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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Chester

Serial No. 85220392

Gregory L. Chester, DBA GLC New Product Consultants, Inc., *pro se*.

Nicholas A. Coleman, Trademark Examining Attorney, Law Office 115 (John Lincoski, Managing Attorney).

Before Quinn, Bucher, and Gorowitz, Administrative Trademark Judges.

Opinion by Gorowitz, Administrative Trademark Judge:

Gregory L. Chester (Applicant) has appealed the final refusal to register the applied-for term, **SpiderGraph**, on the Principal Register for "printed material, namely, printed graphs and charts for use in the comparison and analysis of alternative choices in decision-making applications" in Class 16[1] on the ground that

[1] Application Ser. No. 85220392 filed on the Supplemental Register on January 18, 2011; amended to the Principal Register on July 21, 2011, based on Section 1(a) of the Trademark Act, alleging first use anywhere on January 17, 1985 and first use in commerce on March 17, 1986.

the applied for term is merely descriptive under Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1).

The application was filed on the Supplemental Register. Registration was refused on February 10, 2011, pursuant to Section 23 of the Trademark Act, 15 U.S.C. § 1091 on the ground that the applied for term was generic and incapable of functioning as a trademark. On July 21, 2011, Applicant amended the application to the Principal Register.[2] Thereafter, on August 15, 2011, registration was refused pursuant to Section 2(e)(1) on the ground that the mark is merely descriptive.

When the refusal was made final, Applicant appealed and requested reconsideration. After the Trademark Examining Attorney denied the request for reconsideration, the appeal was resumed. We affirm the refusal to register.

In his brief, Applicant argues that he owned a prior registration for the same mark and the same goods[3] and that because the mark was deemed registrable by the prior Examining Attorney, the descriptiveness refusal is inappropriate. Applicant's reliance on this registration is misplaced. "[A]lthough a term at its inception or adoption may have been arbitrary or even suggestive in character, it may thereafter through use in a descriptive sense over a period of time lose its distinguishing and origin denoting characteristics and be regarded by the relevant section of the purchasing public as nothing more than a descriptive designation

[2] In the Office Action dated August 15, 2011, the Examining Attorney accepted the Applicant's amendment to the Principal Register and the refusal to register on the Supplemental Register pursuant to Section 23 essentially was vacated.

[3] Reg. No. 2688910 issued on February 18, 2003 and was cancelled on September 26, 2009 for failure to file a Section 8 Declaration of Use.

describing rather than identifying the goods on which it has been used." *In re Digital Research, Inc.*, 4 USPQ2d 1242, 1243 (TTAB 1987), citing *In re Int'l Spike,Inc.*, 190 USPQ 505, 507 (TTAB 1976). Moreover, the Board is not bound by the prior decisions of examining attorneys.

> It has been noted many times that each case must be decided on its own facts. *See In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) ("Even if some prior registrations had some characteristics similar to [applicant's] application, the PTO's allowance of such prior registrations does not bind the Board or this court.");and *In re Merrill Lynch, Pierce, Fenner & Smith Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1142 (Fed. Cir. 1987). In view of the foregoing, we are obligated to assess the registrability of applicant's mark on its own merits based on the record in this application and not simply based on the existence of other registrations. Thus, this cancelled registration is only evidence that the registration issued and does not afford applicant any legal presumptions under § 7(b) of the Trademark Act. *See Anderson, Clayton and Co. v. Krier*, 478 F.2d 1246, 178 USPQ 46, 47 (CCPA 1973) (statutory benefits of registration disappear when the registration is cancelled); *In re Brown-Forman Corp.*, 81 USPQ2d 1284, 1286 n.3 (TTAB 2006); *In re Phillips-Van Heusen Corp.*, 63 USPQ2d 1047, 1048 n.2 (TTAB 2002).

In re Pedersen, 109 USPQ2d 1185, 1197 (TTAB 2013).

The only issue before us is whether "SpiderGraph" is merely descriptive when used in connection with "printed material, namely, printed graphs and charts for use in the comparison and analysis of alternative choices in decision-making applications."

A term is deemed to be merely descriptive of goods or services, within the meaning of Section 2(e)(1) of the Trademark Act, if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose

or use of the goods or services. *DuoProSS Meditech Corp. v. Inviro Medical Devices Ltd.,* 695 F.3d 1247, 103 USPQ2d 1753, 1755 (Fed. Cir. 2012); *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012); *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). Whether a term is merely descriptive is determined not in the abstract, but in relation to the goods or services for which registration is sought, the context in which it is being used on or in connection with the goods or services, 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; that a term may have other meanings in different contexts is not controlling. *The Chamber of Commerce of the U.S.,* 102 USPQ2d at 1219*, citing In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007); *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979). The burden is on the United States Patent and Trademark Office to make a *prima facie* showing that the mark or word in question is merely descriptive from the vantage point of purchasers of an applicant's goods. *See In re Box Solutions Corp.*, 79 USPQ2d 1253, 1255 (TTAB 2006) referring to *In re Merrill Lynch, Pierce, Fenner, and Smith, Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1144 (Fed. Cir. 1987).

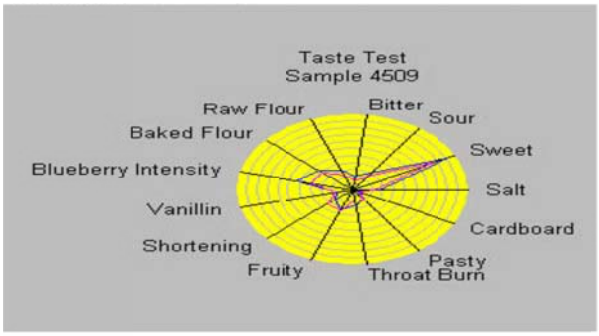
Applicant's goods are printed graphs and charts that are used for the comparison and analysis of alternative choices in decision-making applications.

The Examining Attorney introduced evidence of use of the term "spider graph" in connection with graphs and charts used to compare and analyze choices in decision-

making applications. The evidence includes the following descriptions and definitions of "spider graph" and "spider chart"; and uses of the term "spider graph":

- A spider graph, also called a radar graph, usually compares people, companies, countries or other entities. Entities are compared in various categories, which are numerically demonstrated on the graph much like spokes extending from the center of a bicycle wheel. Sometimes, just one unit, being or object is quantified on a radar graph, but it is measured on various categories. Usually, spider graphs include four or more categories. eHow located at ehow.com;

- A spider chart is a specialized type of chart that represents your data on a series of spokes (or radians), where each spoke is an attribute you are trying to measure, and the spoke's value is the distance from the center of the graph.



(example of a graph rating new foods).
ProWorks located at www.proworks.com;

- You can make a spider graph depending on what you are using. For instance when using hands, draw a large circle on a sheet of paper using a pencil and create spokes that come out from the centre of the circle. Next, label by hand each line and make tick marks along each spoke, subdividing the line into increments on your scale. Finally, plot out your results by entering the associated value with each category and colour the shapes. You can also visit websites like eHow to learn how to make graphs using a computer.
Ask.com located at www.ask.com;

- We at the Rotokawa Cattle Company have developed an important new tool called a spider graph for evaluating and demonstrating the strengths and weaknesses of a bull or cow's body conformation.
  Rotokawa Cattle Company located at www.bakewellrepro.com; and

- NBA Spider graphs are like visual box scores. They're a quick, visual way to compare two or more players. A glance can give you an impression of each player's style and how they match up.
  "How to Watch Sports" located at howtowatchsports.com.

Office Action, February 11, 2011. The Examining Attorney has met the Office's burden of establishing that the term "spider graph" is merely descriptive of a graph used for analyzing choices in decision-making applications.

Applicant contends that the evidence submitted by the Examining Attorney relates to computer generated charts, known as "Radar spider charts,"[4] while "[t]he term 'SpiderGraph' was given to one of the most accurate and simple, 'hand-graphed,' 'non-computer oriented,' trade-off decision-making Methods … ." Appeal Brief, p. 2. According to Applicant, "[a]ll of the evidence entered into the record are [sic] not of the SpiderGraph Charts in question." Appeal Brief, p. 4. Applicant's contentions do not contravene a finding that the applied-for term is merely descriptive. As discussed above, the descriptiveness determination is not made in a vacuum. We look at the goods, "printed material, namely, printed graphs and charts for use in the comparison and analysis of alternative choices in decision-making applications" and determine if consumers knowing the goods, will immediately

[4] Appeal Brief, p. 1.

perceive an idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods from Applicant's use of the term SpiderGraph in connection with the goods.

As to the word "Graph," Applicant's goods are identified as "graphs and charts," [5] and thus the term "Graph" describes Applicant's goods. For the purposes of this decision, the words "chart" and "graph" appear to be used interchangeably.

As to the word "Spider," applicant has acknowledged that he called his graph "the SpiderGraph because it looked like a Spiderweb when it was completed."[6]

Moreover, in comparing the Radar Spider Chart to the SpiderGraph Chart, Applicant described the display on both charts as a "spiderweb."[7] Further, as shown by the Examining Attorney's evidence, the terms "spider graph," "spider diagram" and "spider chart" are slightly different names for substantially the same visual presentation. Much like the name "radar spider chart," these are names given to a type of chart employing a graphical method of displaying multivariate data. As such, the applied for term, SpiderGraph, is a merely descriptive term as defined by Section 2(e)(1) of the Trademark Act.

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[5] We take judicial notice of the definitions of "chart" in Webster's On-Line Dictionary, which include "information in the form of a table, diagram, etc." and "graph." MERRIAM-WEBSTER ONLINE (www.Merriam-Webster.com) copyright © 2014 Merriam-Webster, Incorporated.

The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or have regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

[6] Response, March 10, 2011, p. 3.

[7] *Id.* at p. 2.

We would be remiss if we did not comment on one troubling aspect of Applicant's prosecution of his application, specifically, Applicant's personal attacks on the Examining Attorney. However, so as to be clear, Applicant's comments have had no bearing on our determination of the substantive issue on appeal. The majority of the statements made by Applicant throughout prosecution consisted of attacks on the Examining Attorney's knowledge and ability to understand technical matters. Many of these attacks were repeated in the Appeal Brief, including the statement that "The Examining Attorney should have recused himself!" Appeal Brief, p. 5.[8] Suffice to say that Applicant's comments did nothing to advance the substantive prosecution of his application. The USPTO and the Board require all parties, whether represented by counsel or proceeding *pro se*, "to conduct their business with decorum and courtesy." Trademark Rule 2.192. In any future contact with the USPTO, Applicant should refrain from *ad hominem* attacks on USPTO personnel.

As discussed above, we find that the Examining Attorney's evidence is fully sufficient to support the refusal that the applied-for term, SpiderGraph, is merely descriptive of "printed material, namely, printed graphs and charts for use in the comparison and analysis of alternative choices in decision-making applications."

Decision: The refusal to register is affirmed.

[8] The Examining Attorney responded to this attack in his Appeal Brief, appropriately stating that Applicant's assertion is unfounded, "as the issue at present is not the intricate differences in the products at issue and processes by which they are created, but rather the use of the term in the marketplace to identify a particular genre of charts and graphs." Examining Attorney's Appeal Brief, p. 10