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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Warsaw Orthopedic, Inc.

Serial No. 77277657

Carrie L. Olson of Fredrikson & Byron, P.A. for Warsaw Orthopedic, Inc.

Dominick J. Salemi, Trademark Examining Attorney, Law Office 106 (Mary I. Sparrow, Managing Attorney).

Before Hairston, Bucher and Grendel, Administrative Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

Warsaw Orthopedic, Inc. filed an application to register the mark CHROMALOY (in standard character form) for "surgical implants comprising artificial material" in International Class 10.¹

The trademark examining attorney refused registration under Section 2(e)(1) of the Trademark Act on the ground

¹ Serial No. 79045242, filed on September 12, 2007, alleging a bona fide intention to use the mark in commerce.

that applicant's mark is merely descriptive of the identified goods.

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

The examining attorney maintains that the mark CHROMALOY describes "an important feature of applicant's surgical implants, namely that they are composed of two or more metallic elements, the prominent one being chromium." (Brief, unnumbered p. 3). It is the examining attorney's position that the constituent parts of applicant's mark, "CHROM" and "ALOY," would be understood as the terms "chrome" and "alloy," respectively; that the two-word term "chrome alloy" has descriptive significance when used in connection with applicant's identified goods; and that the combined form of the term CHROMALOY is equally descriptive of applicant's goods. The examining attorney has submitted the following definitions:

chrome: chromium-plated or other bright metallic trim, as on an automobile.

alloy: a substance composed of two or more metals, or of a metal or metals with a nonmetal, intimately mixed, as by fusion or electrodeposition.²

² The definitions are taken from <http://dictionary.reference.com>.

Serial No. 77277657

He also made of record the following excerpts of stories from the LEXIS/NEXIS database:

The implants used in hip replacements are usually made of titanium or cobalt-chrome alloy. The ball and bearing are made of cobalt-chrome, ceramic or plastic. Poughkeepsie Journal; June 15, 2008.

The 4 retrieved implants were analyzed with regard to their macro- and microstructures and the fracture surfaces were examined using electron microscopy. ... Our findings suggest that a solution annealing step could be introduced into the manufacturing process to improve the microstructure of the cobalt chrome alloy. Hospital Business Week; April 13, 2008.

The implant itself is manufactured out of cobalt chrome alloy and ultra high molecular weight polyethylene (UHMWPE), the same materials which are used in artificial hip and knee replacements. Healthcare Mergers, Acquisitions & Ventures Week, November 3, 2007.

HEADLINE: Creating implants for knees...
2) Small internal areas such as the inside box section of a posterior stabilized knee implant can be ground and polished using small rotary tools. ... a) For grinding, mounted points of seeded gel ceramic abrasive are very effective on cobalt chrome alloys. Tooling & Production; August 1, 2007.

HEADLINE: The necks best thing; Neurologist implants experimental artificial disk
But thanks to a sliver of high-density polyethylene sandwiched between pieces of cobalt chrome alloy, along with some pioneering work by an Oklahoma City neurosurgeon, Pippett, 31, figures he's good as new. The Oklahoman; January 23, 2007.

Applicant, in urging reversal of the refusal to register, contends that CHROMALOY is a coined mark which is at most suggestive of applicant's goods. Applicant argues

that "the exercise of thought and perception is required to connect CHROMALOY to 'chrome alloy' and then to the possibility that a surgical instrument [sic] could be made from chrome alloy" due to "the strange spelling and appearance of the term and the difficulty a consumer faces with its pronunciation." (Brief, p. 5). Applicant maintains that "CHROM" and "ALOY" have specific meanings such that when combined to form CHROMALOY, the mark is not merely descriptive of applicant's goods. Applicant has submitted a definition of the term "**chrom**" from "Dictionary.com" which shows that it means, inter alia, "a combining form meaning 'color,' used in the formation of compound words;" and an entry for "**Aloy**" from "OneLook Dictionary" which shows that it is a surname and the corporate symbol for Alloy Online, Inc. Finally, applicant argues that there is no evidence of third-party uses of the term CHROMALOY in connection with medical goods and that the term is not listed in the "OneLook Dictionary."

A term is deemed to be merely descriptive of goods or services, within the meaning of Section 2(e)(1) of the Trademark Act, if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services. See, e.g., *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987); and

Serial No. 77277657

In re Abcor Development Corp., 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; it is enough that the term describes one significant attribute, function or property of the goods or services. See *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 or is intended to be used on or in connection with those 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; that a term may have other meanings in different contexts is not controlling. *In re Bright-Crest, Ltd.*, 204 USPQ 591 (TTAB 1979). 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).

We begin with a determination of whether the term "chrome alloy" is merely descriptive of applicant's goods. Based on the dictionary definitions, we find that chrome may be combined with another metal or material to form an alloy. Applicant's identification of goods, i.e., surgical implants comprising artificial material, is broad enough to encompass surgical implants comprising any of a number of chrome alloys. Furthermore, the LEXIS/NEXIS excerpts establish that one specific chrome alloy, namely cobalt chrome alloy, is often used in surgical implants, e.g., "implants used in hip replacements are usually made of ... cobalt-chrome alloy;" "the implant itself is manufactured out of cobalt chrome alloy;" "introduced into the manufacturing process to improve the microstructure of the cobalt chrome alloy;" and "implants artificial disk ... pieces of cobalt chrome alloy." We conclude, therefore, that the term "chrome alloy" is merely descriptive of applicant's surgical implants because it directly describes a feature or characteristic of such goods.

The next question is whether applicant's mark CHROMALOY would be perceived by the relevant customers of surgical implants as the term "chrome alloy." We find that the relevant customers would immediately recognize

Serial No. 77277657

CHROMALOY as simply a slight misspelling of the term
"chrome alloy." The Supreme Court has held that:

The word, therefore is descriptive, not indicative of the origin or ownership of the goods; and being of that quality, we cannot admit that it loses such quality and becomes arbitrary by being misspelled. Bad orthography has not yet become so rare or so easily detected as to make a word the arbitrary sign of something else than its conventional meaning

Standard Paint Co. v. Trinidad Asphalt Mfg. Co., 220 U.S. 446, 455 (1911).

Other cases have held that a slight misspelling does not change a merely descriptive term into a suggestive term. See *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315 (1938) [NU-ENAMEL; NU held equivalent of "new"]; *In re Quik-Print Copy Shops*, 616 F.2d 523, 205 USPQ 505, 507 n. 9 (CCPA 1980) [QUIK-PRINT held descriptive; "There is no legally significant difference here between 'quik' and 'quick'"]; *In re Hercules Fasteners, Inc.*, 203 F.2d 753, 97 USPQ 355 (CCPA 1953) [FASTIE held equivalent of "fast tie"]; *In re Organik Technologies Inc.*, 41 USPQ2d 1690, 1694 (TTAB 1997) ["ORGANIK, which is the phonetic equivalent of the term 'organic,' is deceptive"]; and *Hi-Shear Corp. v. National Automotive Parts Association*, 152 USPQ 341, 343 (TTAB 1966)

Serial No. 77277657

[HI-TORQUE "is the phonetic equivalent of the words 'HIGH TORQUE'"].

In this case, applicant's mark deletes the letter "e" in "chrome" and a letter "l" in "alloy," and combines the resulting terms to form CHROMALOY. Applicant argues that this creates a term with a strange spelling which is difficult to pronounce. However, the misspelling here is no more novel than the terms in *Andrew J. McFarland, Inc. v. Montgomery Ward & Co.*, 164 F.2d 603, 76 USPQ 97 (CCPA 1947) [KWIXTART held equivalent of "quick start"; merely descriptive of electric storage batteries]; and *Norsan Products Inc. v. R.F. Schuele Corp.*, 286 F.2d 12, 159 USPQ 689 (E.D. Wis. 1968) [KUF'N KOLAR held equivalent of "cuff and collar"; merely descriptive of cuff and collar laundry prespotter]. Furthermore, as seen in *In re Hercules Fasteners, Inc.*, 97 USPQ at 358 and *Andrew J. McFarland, Inc. v. Montgomery Ward & Co.*, 76 USPQ at 99, there is no requirement that the term CHROMALOY be pronounced exactly like the descriptive term "chrome alloy." Thus, even assuming that CHROMALLY is pronounced slightly different than "chrome alloy," this does not mean that it is not merely descriptive. In any event, as often stated, "there is no correct pronunciation of a trademark." *In re Belgrade Shoe*, 411 F.2d 1352, 162 USPQ 227 (CCPA 1969);

Serial No. 77277657

Yamaha International Corp. v. Stevenson, 196 USPQ 701 (TTAB 1977) and cases cited therein.

Insofar as applicant's remaining arguments are concerned, the meanings of the terms "chrom" (combining form meaning color) and "Aloy" (surname and corporate symbol) are not relevant. In addition, it is not necessary that a designation be in common usage in the particular industry in order for it to be merely descriptive. *In re National Shooting Sports Foundation, Inc.*, 219 USPQ 1018 (TTAB 1983). The absence, therefore, on this record of any third-party uses of the term CHROMALOY does not mean that applicant is entitled to registration of the term. Similarly, the absence of CHROMALOY in the dictionary is not evidence that it is not merely descriptive of applicant's goods.

We conclude that when presented with the term CHROMALOY on surgical implants comprising artificial materials, the relevant purchasers would recognize the term as the equivalent of the term "chrome alloy" which describes a feature or characteristic of such surgical implants.

Therefore, applicant's applied-for mark CHROMALOY is merely descriptive of applicant's goods.

Serial No. 77277657

Decision: The refusal to register under Section 2(e)(1) is affirmed.