This Opinion is Not a Precedent of the TTAB

Mailed: September 29, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re King Furniture Australia Pty Ltd

Serial No. 79204467

Alexander Lazouski of Lazouski IP LLC, for King Furniture Australia Pty Ltd.

Dustin Bednarz, Trademark Examining Attorney, Law Office 121, Kevin Mittler, Managing Attorney.

Before Taylor, Mermelstein and Lykos, Administrative Trademark Judges.

Opinion by Taylor, Administrative Trademark Judge:

King Furniture Australia Pty Ltd ("Applicant") has filed for extension of protection of an international registration under Section 66(a) of the Trademark Act, 15 U.S.C. § 141f(a), seeking registration on the Principal Register of the mark KING

LIVING and design, shown below,



for (as amended):

Beds; headboards for beds; chairs being furniture; domestic furniture; furniture; furniture for the bedroom; furniture for the home; furniture for the living room; lounge furniture; furniture for use on patios; mirror frames; mirrors being items of furniture; chairs, namely, recliners; fitted fabric furniture covers; convertible sofas; sofas; coffee tables; tables; cushions in International Class 20;

Bed covers; blanket throws; curtains; cushion covers; quilts; unfitted covers not of paper for sofas; unfitted covers not of paper for tables; Non-woven textile fabrics; Woven fabrics of nylon and cotton for textile use; textiles for furnishings; textiles for interior decorating; spandex and cotton fabric for use as a textile in the manufacture of upholstery; upholstery fabrics; textile wall hangings in International Class 24;

Carpets; floor coverings; floor mats; floor rugs; floor mats; non-textile wall hangings; wallpapers in International Class 27; and

Wholesale store services featuring furniture, flooring, and home décor; retail store services featuring furniture, home namely. flooring. and décor; Franchising, consultation and assistance in business management, organization and promotion; business consultancy: assistance in franchised commercial business management: sales promotion services: business administration; business management in International Class $35.^1$

The Trademark Examining Attorney has finally refused registration of some of

the goods and services identified in International Classes 20, 24 and 35, as fully set

forth below, pursuant to Section 6(a) of the Trademark Act, 15 U.S.C. § 1056(a), based

¹ Application Serial No. 79204467 was transmitted to the USPTO on October 26, 2016, pursuant to Section 66(a) of the Trademark Act, 15 U.S.C. § 1141f(a), based on International Registration No. 1337541, registered October 26, 2016, and claiming priority as of May 6, 2016. The application includes the following description: "The mark consists of the wording 'KING LIVING' with the wording 'KING' appearing at the bottom of a shaded square, and the word 'LIVING' appearing beneath the shaded square."

on Applicant's failure to comply with the requirement to disclaim the word KING on the ground that it is merely descriptive of a characteristic or feature of these goods and services within the meaning of Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1). The goods and services subject to the refusal in this proceeding are as follows:

> Beds; headboards for beds; domestic furniture; furniture; furniture for the bedroom; furniture for the home; fitted fabric furniture covers; convertible sofas; sofas in International Class 20;

> Bed covers; blanket throws; quilts in International Class 24; and

Wholesale store services featuring furniture, flooring, and home décor; retail store services featuring furniture in International Class 35.

Applicant appealed, and both Applicant and the Examining Attorney filed briefs.

We affirm the refusal of registration in the absence of a disclaimer.

I. Applicable Law

An examining attorney may require an applicant to disclaim an unregistrable component of a mark otherwise registrable. Trademark Act Section 6(a). Merely descriptive terms are unregistrable, under Trademark Act Section 2(e)(1), and therefore, are subject to disclaimer if the mark is otherwise registrable. Failure to comply with a disclaimer requirement is grounds for refusal of registration. *See In re Stereotaxis Inc.*, 429 F.3d 1039, 77 USPQ2d 1087, 1089 (Fed. Cir. 2005); *In re Omaha Nat'l Corp.*, 819 F.2d 1117, 2 USPQ2d 1859 (Fed. Cir. 1987); *In re Ginc UK Ltd.*, 90 USPQ2d 1472 (TTAB 2007); *In re Nat'l Presto Indus., Inc.*, 197 USPQ 188 (TTAB 1977).

The test for determining whether a mark is merely descriptive is whether it immediately conveys information concerning a quality, characteristic, function, ingredient, attribute or feature of the product or service in connection with which it is used, or intended to be used. *See In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012). The determination of whether a mark is merely descriptive must be made in relation to the goods or services for which registration is sought. *Id.* 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. *Id.*; *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1010 (Fed. Cir. 1987).

II. Arguments and Evidence

Applicant maintains that the phrase KING LIVING in its applied-for mark is a unitary phrase and a double entendre in connection with its goods and services because as used in its mark, the word KING does not stand alone as a separable and merely descriptive element of the mark, a disclaimer is not required. Applicant explains that:

> [T]he wording "KING LIVING" as used in the instant application does not have an immediate connotation, and is "open to numerous interpretations as to its precise meaning." Because the wording "KING LIVING" requires imagination and "mental pause" to ascertain its meaning as used in connection with the goods, the mark as a whole conveys no immediate, definite information regarding he nature of the goods offered by the Applicant.

Applicant has submitted the following evidence in support of its position:

A. Definition of the word "king"

a male monarch of a major territorial unit; especially: one whose position is hereditary and who rules for life.²

B. Definitions of the phrase "live like a king"

- 1. Live in great comfort and luxury³
- 2. to live in a very comfortable way, with much more money than you need⁴
- 3. Enjoy a lavish style of living, as in He spared no expense, preferring to live like a king as long as he could...⁵

C. Internet excerpts using the phrase "King Living" ⁶

1. Trip Advisor Review⁷

Use of the phrase in a comment section about a hotel in Egypt, *i.e.*, "If you ever want to try the king living style...."

² The definition was taken from the on-line Merriam-Webster Dictionary (https://www.merriam-webster.com/dictionary/king), last accessed on June 19, 2017. Applicant's June 19, 2017 Response; TSDR 13.

³ The definition was taken from the on-line Oxford Dictionaries (https://en.oxforddictionaries.com/definition/live_like_a_king_(or_queen)), last accessed on June 19, 2017. Applicant's June 19, 2017 Response; TSDR 25.

⁴ The definition was taken from the on-line MacMillan Dictionary (http://www.macmillandicationary.com, last accessed on June 19, 2017. Applicant's June 19, 2017 Response; TSDR 29.

⁵ The definition was taken from Dictionary.com, referencing The American Heritage[®] Idioms Dictionary (http://www.dictionary.com/browse/live-like-a-king), last accessed on June 19, 2017. Applicant's June 19, 2017 Response; TSDR 31.

⁶ The URL is chrome-extension://bpconcjcammlapcogcnnelfmaeghhagj/edit.html, which does not appear to be active. However, the Examining Attorney addressed these materials and, accordingly, we consider them to be of record.

⁷ October 18, 2017 Response to Office Action, TSDR 8.

2. Result of a Google search for "king living" – an excerpt from the book *Excavation Memoir*⁸

Use of the phrase "His majesty made his offerings similar to [illegible] a king living on earth, a king living eternally."

3. Comment from a forum concerning elder care issues on the website at www.agingcare.com⁹

Use of the phrase "My Dad said he felt like a King living there :)"

4. Comment from the Expedia website about a hotel in India¹⁰

Use of the phrase "A truly king living life at Taj."

The Examining Attorney, conversely, maintains that the word "king" merely

describes a characteristic or feature of Applicant's goods, namely being "principal or

chief in size or importance" and "of or relating to a king-size bed," and accordingly a

disclaimer of the word is required.

The Examining Attorney has supported the refusal with the following:

A. Definitions of "king" and "live like a king":

1. "king"

Principal or chief, as in size or importance Of or relating to a king-size bed¹¹

2. "live like a king"

 $^{^{8}}$ Id. at 12.

⁹ *Id*. at 13.

 $^{^{10}}$ Id. at 15.

¹¹ The definition was taken from the on-line version of *The American Heritage Dictionary* (http://www.ahdictionary.com), last accessed on April, 14, 2017, April 14, 2017 Office Action, TSDR 10.

to live in a very comfortable way, with much more money than you need $^{12}\,$

B. Internet materials from the websites of various third-party commercial establishments showing the word "king" used by them in connection with the sale of bed, bedding and furniture:

- Macy's uses the word "king" to refer to the size of beds on its website (www.macy's.com)¹³
- Pottery Barn uses the word "king" to refer to the size of a bed on its website (https://www.potterybarn.com)¹⁴
- Expand Furniture uses the word "king" to refer to the size of a sofa bed on its website (https://expandfurniture.com)¹⁵
- Bed Bath & Beyond uses the word "king" to refer to the size bedding on its website (https://www.bedbathandbeyond.com)¹⁶
- Target uses the word "king" to refer to the size of a mattress protector on its website (https://www.target.com)¹⁷

C. A copy of Applicant's Registration No. 5010020 for the mark KING

KINGLIVING.COM and design, with the word KING disclaimed.¹⁸

 15 Id. at 18.

 16 Id. at 19.

¹² The definition was taken from the on-line MacMillan Dictionary (http://www.macmillandicationary.com, last accessed on June 19, 2017. Applicant's June 19, 2017 Response; TSDR 29.

¹³ April 14, 2016 Office Action, TSDR 11.

¹⁴ July 7, 2017 Office Action, TSDR 17.

¹⁷ *Id*. at 20.

¹⁸ *Id.* at 21-23. Applicant's disclaimer of KING in its prior registration "constitutes an admission of the merely descriptive nature of that term [with respect to the goods in that registration] . . . at the time of the disclaimer." *In re DNI Holdings Ltd.*, 77 USPQ2d 1435, 1442 (TTAB 2005). While the prior registration is relevant, our consideration of it makes no difference to the result we reach. The descriptiveness of the word "king" with respect to the goods at issue in this case is adequately established by other evidence. But the registration

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D. Internet materials from Applicant's websites that use the term "king" to refer to the size of bed and mattress¹⁹

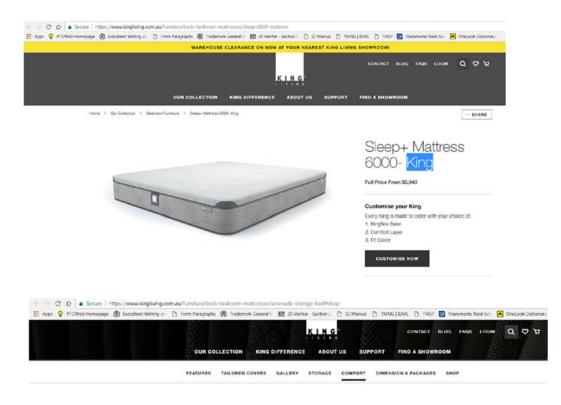
The evidence submitted by the Examining Attorney convinces us that the term

"KING" in Applicant's applied-for KING LIVING and design mark [KING], when used in connection with Applicant's identified "beds; headboards for beds; domestic furniture; furniture; furniture for the bedroom; furniture for the home; fitted fabric furniture covers; convertible sofas; sofas" (Class 20), and "bed covers; blanket throws; [and] quilts" (Class 24) merely describes, without any type of multi-step reasoning or mental gymnastics, an available size of the goods themselves as well as the import of the wholesale and retail flooring, and home décor retail services and an available size of furniture featured in Applicant's wholesale and retail furniture, services. Indeed, as shown in the web pages below,²⁰ Applicant uses the word KING descriptively on its website when referring to its products.

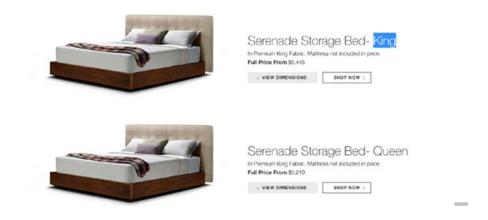
is irrelevant to the ultimate issue in this case, *i.e.*, whether KING LIVING, as used in the current application, is a unitary non-descriptive element of Applicant's mark, precluding a requirement to disclaim KING.

¹⁹ November 20, 2017 Office Action, TSDR 10-12.

 $^{^{20}}$ Id.



Popular Serenade Storage Bed packages



In traversing the refusal, Applicant primarily contends that the phrase "KING LIVING" in its mark, when used in relation to its goods and services, is unitary²¹ and presents a double entendre and therefor a disclaimer is not required.

 $^{^{21}}$ Applicant did not argue that its mark is unitary as displayed, only that the wording is unitary because it is a double entendre.

A mark or portion of a mark is considered "unitary" when it creates a commercial impression separate and apart from any unregistrable component. The test for unitariness inquires whether the elements of a mark are so integrated or merged together that they cannot be regarded as separable. *See In re EBS Data Processing*, 212 USPQ 964, 966 (TTAB 1981); *In re Kraft, Inc.*, 218 USPQ 571, 573 (TTAB 1983). The inquiry focuses on "how the average purchaser would encounter the mark under normal marketing of such goods and also . . . what the reaction of the average purchaser would be to this display of the mark." *Dena Corp. v. Belvedere Int'l, Inc.*, 950 F.2d 1555, 21 USPQ2d 1047, 1052 (Fed. Cir. 1991) (quoting *In re Magic Muffler Serv., Inc.*, 184 USPQ 125, 126 (TTAB 1974)).

A "double entendre" is a word or expression that has a double connotation or significance as applied to the goods or services. The mark that comprises the "double entendre" will not be refused registration as merely descriptive if one of its meanings is not merely descriptive in relation to the goods or services. However, the multiple meanings that make an expression a "double entendre" must be well recognized by the public and readily apparent from the mark itself. *See In re Calphalon Corp.*, 122 USPQ2d 1153, 1163-64 (TTAB 2017) (quoting TRADEMARK MANUAL OF EXAMINING PROCEDURE ("TMEP") § 1213.05(c)) (finding SHARPIN not a double entendre in relation to cutlery knife blocks with built-in sharpeners and affirming descriptiveness refusal); *In re The Place, Inc.*, 76 USPQ2d 1467, 1470-71 (TTAB 2005) (finding THE GREATEST BAR not a double entendre in relation to restaurant and bar services and affirming descriptiveness refusal). A true "double entendre" is unitary by

definition, and should not be broken up for purposes of requiring a disclaimer. *See In re Kraft, Inc.*, 218 USPQ 571, 573 (TTAB 1983). *See also* TMEP § 1213.05(c) (Oct. 2017), and the authorities cited therein.

Applicant argues that the "KING LIVING" portion of its mark, when used in connection with its furniture and bed-related goods and services, is a double entendre that presents an alternative meaning for the consumer, namely, that its mark evokes the phrase "living like a king." A review of the evidence submitted by Applicant demonstrates that the term "living like a king" is an established and well-known phrase that would readily be understood by the consuming public to mean living in comfort and luxury, or having a lavish lifestyle.

Applicant attempts to transpose that meaning onto the phrase "KING LIVING" by providing dictionary definitions of the word "king" and Internet results from searches of the word "king" followed by the word "living." We find that Applicant's evidence falls far short of establishing that the meaning imparted by the phrase KING LIVING is evocative of, or synonymous with, that conveyed by the phrase "living like a king." Both the excerpt from the book *Excavation Memoir* and from the agingcare.com website use the word "king" as a noun, connoting a "monarch," and the word "living" simply connotes "having life."²² So, too, does the wording taken from the

²² "Living" as defined, in part, in *Merriam Webster's* on-line dictionary. https://www.merriamwebster.com/dictionary/living, last accessed September 24, 2018. The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or have regular fixed editions. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff'd*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016); *Threshold.TV Inc. v. Metronome Enters. Inc.*, 96 USPQ2d 1031, 1038 n.14 (TTAB 2010); *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

Expedia website. The combination of the word "king" and "living" in those instances simply do not readily convey the impression of "living in comfort and luxury," or any other unique meaning apart from the ordinary meaning conveyed by each term.

The only excerpt that shows the phrase "King Living" being used in a manner that invokes the same lavish lifestyle connotation as that conveyed by the phrase "living like a king" is from a comment posted on Trip Advisor. This single post, appearing in the user-generated comment section for a hotel located in Egypt, is not sufficient to show that the phrase "KING LIVING," without more, would be well-recognized by the consuming public as meaning a comfortable and lavish lifestyle. Accordingly, the phrase "KING LIVING" in Applicant's mark is not a double entendre. Instead, as discussed, the record establishes that the word KING in Applicant's mark is merely descriptive of a feature or characteristic of Applicant's good and services.

Because we did not find Applicant's mark to be a unitary phrase, Applicant's contention that the Examining Attorney improperly dissected Applicant's KING LIVING and design mark and requested a disclaimer of KING is not well taken.

Finally, contrary to Applicant's assertions, we have no doubt that the word KING in Applicant's mark is mark is merely descriptive.

After careful consideration of all of the evidence and arguments presented, including evidence and arguments not specifically discussed herein, we conclude that when applied to Applicant's goods and services, the word KING immediately describes a feature or characteristic of those goods and services, namely, that KING describes the size of the identified "beds; headboards for beds; domestic furniture;

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furniture; furniture for the bedroom; furniture for the home; fitted fabric furniture covers; convertible sofas; sofas" (Class 20), "bed covers; blanket throws; [and] quilts" (Class 24), and the import of and/or size of the furniture, flooring and home décor featured in Applicant's wholesale and retail store services (Class 35).

Decision: The refusal to register based on the requirement for a disclaimer of the word KING is affirmed. However, if Applicant submits the required disclaimer of KING to the Board within thirty days of the mailing date of this decision, the decision will be set aside as to the affirmance of the disclaimer requirement.²³ *See* Trademark Rule 2.142(g), 37 C.F.R. § 2.142(g).

In the event that Applicant does not submit the required disclaimer, the application nonetheless will be forwarded for registration with respect to the goods and services not subject to the refusal.

²³ The standard printing format for the required disclaimer text is as follows: "No claim is made to the exclusive right to use KING in connection with beds, headboards for beds, domestic furniture, furniture, furniture for the bedroom, furniture for the home, fitted fabric furniture covers, convertible sofas, sofas (Class 20); bed covers blanket throws, quilts (Class 24); and wholesale store services featuring furniture, flooring and home décor; retail store services featuring furniture flooring and home décor (Class 35), apart from the mark as shown." TMEP § 1213.08(a)(i).