

**THIS OPINION IS NOT A
PRECEDENT OF THE TTAB**

Mailed:
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Bucher

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Future First LLC

Serial No. 78769110

Larry M. Meyers of Larry Meyers, P.C. for Future First LLC.

Jordan A. Baker, Trademark Examining Attorney, Law Office
102 (Karen M. Strzyz, Managing Attorney).

Before Seeherman, Walters and Bucher, Administrative
Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

Future First LLC seeks registration on the Principal
Register of the mark **Banana Chair** (*in standard character
format*) for goods identified in the application as
"furniture, chair" in International Class 20.¹

The Trademark Examining Attorney refused registration
on the ground that the term is merely descriptive under
Section 2(e)(1) of the Trademark Act, 15 U.S.C.

¹ Application Serial No. 78769110 was filed on December 8,
2005 based upon applicant's claims of first use anywhere and
first use in commerce at least as early as May 1974.

§ 1052(e)(1), and furthermore, that applicant's evidence of acquired distinctiveness under Section 2(f) of the Act is insufficient to overcome the Section 2(e)(1) refusal.

After the Trademark Examining Attorney made the refusal final, applicant appealed to this Board. We reverse the refusal to register.

Rory Scott Dean, applicant's owner, states that he invented a legless rocking chair having a curved bottom, and began marketing it in 1974 under the trademark "Banana Chair." These chairs are designed for lounging, watching television, or playing video games. They are inexpensive (\$19 to \$59 at retail), often marketed along with casual furniture such as bean bag chairs.

The Trademark Examining Attorney contends that the term "banana chair" is the common commercial name for a curved, legless rocking chair that is not associated with any one particular source.

A mark is merely descriptive, and therefore unregistrable pursuant to the provisions of Section 2(e)(1) of the Trademark Act, if it immediately conveys "knowledge of a quality, feature, function, or characteristic of the goods or services." *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007). A mark is suggestive, and therefore registrable on the Principal

Register without a showing of acquired distinctiveness, if imagination, thought or perception is required to reach a conclusion on the nature of the goods or services. "Whether a given mark is suggestive or merely descriptive depends on whether the mark 'immediately conveys ... knowledge of the ingredients, qualities, or characteristics of the goods ... with which it is used,' or whether 'imagination, thought, or perception is required to reach a conclusion on the nature of the goods.'" (citation omitted) *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987); *In re Home Builders Association of Greenville*, 18 USPQ2d 1313 (TTAB 1990); and *In re American Greetings Corp.*, 226 USPQ 365 (TTAB 1985).

It is the Examining Attorney's position, as set out in his brief, that:

The applicant's mark merely describes a common commercial name for a particular kind of chair []. Applicant's chair is in a similar shape to that of the banana fruit, and chairs in an identical or similar shape and size to those produced by applicant and by others have come to be known as [] "banana chairs." Although the evidence in the record shows this kind of curved, legless, upholstered chair [] var[ies] in style and size, all of the chairs feature a basic set of similarities that would allow a consumer to recognize a highly similar "banana" shape. The evidence of record convincingly shows the wording "banana chair" to refer to a common

style of chair that is not associated with any particular trademark source.²

In response to the initial refusal, applicant submitted for the record a declaration about Mr. Rory Scott Dean's history of inventing the "Banana Chair" in 1974, and proffered a series of newspaper advertisements (1988 to 1994) promoting its Banana Chairs that were available in then-existing retail establishments in Utah.

The Trademark Examining Attorney concludes that the resemblance between the shape of these chairs and a banana is so strong that it has become the common commercial name of these molded rocking chairs. While a generic name is the ultimate in descriptiveness under Section 2(e)(1) of the Lanham Act, the Trademark Examining Attorney has not applied the two-part test for genericness taken from *H. Marvin Ginn Corp. v. International Ass'n of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528 (Fed. Cir. 1986).

However, in support of the contention that " ... [t]he evidence of record convincingly shows the wording 'banana chair' ...refer[s] to a common style of chair ...," the

² In the initial Office Action the Trademark Examining Attorney contended that the term **Banana Chair** described teak-framed, cabana furniture woven with treated-banana fibers. However, with the following Office Actions and in his brief, the Trademark Examining Attorney did not pursue this argument, and therefore we have given the foregoing argument no consideration.

Trademark Examining Attorney has submitted for the record evidence in which the term "banana chairs" is used for furniture that seems to be similar to applicant's product.³

The Futons and Beds ad and the AK Design article, noted in footnote 3, appear to reflect the most significant current commercial usages on the web. Interestingly, both originate in Salt Lake City - in Mr. Rory Scott Dean's home state of Utah.

The Trademark Examining Attorney has also submitted "hits" where the term is used in non-retail settings online, such as chat rooms, on Craigslist or eBay, in forums and

³

- SUS Furniture of Lewistown, MT, <http://www.susfurniture.com/>
- Gone Bananas website advertising "The Original Banana Chair Video Rocker," accessed by the Trademark Examining Attorney on March 9, 2007, at www.gone-bananas.com. This same Gone Bananas website was cited a second time by the Trademark Examining Attorney as a sponsored link from a Google search. The record does show that applicant sent this online merchant a cease and desist letter on August 14, 2006.
- City Living Stores (Economy Hardware online) <http://www.citylivingstores.com/cgi-bin/category/377> Banana Chair.
- Futons and Beds: Banana Chairs or Video Chairs, \$ 59.99 http://www.futonsandbeds.com/bean_bags_banana_chairs.htm The website indicates that this retail establishment is located at 479 E 2100 S, Salt Lake City, UT 84115.
- HEADLINE: "Seating company is sitting pretty"
" ... Styling, innovation and affordability put AK[Design]'s offerings snugly between low-tech "banana" chairs and elaborate electronic chairs, decked out with speakers and leather, that sell for up to \$2,000. AK's products were attractive to mass retailers like Costco and Best Buy, among others. Gamers looking for comfort and styling could find what they needed with AK Rockers, which can cost as little as \$79.99..." *Deseret News* (Salt Lake City) May 9, 2005. By Brice Wallace, *Deseret Morning News*.

blogs, etc., where individual consumers use this term.⁴ This evidence is of little probative value. We have no way of knowing whether some or even many of these excerpts may be referencing applicant's goods. In this respect, we note that most of these items are connected to the Pacific Coast and Intermountain West region of the United States - the exact part of the country where most of applicant's goods have been marketed (viz., "furniture stores in Utah, Montana, California, Wyoming, Idaho, Texas, Washington, and Colorado"). Moreover, the fact that an individual posting a comment on a blog or other online forum may use a term without proper capitalization is not necessarily evidence that he or she believes the term is a common commercial name, nor is it evidence that readers of the posting regard it as such.

⁴ <http://local.yahoo.com/info-19830862>; ebay listing for "Gently used Video Rocker (a.k.a. Banana Chair)"; Sister Jane's blog <http://www.sisterjane.blogspot.com/2006/11/here-at-last.html>; Salt Lake City craigslist > [furniture http://saltlakecity.craigslist.org/fur/444314193.html](http://saltlakecity.craigslist.org/fur/444314193.html); Phoenix craigslist > [furniture http://phoenix.craigslist.org/fur/452353036.html](http://phoenix.craigslist.org/fur/452353036.html); Portland craigslist > [Multnomah Co. > furniture http://portland.craigslist.org/ele/446597415.html](http://portland.craigslist.org/ele/446597415.html); KSL NewsRadio [Utah] Classifieds at <http://www.ksl.com/>; <http://forum.nuklearpower.com/>;
HEADLINE: "Summer theater lineup opens with 'Ragtime'"
" ... Chaise lounges, banana chairs, low chairs and pets are not allowed ... " <http://www.lvrj.com/living/7953397.html> Las Vegas Review-Journal, June 12, 2007.

We cannot conclude from the evidence of record that the Office has met its burden of showing that the term "banana chair" is the common commercial name for a particular type of chair. Given the ability of Internet search engines to retrieve many uses of almost any term, we cannot find on the basis of these isolated uses of "banana chair" as a common commercial name by individuals on blogs or public access sites such as Craig's List that this term is clearly the name of these types of chairs.

As to whether the mark is considered merely descriptive because the term **Banana Chair** describes the shape of the chair, namely that of a banana, again we find that it is not. Although the chair has a curved shape that may suggest the curve of a banana, the chair does not in fact look like a banana, and the term **Banana Chair** does not immediately and directly describe its shape.

Accordingly, we find that applicant's mark is not merely descriptive. As a result, we do not need to reach the question of the sufficiency of applicant's showing of acquired distinctiveness.

We also point out that our decision is based solely on the record before us. We make no comment on what the result

might be on a different record, such as what might be adduced in an *inter partes* proceeding.

Decision: We hereby reverse the refusal of the Trademark Examining Attorney to register this mark under Section 2(e)(1) of the Lanham Act.