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PRECEDENT OF THE T.T.A.B

Mailed: January 7, 2010

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Webid Consulting Ltd.

Serial No. 77370042

James A. Wahl of Krass Monroe, P.A. for Webid Consulting Ltd.

Brendan D. McCauley, Trademark Examining Attorney, Law Office 114 (K. Margaret Le, Managing Attorney)

Before Holtzman, Kuhlke and Ritchie, Administrative Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Webid Consulting Ltd., applicant, has filed an application to register the mark MANWEAR in standard characters on the Principal Register for goods ultimately identified as "men's clothing, namely, coats, jackets, vests, sweaters, t-shirts, shirts, jerseys, shorts, parkas, pullovers, wind-jackets, pants, raincoats; sportswear, namely, sweatsuits, jeans, sport jackets, overalls; underwear, namely, short and long sleeve tee-shirts, long

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johns, briefs, boxers; men's leather clothing, namely, coats, jackets, vests, shorts, parkas, pants, raincoats; men's fashion accessories, namely, ties, socks, caps, gloves, belts, wristband, watch wristband, hats, shoes and scarves" in International Class 25. The application was filed on January 11, 2008, under Section 1(b) of the Trademark Act, 15 U.S.C. §1052(b), alleging a bona fide intention to use the proposed mark in commerce.

The examining attorney has 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 its goods. The examining attorney argues that "the matter sought to be registered describes a feature, characteristic or purpose of applicants goods, namely, wear or clothing for a male." Br. p. 7.

After the examining attorney made the refusal final, applicant appealed and filed a request for reconsideration. On June 2, 2009, the examining attorney denied the request for reconsideration and the Board resumed the appeal. Both applicant and the examining attorney have filed briefs. We affirm the refusal to register.

The issue before us is whether the term MANWEAR is merely descriptive of men's clothing.<sup>1</sup> "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 use." In re Bayer Aktiengesellschaft, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007). See also In re Oppedahl & Larson LLP, 373 F.3d 1171, 71 USPQ2d 1370, 1371 (Fed. Cir. 2004); and In re MBNA America Bank N.A., 340 F.3d 1328, 67 USPQ2d 1778, 1780 (Fed. Cir. 2003); In re Engineering Systems Corp., 2 USPQ2d 1075 (TTAB 1986); and In re Bright-Crest, Ltd., 204 USPQ 591 (TTAB 1979). It is not necessary, in order to find a mark merely descriptive, that the mark describe each feature of the goods or services, only that it describe a single, significant ingredient, quality, characteristic, function, feature, purpose or use of the goods or services. In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987).

Further, it is well-established that the determination of mere descriptiveness must be made not in the abstract, but in relation to the goods or services for which

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<sup>1</sup> Inasmuch as the only refusal here is based on the proposed mark being merely descriptive, we do not have to address the arguments concerning whether MANWEAR "indicates a genre of clothing for males or related retail services." Applicant's Br. p. 12.

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registration is sought, the context in which the mark is used, and the impact that it is likely to make on the average purchaser of such goods or services. Bayer, 82 USPQ2d at 1831. See also In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978). Finally, "[t]he examining attorney has the burden to establish that a mark is merely descriptive." Bayer, 82 USPQ2d at 1831.

In support of his position that the proposed mark is merely descriptive, the examining attorney submitted numerous dictionary definitions. Below are examples of relevant definitions:

Man -an adult male human, as distinguished from a boy or a woman

Men -plural of man

Wear -clothing or other articles for wearing, esp. when fashionable or appropriate for a particular function (often used in combination); travel wear; sportswear.

www.dictionary.com.

"Applicant does not dispute those meanings" but argues that "these definitions do not lead to the conclusion that the combination of the two words results in a descriptive term." Br. at 8.

We also take judicial notice of the definition of the term "men's wear" as "apparel and accessories for men. Also, menswear." The Random House Dictionary of the

English Language (unabridged) (2d ed. 1987). University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., 213 USPQ 594, 596 (TTAB 1982), aff'd, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

The examining attorney also submitted various webpages that include references to the term "manwear"; however, the majority of these websites are from foreign sources. While foreign websites may have some probative value depending on the circumstances, we do not find these examples to be particularly probative here.<sup>2</sup> Bayer, 82 USPQ2d at 1835 ("Information originating on foreign websites of in foreign news publications that are accessible to the United States public may be relevant to discern United States consumer impression of a proposed mark").<sup>3</sup> The evidence does include

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<sup>2</sup> We note, however, that it is reasonable to presume that at least purchasers in the wholesale clothing market in the United States would be exposed to these foreign usages considering the amount of clothing manufactured overseas. See, e.g., www.go4worldbusiness.com a webpage for the company Oceanus Industrial Limited of China which deals in the export of "kidswear, manwear, ladywear, jeans, denim jackets, [etc.]"; www.imports.com an export company for different brands of "women clothing, textile, underware, night gowns, pyjamas, etc. also manwear"; and www.made-in-china.com a production and export company that produces inter alia "manwear, woman-garment blouse [etc.]"

<sup>3</sup> Applicant's reliance on In re Men's Int'l Professional Tennis Council, 1 USPQ2d 1917 (TTAB 1986) is misplaced in view of In re Cell Therapeutics Inc., 67 USPQ2d 1795, 1797 (TTAB 2003) wherein the Board stated:

Taking a broader view, we note that the Professional Tennis Council and [In re] Appetito Provisions [Co., 3

the following excerpts from webpages that are somewhat more probative in this circumstance:

Joe Simpson, a former preacher, who now walks the red carpets behind his daughter, wearing slick, metrosexual manwear (www.momcentral.com); and

[Tim McGraw's] jeans look like metrosexual manwear not country singer gear (www.gabsmash.blogspot.com).

Applicant argues that these examples "wholly fail to show that 'manwear' is commonly used as the name of the Applicant's services. First, neither is a trademark usage; rather these are textual references to clothing. Second, finding only two examples of use in the United States is clearly a de minimus showing that falls far short of establishing common usage. This evidence has absolutely no probative value of the issue of descriptiveness, other than to support the Applicant's position that MANWEAR is not in common use in the United States." Br. pp. 14-15. The fact that it is not trademark usage but rather a "textual reference" or descriptive usage is directly relevant to the refusal based on mere descriptiveness. The fact that only two examples are in the record simply goes to the weight of

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USPQ2d 1553 (TTAB 1987)] cases were decided well over fifteen years ago. This Board would be blind if it did not recognize that during the past fifteen years, there has been a dramatic change in the way Americans receive their news.

that evidence. As noted below, being the first or only user of a term does not make it suggestive.

Based on the evidence of record, the examining attorney has clearly established prima facie that the term "manwear" is descriptive of applicant's identified goods which consist of menswear. First, the term is comprised of clearly descriptive terms. Wear denotes clothing and man indicates for whom this clothing is designed. Further, when combined as MANWEAR there is nothing incongruous about the use of the term MANWEAR. When buying clothing, a consumer immediately would understand that the term "manwear" is referring to clothing worn by men. There is simply nothing left to the imagination that the term MANWEAR is referring to clothing for a man.

Applicant argues that by "substituting MAN for MEN'S and thus intentionally diverting from use of menswear, the commonly understood term for men's clothing, the Applicant has created an obvious incongruity in the mind of the prospective customer." Br. at 9. However, the only difference between the terms MANWEAR and MENSWEAR is that applicant uses the singular of MAN while the generic term uses the plural possessive. Inasmuch as "man" has the same meaning as the word "mens" except that it is a singular, non-possessive form of the word, it is difficult to see how

this change results in an incongruity or a double entendre. In re Acuson, 225 USPQ 790, 792 (TTAB 1985) ("We see no significance in the fact that the term 'COMPUTED' is used instead of 'COMPUTER' or 'COMPUTERIZED.'")

We add that incorrect spellings do not transform a descriptive or generic term into a suggestive one. Nupla Corp. v. IXL Manufacturing Co., 114 F.3d 191, 42 USPQ2d 1711, 1716 (Fed. Cir. 1997) (CUSH-N-GRIP merely misspelling of CUSHION-GRIP generic "as a matter of law"); Weiss Noodle CO. v Golden Cracknel and Specialty Co., 290 F.2d 845, 129 USPQ 411 (CCPA 1961) (HA-LUSH-KA held to be the generic equivalent of the Hungarian word "haluska"); and In re Carlson, 91 USPQ2d 1198, 1203 (TTAB 2009) (URBANHOUSING equivalent of descriptive term URBAN HOUSING).

Relying on In re Shutts, 217 USPQ 363 (TTAB 1983), applicant argues that "[j]ust as one would not 'rake' snow, the average person, as demonstrated by the definitions listed above, will not understand 'man' to mean clothing sizes, garments or store departments. It is only with some measure of imagination or mental pause that one would understand MANWEAR to relate to clothing." Br. p. 11. We do not find these facts to be congruent to those presented in Shutts, wherein the Board found SNORAKE to be suggestive stating that "as applied to applicant's tool, [it] does not

readily and immediately evoke an impression and understanding of applicant's implement as a snow removal device; nor does the term 'rake,' even technically viewed, connote, as the Examining Attorney maintains, simply 'to remove' or 'to scrape off'." Shutts, 217 USPQ at 364. The word man "even technically viewed" connotes the singular of men.

Applicant's argument that "the term MAN does not have a single recognized meaning" is not persuasive. Br. at 12. The fact that "man" has other meanings in other contexts is not relevant; we are constrained to make our analysis within the context of the identified goods. Thus, while the terms man and wear are words with numerous meanings, when they are combined and used in association with men's wear, their combined meaning is clear, namely, clothing for men. This is not a circumstance where the different meanings would all relate to the identified goods, which could create an incongruity or a mental pause.

Finally, applicant argues that its proposed mark "is not commonly used or understood to relate in any way to [its] goods." Br. at 15. As discussed above, the meaning of MANWEAR in the context of clothing, and more specifically men's wear, would be clear to relevant purchasers. Moreover, it is well settled that even if

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applicant is the first and only user of this term, that alone cannot "alter the basic descriptive significance of the term and bestow trademark rights therein." In re Gould, 173 USPQ 243, 245 (TTAB 1972).

We are persuaded that when applied to applicant's clothing, MANWEAR immediately describes, without need for conjecture or speculation, a significant feature of the goods, namely that they are men's clothing.

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