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PRECEDENT OF THE TTAB

Mailed: January 30, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Rebecca Brough

Serial No. 78680981

Kenneth A. Linzer of Linzer & Associates, P.C. for Rebecca Brough.

Robert Clark, Trademark Examining Attorney, Law Office 101 (Ronald R. Sussman, Managing Attorney).

Before Zervas, Kuhlke and Taylor, Administrative Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Rebecca Brough, applicant, seeks registration on the Principal Register of the mark shown below for goods identified as "clothing, headgear and footwear made of non-animal products, namely footwear, sportswear, coats, sport coats, jackets, rainwear, shorts, sweat shorts, sweatsuits, sweat pants, vests, suits, tank tops, jeans, shirts, hats,

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gloves, socks, shoes, boots, slippers, sandals, caps, headbands and belts" in International Class 25.¹



Registration has been refused under Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1), on the ground that applicant's mark is deceptively misdescriptive of its goods, and Section 2(a) of the Trademark Act, 15 U.S.C. §1052(a), on the ground that applicant's mark is deceptive. In addition, registration has been refused based on the requirement to amend the identification of goods inasmuch as "sportswear" is indefinite.

When the refusals were made final, applicant appealed and briefs have been filed.²

As a preliminary matter, we note that applicant, in its reply brief, amended its identification of goods by deleting the word "sportswear" in response to the examining attorney's requirement. Accordingly, the requirement for

¹ Application Serial No. 78680981, filed July 28, 2005, alleging first use anywhere and use in commerce on May 1, 2003, under Section 1(a) of the Trademark Act, 15 U.S.C. §1051(a).

² The exhibits attached to applicant's reply brief are untimely and have not been considered. Trademark Rule 2.142(d). To the extent applicant was attempting to request remand for entry of an amendment (Exh. Z), this should have been done as a separate filing with a showing of good cause. In any event, the letter specifically states that applicant "is not requesting a formal amendment at this time."

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an acceptable identification of goods is deemed satisfied, and the appeal on this issue is moot. The remaining refusals are considered based on the goods as amended.

Deceptive Misdescriptiveness

The test for deceptive misdescriptiveness has two parts. First it must be determined if the matter sought to be registered misdescribes the goods. If so, then it must be ascertained if it is also deceptive, that is, if anyone is likely to believe the misrepresentation. In re Quady Winery Inc., 221 USPQ 1213, 1214 (TTAB 1984). See also In re Phillips-Van Heusen Corp., 63 USPQ2d 1047 (TTAB 2002).

The examining attorney provided the following dictionary definition of MINK: "2. a. The soft, thick, lustrous fur of this animal. b. A coat, stole or hat made of the fur of this animal." The American Heritage Dictionary of the English Language (3d ed. 1992). In addition, the examining attorney submitted webpage printouts showing various mink clothing items.

Applicant has indicated and the identification of goods specifies that the goods do not contain animal products which would include mink. Applicant does not dispute the meaning of mink or that mink is used generally in various clothing items, including, coats, shoes, slippers, gloves, hats, etc. Applicant focuses her

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argument on the manner in which she uses the mark. For example, one of her advertisements reads:

Rebecca Brough is the founder and designer of MINK shoes. Rebecca has maintained a lifelong interest in the preservation, protection and safeguarding of the environment ... MINK is devoted to ... providing cruelty-free fashionable footwear ... Research and development of an exceptional non-leather shoe has taken Rebecca four years. Rebecca worked to develop a new way of manufacturing shoes with non-animal materials.

See Response (August 18, 2006) Exh. A.

Applicant further argues that her customers:

... would never imagine that MINK shoes are manufactured using mink-fur, or any animal-materials, in light of the above ... [and] all the publicity which mink shoes has received, and there has been quite a lot, focuses on the animal-free nature of MINK shoes. So, the likelihood that a purchaser would be attracted to the product and then deceived about the materials used in the shoe products' actual construction are practically zero.

Br. pp. 9-10.

In noting that applicant is listed on PETA's (People for the Ethical Treatment of Animals) "Shopping Guide to Compassionate Clothing," applicant concludes that "use of the animal's name for the shoe is simply an off-the-wall, out-of-the-box, wildly creative, animal-friendly design."³ Br. p. 12.

³ We note that applicant's arguments only pertain to her shoe products, but the application contains a list of several clothing items with an accompanying allegation of use that pertains to each of the items in the list. See *Medinol Ltd. v. Neuro Vasx*

There is no issue that MINK, an animal product, misdescribes applicant's various clothing items made of non-animal products. Moreover, the design element of the crown does not detract from this meaning or serve to indicate that the goods do not include mink.

With regard to the next inquiry, whether consumers would believe the misrepresentation, mink is a generic term for coats and hats and printouts from several websites in the record show coats, hats, slippers and boots made of or consisting of mink. See, e.g., valentino.com; ebay.com; and newyorkmetro.com. Consumers would certainly believe coats, hats, slippers, and boots contain mink.

Applicant's arguments that focus on her actual use of the proposed mark are not relevant to our inquiry. We must make our determination based on the applied-for mark, which consists only of the stylized word MINK and a crown design, and the goods as identified. Thus, we must consider any possible marketing or type of goods encompassed within the parameters of the application. As the examining attorney noted, applicant could use the term MINK in connection with faux fur without any disclaimer or explanation; the

Inc., 67 USPQ2d 1205 (TTAB 2003). The refusals have been issued against all of the goods in the application and we make our determination based on the various goods listed in the application.

application as presented would provide trademark protection for any use of the term MINK with the non-animal clothing items listed in the identification of goods. Put simply, applicant's explanations and intentions are not part of the application.

In view of the above, applicant's mark is deceptively misdescriptive of its goods.

Deceptiveness

The test for determining whether a mark is deceptive under Section 2(a) has been stated by the Court of Appeals for the Federal Circuit as: 1) is the term misdescriptive of the character, quality, function, composition or use of the goods; 2) are prospective purchasers likely to believe that the misdescription actually describes the goods; and 3) is the misdescription likely to affect the decision to purchase. In re Budge Manufacturing Co., Inc., 857 F.2d 773, 8 USPQ2d 1259, 1260 (Fed. Cir. 1988).

The first two factors have already been established in connection with the refusal under Section 2(e)(1) discussed above. What remains is to determine whether the misdescription is likely to affect the decision to purchase.

The examining attorney submitted printouts from several websites to show that fur in general and mink in

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particular is a desirable material for applicant's goods, including coats, hats, slippers and boots. See, e.g., collections-corner.com ("Men are warming up to fur. Long the choice of well-heeled women, men now seek the same status ... Fur is no longer just for warmth on the coldest of days, fur has moved into the hot must have fashion category and is worn from day to night and across all seasons"); and madisonavemall.com ("Fur accessories are the hottest items, to the runways. Sable, chinchilla, mink, fox, fur muffs, fur scarves, fur headbands, fur handbags and fur evening bags, all the latest designer fur accessories are for sale ...")

As shown by the evidence of record, mink is perceived as a desirable component of various clothing items. This evidence is sufficient to establish that mink is perceived by prospective purchasers as a luxury item that imbues the owner with status and would materially affect the purchasing decision. Thus, we conclude that the mark MINK is deceptive in connection with the identified goods.

Decision: The refusals to register under Sections 2(e)(1) and 2(a) of the Trademark Act are affirmed.