

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed:
November 30, 2012

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re OurPet's Company

—
Serial No. 85329890

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John D. Gugliotta of Patent Copyright & Trademark Law Group for OurPet's Company.

Katherine S. Chang, Trademark Examining Attorney, Law Office 115 (John T. Lincoski, Managing Attorney).

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Before Rogers, Chief Administrative Trademark Judge, and Kuhlke and Gorowitz, Administrative Trademark Judges.

Opinion by Gorowitz, Administrative Trademark Judge:

OurPet's Company (applicant) filed an application to register the mark TOYS FOR TREATS for "pet toys" in Class 28.¹

The examining attorney refused registration pursuant to Section 2(e)(1) of the Trademark Act of 1946, 15 U.S.C. § 1052(e)(1), on the ground that applicant's

¹ Application Serial No. 85329890, filed May 25, 2011, based on intent to use pursuant to Section 1(b) of the Trademark Act.

proposed mark is merely descriptive.² The refusal was made final in the Office action dated February 7, 2012. Applicant has appealed the refusal.

A term is deemed to be merely descriptive of goods or services, within the meaning of Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1), if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services. In re Bayer AG, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007), citing In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987).

For the Board to be able to determine that a proposed mark is merely descriptive within the meaning of Section 2(e)(1), the United States Patent and Trademark Office must make a prima facie showing that the word or phrase in question is merely descriptive from the vantage point of purchasers of the applicant's goods. See In re Stereotaxis Inc., 429 F.3d 1039, 77 USPQ2d 1087, 1090 (Fed. Cir. 2005), citing In re Abcor Development, 588 F.2d 811, 200 USPQ 215 (CCPA 1978); see also, In re Merrill Lynch, Pierce, Fenner, and Smith, Inc., 828 F.2d 1567, 4 USPQ2d 1141, 1144 (Fed. Cir. 1987). As established below, the examining attorney introduced persuasive evidence and on the basis thereof, the Office has met this burden.

The evidence made of record in the Office action dated September 13, 2011 consists of dictionary definitions of both “toys” and “treats” (Office action at pages

² On November 10, 2011, the examining attorney issued a second Office action, in which she continued the descriptiveness refusal and requested information about applicant's goods.

2-3), a webpage from the Big Apple Pet Supply³ (Office action at page 4) and several articles using the phrase “toys for treats,” to mean either “using toys as treats”⁴ or “toys for dispensing treats.”⁵

In the Final Office action, dated February 7, 2012, the examining attorney introduced additional evidence consisting of a webpage from The Dog Resort website offering “Interactive toys for treats” (Office action at page 2).⁶

The only information and documentation provided by applicant was in response to the examining attorney’s request for information about its goods (November 10, 2011 Office action). In response to this inquiry, the applicant stated:

“The nature of the goods is a puzzle-based, treat-dispensing toy for pets that entices stimulating interaction by providing a challenging situation for a pet, to which the pet must find a solution to access a treat.”

January 18, 2012 Response. Applicant also submitted a document entitled “Stick Puzzle Concept,” in which applicant provides a written explanation of the “concept” for the toy and also includes photographs thereof. On page one of the document it states: “Stick snacks create barrier between dog and hidden treat inside the toy’s

³ The examining attorney also submitted a page from the website netpetshop.co.uk. Since the site is located in the United Kingdom and does not reflect use in the United States, we did not consider the evidence from this site.

⁴ Pet-Advice.Net and ZooToo (“Human Food for puppies/Treats”), September 13, 2011 Office action at pages 6-7.

⁵ “Chicago Tribune -TribLocal Northbrook (“Beautiful Chayce is looking for a happy forever home”), September 13, 2011 Office action at page 8.

⁶ The examining attorney also submitted an additional portion of the article from Pet-Advice.Net.

chamber.” This information supports affirmance of the refusal because it shows that applicant’s goods are pet toys for dispensing treats.

To overcome the refusal, applicant argues that “in order for a mark to be non-registrable because of descriptiveness, it must not only be descriptive, but must be ‘merely’ descriptive of the goods or services to which it relates ... Stated differently, to be non-registrable, the mark must do nothing other than immediately convey an understanding of the goods for which registration is sought.” (Applicant’s Brief at page 4). This argument misstates the law.

Applicant inappropriately relies on footnote 7 in *In re Quik-Print Copy Shop, Inc.* 205 USPQ 505 (CCPA 1980) to support its position. Footnote 7 states: “In this context, ‘merely’ is considered to mean ‘only.’” This footnote is taken out of context by applicant. The statement to which this footnote refers is:

“A mark is merely descriptive if it immediately conveys to one seeing or hearing it **knowledge of the ingredients, qualities, or characteristics of the goods** or services with which it is used..”

In re Quik-Print Copy Shop, 205 USPQ at 507 (emphasis added). In this context, defining “merely” as “only” does not mean that “the mark must do nothing other than immediately convey an understanding of the goods for which registration is sought” but rather that a merely descriptive mark *does* immediately convey knowledge of the ingredients, qualities or characteristics of the goods.

“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.” *In re Bayer AG*, 82 USPQ2d at 1831, citing *In re Abcor Development Corp.*, 200 USPQ 215.

Thus, the question that we must ask is: does the proposed mark TOYS FOR TREATS immediately convey to the average purchaser that applicant’s goods are pet toys for dispensing treats? In addition to the evidence made of record by the examining attorney, applicant answered the question in its January 18, 2012 Response when it described its goods as “treat-dispensing toys for pets.” Thus, the phrase TOYS FOR TREATS immediately describes a significant feature of the goods, namely that they are toys for dispensing treats. Moreover, the combination does not evoke a new and unique commercial impression. Rather, each component retains its descriptive significance and the combination results in a composite that is itself merely descriptive. *Duopross Meditech Corp. v. Inviro Medical Devices, Ltd.*, 695 F.3d1247, 103 USPQ2d 1753 (Fed. Cir. 2012).

Accordingly, we find substantial evidence that the term TOYS FOR TREATS is merely descriptive of pet toys.

Decision: The refusal to register is affirmed.