate odors. No imagination or thought is required to discern this touted feature or characteristic of at least some of applicant's bags. The mark need not describe all the goods and services identified, as long as it merely describes at least one of them. *See In re Stereotaxis Inc.*, 429 F.3d 1039, 77 USPQ2d 1087, 1089 (Fed. Cir. 2005) ("[T]he Trademark Office may require a disclaimer as a condition of registration if the mark is merely descriptive for at least one of the products or services involved."). *See* TMEP §1209.01(b) (5th ed. 2007).

Severely undermining the foundation of applicant's argument that the mark is not merely descriptive are applicant's Director's statement that "applicant's products are scented," and applicant's very own use of the term "stripes" on its packaging for kitchen garbage bags:¹

¹ This evidence was submitted prior to the appointment of present counsel to represent applicant during prosecution of the application.

Vanilla Fresh Scented Stripes. Only Heavy Duty Hero brand garbage bags are made with Scent Stripes™ to quickly eliminate odors in the home. The white stripes help to neutralize odors at the source--your garbage can & trash. The colored stripes bring a fresh and natural fragrance to your kitchen and home.

The examining attorney's Internet evidence showing uses of "scent stripes" is not persuasive inasmuch as the uses are in connection with colognes, perfumes and candles; that is, goods clearly different from the type of goods listed in applicant's identification of goods.

Applicant's evidence of third-party registrations of marks that include "SCENT" is not persuasive of a different result. Each case must be decided on its own facts, and a mark that is merely descriptive should not be registered on the Principal Register simply because similar marks appear on the register. *In re Scholastic Testing Service, Inc.*, 196 USPQ 517 (TTAB 1977). We are not privy to the files in these registrations. In any event, we are not bound by the prior actions of examining attorneys. *See In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) ("Even if some prior registrations had some characteristics similar to [applicant's] application, the PTO's allowance of such prior registrations does not bind the board or this court.").

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Decision: The refusal to register is affirmed.