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Oral Hearing: January 28, 2014 Mailed: February 25, 2014

United States Patent and Trademark Office

Trademark Trial and Appeal Board

In re Amazing Mazes LLC

Serial No. 85122528

Mary Margaret L. O'Donnell and Avery N. Goldstein of Blue Filament Law PLLC for Amazing Mazes LLC.

Ramona Ortiga Palmer, Trademark Examining Attorney, Law Office 117 (Brett J. Golden, Managing Attorney).

Before Bucher, Kuhlke and Lykos, Administrative Trademark Judges.

Opinion by Lykos, Administrative Trademark Judge:

On September 3, 2010, Amazing Mazes LLC ("applicant") filed an application to register the proposed mark **4D** in standard character format for, as amended, "entertainment services in the nature of an amusement park attraction, namely, a themed area featuring mirror labyrinths with rotating mirrors therein" in International Class 41.[1]

[1] Application Serial No. 85122528 was originally filed under Section 1(b) of the Trademark Act. On October 3, 2012, applicant amended the filing basis to Section 1(a) and submitted an acceptable amendment to allege use.

The Trademark Examining Attorney has refused registration of the mark under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that the mark is merely descriptive of applicant's services, or alternatively, that the mark is deceptively misdescriptive. For the reasons discussed herein, the Board affirms both refusals.

I. Factual Background – Information Request

A person will enter the mirror maze at one location on foot and attempt to exit the mirror maze at another location. The record includes portions of two patent applications attributed to applicant.[2] The first involves stationary, angled mirrors having lighting in the floor providing an optical illusion that the maze extends into infinity. The second patent uses rotating mirrors to enhance the disorienting effect of the labyrinth.

Because the exact nature of applicant's services was unclear, during prosecution of this application, the examining attorney made a rather detailed information request. See Trademark Rule 2.61(b). See also TMEP § 1209.02 (Oct. 2013) ("The examining attorney may request that the applicant submit additional explanation or materials to clarify the meaning of the mark or the nature of the goods or services.).3 In relevant part, applicant responded that "applicant's services do not create a fourth dimension of physical existence

[2] "Mirror Maze Including Floor Lighting," Pat. Appl. No. 11/680376, filed February 28, 2007, and "Rotating mirrored stile for usage within a mirror labyrinth," Pat. Appl. No. 12/705,047, filed February 12, 2010.

[3] The information request consisted of 29 questions. *See* March 3, 2011, Office Action.

which is in fact physically impossible"; that "the visual adventure associated with applicant's services is created by using multiple reflections between mirrors and necessarily requires light to do so"; that "to the extent special effects lighting is considered to include multiple reflections between mirrors, then special effect lighting would be present"; that while applicant's services do not include motion simulators or films, "to the extent that motion is involved, such motion would involve a rotating mirror"; and that said mirrors lack a "tactile or odor generating functionality." Applicant's Responses to Request Nos. 1, 3, 4, 6, 7, 9 and 10.

II. Is Applicant's Proposed Mark Merely Descriptive?

First we consider the refusal that applicant's mark is merely descriptive of the identified services. Section 2(e)(1) of the Lanham Act precludes registration of a mark that, "when applied to the goods of the applicant, is merely descriptive of them."15 U.S.C. § 1052(e)(1) (2006). "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 used." *In re Chamber of Commerce of the U.S.,* 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012)*, quoting In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007). Evidence that a term is merely descriptive to the relevant purchasing public "may be obtained from any competent source, such as dictionaries, newspapers, or surveys." *In re Bayer*, 82 USPQ2d at 1831, *quoting*

In re Bed & Breakfast Registry, 791 F.2d 157, 229 USPQ 818, 819 (Fed. Cir. 1986).

Applicant contends that its applied-for mark **4D** is suggestive, not merely descriptive, because it is a "clever reference to an alternate reality or parallel universe." Applicant's Brief, p. 4. Applicant is critical of the evidence submitted by the examining attorney in support of the refusal, arguing that the dictionary definition made of record supports applicant's position that its mark is suggestive. Applicant further submits that the evidence of third-party use of the term "4D" is inapplicable because it pertains only to film or theater or other "simulated" entertainment experiences (for example, an amusement park ride) in which "moisture, odors, and moving seats are present and timed to the visual presentation." See also Applicant's Brief, p. 1 and pp. 10-19. As applicant maintains, its services are quite distinct, involving a self-guided walk through a mirrored maze without any special effects such as water sprays, odors, shaking or sounds because the presence thereof would be hazardous in an enclosed labyrinth environment. Applicant also points to various third-party registrations for entertainment services where the mark incorporates a number plus the letter "D" or term "dimension" without a disclaimer, as further support for registration.

We are not persuaded by applicant's arguments. Rather, we find that the Office has satisfied its burden of demonstrating that applicant's mark immediately conveys to prospective purchasers a significant feature of the identi-

fied services, namely that they include special effects that have come to be known as "4D." While we agree with applicant that the dictionary definition of "four-dimensional" made of record by the examining attorney is of limited probative value to support our determination of mere descriptiveness, much of the remaining record evidence shows that consumers frequently encounter the term "4D" in the amusement industry and understand the term to mean that the attraction includes additional special effects. As seen in the discussion of the evidence in the record, *infra*, we find such additional special effects would include "rotating mirrors" (language expressly included in applicant's identification of services) or special lighting (a feature of the service expressly noted by applicant). Applicant's Responses to Request Nos. 4, 10, 12-15.

Generally, the term "4D" in contemporary parlance describes a characteristic of a theater, film or amusement park attraction and refers to special effects such as moving seats, water mists, or scents. See the following representative examples of use by third-parties in the industry:

- "Through the magic of Digital 3D projection and **4D** Special FX, rides are transported down to Bikini Bottom for the adventure of their lives. Wind, bubbles, and scent are just a few of the **4D** FX that create this extraordinary experience."
  www.excalibur.com/attractions/spongebob4d.aspx (March 3, 2011, Office Action).

- "Follow the trajectory of the virtual objects as they travel towards their targets through a dazzling 3D landscape. For an added "**4D**" element, you can feel them as they whoosh by. Watch out for the water-filled balloons - they pop and splash."
  disneyworld.disney.go.com/parks/hollywood-studios/attractions/toy-story-mania (April 25, 2012, Office Action).

- "The theater is equipped with **4D** capabilities, which combine the high-definition drama of a 3D film with special sensory effects that are built into the theater seats and environment….Films are transformed into 15-minute experiences that bring on-screen images virtually to life with special effects such as mist, wind, snow, bubbles, leg ticklers, scents, enhanced lighting, and seat vibrations!" http://www.aqua.org/explore/baltimore/exhibits-experiences/4d-theater (April 25, 2012, Office Action).

The majority of evidence submitted by the examining attorney uses the term "4D" within this context. For this reason, applicant argues that "4D" is descriptive only for movie theaters or other simulated experiences such as amusement park rides featuring films with movement, water effects (i.e., spray, mist) or odors, each synchronized to film. Applicant further asserts that the record is devoid of evidence of use of the term in connection with labyrinth maze amusement attractions. Applicant's Brief, p. 5. While the examining attorney has submitted a considerable amount of evidence showing usage of the term "4D" in connection with movie theaters and amusement park rides, it is clear that the application of "4D" special effects extends beyond such venues. Particularly probative is applicant's own use of the term "4D" in advertising its self-guided mirror mazes or "mirror labyrinths." Applicant uses the term "4D" in a descriptive fashion as stated below to refer to the moving or rotating mirrors:

- "One of San Antonio's newest attractions, Ultimate Mirror Maze will have you seeing double in an amusing 4D moving mirror maze experience." http://www.livingsocial.com :

April 25, 2012, Office Action.

In addition, applicant contends that "4D" is limited to sensory effects such as water sprays, odors, physical shaking or buzzing noises. The evidence however shows that the term "4D" encompasses other types of special effects such as special lighting or rotating mirrors. *See* excerpt above from the website Living Social.com. See article obtained from the Daily Press (Newport News, Virginia) dated August 7, 2008, titled, "Artist to Empower Kids at Bay Days" ("There's also a theater that the foundation calls "four dimensional" because it's equipped with a fog machine, lights and simulated wind.") and website excerpt obtained from www.inparknews.blogspot.com/2010/09/new-4d-theater-at-lands-end-amusement.html (" … the multi-sensory 4D experience offers high-tech moving seats, air blasts, water sprays, aromas and even leg ticklers. Added in-theatre effects include special effects lighting, wind, bubbles and low smoke." Applicant's own use of its proposed mark 4D on its specimen displayed below also serves to emphasize its descriptive nature:

With regard to applicant's contention that prospective consumers would perceive the proposed mark **4D** as suggestive because it is invocative of an alternate reality, differing spatial relations or altered perceptions, we disagree. "[D]escriptiveness of a mark is not considered in the abstract." *Coach Services Inc. v. Triumph Learning, LLC*, 663 F.3d 1356, 101 USPQ2d 1713, 1728 (Fed. Cir. 2012) (internal citation omitted). Instead, descriptiveness must be evaluated "in relation to the particular goods [or services] for which registration is sought, the context in which it is being used, and the possible significance that the term would have to the average purchaser of the goods [or services] because of the manner of its use or intended use." *In re Chamber of Commerce,* 102 USPQ2d at 1219*, quoting In re Bayer*, 82 USPQ2d at 1831. *See, e.g., In re Polo Int'l Inc.*, 51 USPQ2d 1061 (TTAB 1999) (finding DOC in DOC-

CONTROL would be understood to refer to the "documents" managed by applicant's software, not "doctor" as shown in dictionary definition). In other words, the issue is whether someone who knows what the services are will understand the mark to convey information about them. *In re Tower Tech, Inc.*, 64 USPQ2d 1314, 1316-1317 (TTAB 2002); *In re Patent & Trademark Serv. Inc.*, 49 USPQ2d 1537, 1539 (TTAB 1998). As the record shows, applicant's use of the term "4D" in relation to amusement attraction service is not unique. As aptly put by the examining attorney, "[w]hen the applicant's services are considered in relation to the term '4D,' consumers would not believe that the only significance of the term is that of a 'mathematical conundrum' or 'parallel universe' waiting behind the next mirror" nor "would consumers believe '4D' only refers to an alternate zone or dimension, experience in time or space, or invitation to another world." Examining Attorney Brief, unnumbered page eight. Rather, the term "4D" would be perceived by consumers as identifying or describing the special effects of rotating mirrors or lighting.

Applicant refers to third-party registrations for "D" or "dimension" marks registered on the Principal Register as evidence that applicant's mark is not merely descriptive. *supra* at 4. The marks cited by applicant incorporating the terms "fifth," "sixth" or "seventh" dimension (or the equivalent thereof) are distinct and therefore not relevant to our analysis. The remaining marks having the terms "4D" or "Fourth Dimension" must be weighed against evidence showing disclaimers of the term "4D" in relation to more similar services. *See*

4D SPECIAL FX THEATER, as shown at left, Reg. No. 3603472 for "operation of movie theaters"; SHREK **4-D** PRESENTED IN OGRE-VISION, Registration No. 2848805 for "entertainment services in the nature of an amusement park attraction"; PIRATES **4-D**, Registration No. 2526741 for "amusement park services, namely a multimedia presentation consisting of film, sound tapes, and computer controlled special effects." (emphasis supplied).

In sum, based on the evidence of record, we find that applicant's proposed mark, **4D**, when considered in relation to "entertainment services in the nature of an amusement park attraction, namely, a themed area featuring mirror labyrinths with rotating mirrors therein" immediately informs prospective purchasers that applicant's services feature special effects such as rotating mirrors and lighting. Competitors in this field should be free to use the descriptive language "4D" when describing to the public their own mirror maze or "mirror labyrinth" services which incorporate "rotating mirrors" or special lighting in advertising and marketing materials. As noted in the seminal case of *In re Abcor Dev. Corp.*, 588 F.2d 811, 813, 200 USPQ 215, 217 (CCPA 1978):

> The major reasons for not protecting such marks are: (1) to prevent the owner of a mark from inhibiting competition in the sale of particular goods; and (2) to maintain freedom of the public to use the language involved, thus avoiding the possibility of harassing infringement suits by the registrant against others who use the mark when advertising or describing their own products.

We find that the Office has met its burden of proof that applicant's proposed mark **4D**, when used in connection with the identified services, is merely descriptive.

III. *Is the Proposed Mark Deceptively Misdescriptive*?

For sake of completeness, we now consider the examining attorney's alternate ground of refusal. Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), also prohibits registration of designations that are deceptively misdescriptive of the goods or services to which they are applied. A mark is considered deceptively misdescriptive if (i) the mark misdescribes a quality, feature, function, or characteristic of the goods or services with which it is used; and (ii) consumers would be likely to believe the misrepresentation. *In re Quady Winery, Inc.*, 221 USPQ 1213 (TTAB 1984).

As the starting point for our analysis, we note that for a term to misdescribe services, the term must be merely descriptive of a significant aspect of the goods which the goods could plausibly possess but in fact do not. *See In re Phillips-Van Heusen Corp.*, 63 USPQ2d 1047, 1051 (TTAB 2002). As shown by the evidence discussed above, the term "4D" refers to a type of special effect prevalent in the amusement attraction industry. The identification of services does not explicitly include or exclude the term "4D." It does however expressly include the feature of "rotating mirrors." Applicant in response to the examining attorney's information request has stated that other than lighting and rotating mirrors, its mazes do not include other special effects or films. There-

fore, for purposes of determining this alternate ground of refusal, we assume for the sake of this discussion that the term "4D" is a term of art in the entertainment field, as suggested by applicant, requiring special effects such as water sprays, odors, shaking or sounds, but does not encompass rotating mirrors or special effects lighting. Nonetheless, based upon the evidence discussed above, consumers, upon encountering the term "4D" in applicant's advertisements and trade dress will expect amusement park attraction services having tactile or odor-generating functionalities that are decidedly absent from applicant's mirror labyrinths. Accordingly, the alleged mark **4D** misdescribes applicant's services.

Turning now to the second prong for deceptively misdescriptive terms, applicant contends that because special water or movement effects in an enclosed maze environment would create a liability issue, consumers would be sensitive to this reality, and hence not be likely to believe the misrepresentation. However, the evidence of record discussed above demonstrates that consumers of amusement park attractions understand the term "4D" as describing special effects more varied than simply water or movement, including but not limited to odor, sound or wind. Inasmuch as designers of mirror mazes are constantly attempting to enhance the experience and effect, applicant cannot preclude the possibility of adding various types of forced air, sounds or smells. Prospective consumers encountering applicant's proposed mark are therefore likely to believe that applicant's services will include some combination of

"4D" special effects typical of other "4D" amusement park attractions but absent from applicant's maze. Accordingly, because both elements of the test for a deceptively misdescriptive term have been satisfied, registration of the term "4D" is barred by Section 2 (e)(1) of the statute under this alternate ground of refusal.

Decision: The refusal to register the alleged mark **4D** as merely descriptive under Section 2(e)(1) is affirmed. In the alternative, the examining attorney's refusal alleging that the term is deceptively misdescriptive under Section 2(e)(1) is affirmed.