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PRECEDENT OF THE T.T.A.B

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Keith Stonebraker

Serial No. 77613568

James M. Duncan, of Klein Denatale Goldner Cooper Rosenlieb
& Kimball, LLP, for Keith Stonebraker

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111 (Robert Lorenzo, Managing Attorney)

Before Grendel, Holtzman and Kuhlke, Administrative
Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Keith Stonebraker, applicant, has filed an application to register the mark KAMO KIDS in standard characters on the Principal Register for "disposable diapers" in International Class 16. The application was filed on November 13, 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. Both applicant and the examining attorney have filed briefs. We affirm the refusal to register.

"A mark is merely descriptive if it 'consist[s] merely of words descriptive of the qualities, ingredients or characteristics of the goods or services related to the mark." In re Oppedahl & Larson LLP, 373 F.3d 1171, 71 USPQ2d 1370, 1371 (Fed. Cir. 2004), quoting, Estate of P.D. Beckwith, Inc. v. Commissioner, 252 U.S. 538, 543 (1920). See also In re MBNA America Bank N.A., 340 F.3d 1328, 67 USPQ2d 1778, 1780 (Fed. Cir. 2003). The test for determining whether a mark is merely descriptive is whether it immediately conveys information concerning a significant 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 Engineering Systems Corp., 2 USPQ2d 1075 (TTAB 1986); 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,

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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 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. In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978).

The examining attorney argues that KAMO KIDS describes a feature of the goods and the intended user of applicant's goods. Specifically, the examining attorney argues that KAMO is the phonetic equivalent of CAMO which is the shortened word for camouflage and applicant intends to place a camouflage design on its diapers. With regard to the term KIDS, the examining attorney contends that it describes the intended user of the goods. The examining attorney further argues that when combined the terms do not lose their descriptive significance.

In support of her position, the examining attorney has submitted the following definitions:

CAMO "informal Camouflage fabric or a garment made of it." The American Heritage Dictionary of the English Language (4th ed. 2006) retrieved from dictionary.reference.com.;

CAMO "noun fabric dyed with splotches of green and brown and black and tan; intended to make the wearer of a garment made of this fabric hard to distinguish from the background." WordNet (Princeton University 2006) retrieved from dictionary.reference.com.; and

KID 3. "informal a) A child b) A young person." The American Heritage Dictionary of the English Language (4th ed. 2006) retrieved from dictionary.reference.com.

In addition, she submitted two third-party registrations for disposable diapers where the word KIDS is disclaimed and one third-party registration for clothing, including baby bibs, where the word CAMO is disclaimed. See March 17, 2010 Office Action (Reg. Nos. 3347123, 3078939, and Reg. No. 3570702).

Applicant argues that the examining attorney failed to meet her burden of demonstrating that KAMO KIDS is merely descriptive. Specifically, applicant contends that the examining attorney only examined the individual components of the proposed mark KAMO KIDS rather than considering the proposed mark as a whole. Applicant argues that its mark "makes use of alliteration [which] encourages persons encountering it to perceive it as a whole." Br. p. 6. Applicant points to the section in the Trademark Manual of

Examining Procedure that covers disclaimer practice which provides that alliteration may "create a distinctive impression" rendering a composite mark unitary and eliminating the need to disclaim individual elements.

While not directly on point, this line of argument comports with the established principle that a refusal based on mere descriptiveness is obviated where the combination of descriptive terms creates a unique, incongruous or nondescriptive meaning. Applicant contends that "camouflage is generally used by the military and in various sports, such as hunting, which activities are incongruous with an article made for infants, i.e., disposable diapers." Br. p. 7. Applicant also argues that infants are the intended users of the product and they represent a "very small subset of the group generally referred to as young persons." Br. p. 3.

In determining whether a proposed mark that contains multiple words is merely descriptive it is appropriate to examine the individual terms to determine whether they are descriptive terms. Of course, the determination of whether the composite mark also has a descriptive significance turns upon the question of whether the combination of terms evokes a new and unique commercial impression. If each component retains its descriptive significance in relation

to the goods or services, the combination results in a composite that is itself descriptive. Applicant takes issue with the examining attorney's reliance on cases involving marks that contain TLD's (top level domains). In *re Hotels.com, LP*, 573 F.3d 1300, 91 USPQ2d 1532 (Fed. Cir. 2009); and *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370 (Fed. Cir. 2004). While the facts may be distinguished, the statement of the law is equally applicable here. It is appropriate and necessary for the examining attorney to make a showing regarding the individual terms. Further, evidence establishing the mere descriptiveness of the individual terms, may be sufficient to establish mere descriptiveness of the whole. See *In re Gould Paper Corp.*, 834 F.2d 1017, 5 USPQ2d 1110 (Fed. Cir. 1987) (evidence that separate words SCREEN and WIPE were generic satisfied evidentiary burden to establish genericness of the mark SCREENWIPE).

In its August 5, 2009 response to the Office Action, applicant stated that "[t]he disposable diapers will have applied, to the outside surface, various patterns which simulate a camouflage design." Response p. 2. Thus, the term KAMO clearly describes a significant feature of the goods. The fact that it is a misspelling of the word CAMO does not obviate the refusal. A misspelling that is the

equivalent of a merely descriptive word or term is also merely descriptive if it would be immediately and directly perceived by consumers as the equivalent of the merely descriptive term. In re Carlson, 91 USPQ2d 1198 (TTAB 2009). There is nothing in the record to suggest that consumers would not directly perceive KAMO as the phonetic equivalent of CAMO.

Further, applicant essentially concedes that the term KIDS includes infants, if only as a subset. In fact, the term KIDS includes any child requiring diapers, regardless of age. It is not relevant to our determination that the term KIDS may encompass children who do not use diapers. When viewed in relation to applicant's diapers, the relevant meaning of KIDS is clear. In re Bright-Crest, Ltd., 204 USPQ 591 (TTAB 1979).

Taken together these terms retain their descriptive significance. We make our analysis in the context of the identified goods which encompass applicant's intended goods, i.e., diapers with a camo design on the surface. Thus, applicant's argument that its proposed mark is incongruous because infants and hunting and military activities are incompatible is not persuasive. The goods themselves will have the camo design on them. In addition, based on the definitions for CAMO and the listing of goods

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in the third-party registration, the word "camo" is used with fabric and clothing generally and is not limited to only military and hunting activities. Moreover, we find that the alliteration is not sufficient to create a distinct commercial impression separate from the descriptive meanings. Finally, applicant is correct that when there is doubt as to the mere descriptiveness of a proposed mark, we must resolve such doubt in favor of an applicant. However, we have no doubt in this case.

Based on the evidence of record, the examining attorney has established prima facie that KAMO KIDS is merely descriptive of applicant's identified goods "disposable diapers." Applicant's arguments do not sufficiently rebut this showing.

We are persuaded that when applied to applicant's disposable diapers, KAMO KIDS immediately describes, without need for conjecture or speculation, a significant feature of the goods, namely the camo design, and the intended users, namely kids.

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