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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Aldila Golf Corp.

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Serial No. 85477282

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Gary L. Eastman, Gary L. Eastman, APLC for Aldila Golf Corp.

Angela Micheli, Trademark Examining Attorney, Law Office 101 (Ronald R. Sussman, Managing Attorney).

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Before Bucher, Mermelstein, and Hightower, Administrative Trademark Judges.

Opinion by Hightower, Administrative Trademark Judge:

On November 20, 2011, applicant Aldila Golf Corp. applied to register the mark VICTORY ARMOUR PIERCING, in standard characters, for “archery arrows; archery equipment, namely, arrow nocks,nock inserts, arrow points, arrow tips, arrow shafts and fletching” in International Class 28.¹ The examining attorney has refused registration pursuant to Section 6(a) of the Trademark Act, 15 U.S.C. § 1056(a), based on applicant’s failure to comply with an Office requirement to

¹ Application Serial No. 85477282, based on applicant’s allegation of a bona fide intention to use the mark in commerce under Trademark Act Section 1(b), 15 U.S.C. § 1051(b).

disclaim “ARMOUR PIERCING” because the wording is merely descriptive of applicant’s services within the meaning of Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1). Applicant timely appealed, and the appeal is fully briefed.

A. Evidentiary Objection

The examining attorney objects to the results of searches of Office database records attached to applicant’s appeal brief as new evidence.² The objection is well-taken. This evidence was not timely submitted, and we have given it no consideration. Trademark Rule § 2.142(d), 37 C.F.R. § 2.142(d); *In re Luxuria s.r.o.*, 100 USPQ2d 1146, 1147-48 (TTAB 2011); *In re Fitch IBCA Inc.*, 64 USPQ2d 1058, 1059 n.2 (TTAB 2002); *In re Trans Cont’l Records Inc.*, 62 USPQ2d 1541, 1541 n.2 (TTAB 2002); Trademark Trial and Appeal Board Manual of Procedure (TBMP) §§ 1203.02(e), 1207.01 (3d ed. rev. 2 June 2013).

B. Disclaimer Requirement

A requirement under Trademark Act Section 6 for a disclaimer of unregistrable matter in a mark is appropriate when that matter is merely descriptive of the goods at issue. See *In re Stereotaxis Inc.*, 429 F.3d 1039, 77 USPQ2d 1087, 1089 (Fed. Cir. 2005). Merely descriptive or generic terms are unregistrable under Trademark Act Section 2(e)(1), 15 U.S.C. § 1052(e)(1), and therefore are subject to a disclaimer requirement if the mark is otherwise registrable. Failure to comply with a disclaimer requirement is a ground for refusal

² Exhibits 3, 4, and 5.

of registration. *See In re Omaha Nat'l Corp.*, 819 F.2d 1117, 2 USPQ2d 1859 (Fed. Cir. 1987); *In re Box Solutions Corp.*, 79 USPQ2d 1953, 1954 (TTAB 2006).

The examining attorney alleges that the ARMOUR PIERCING portion of applicant's mark is merely descriptive of its goods. A term is merely descriptive within the meaning of Section 2(e)(1) if it immediately conveys knowledge of an ingredient, quality, characteristic, function, feature, purpose, or use of the goods with which it is used. *See, e.g., In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012); *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987). Whether a particular mark is merely descriptive must be determined not in the abstract, but in relation to the goods or services for which registration is sought, the context in which the mark is used, and the possible significance that the mark is likely to have to the average purchaser encountering the goods or services in the marketplace. *See DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1755 (Fed. Cir. 2012); *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978); *In re Remacle*, 66 USPQ2d 1222, 1224 (TTAB 2002). In other words, the issue is whether someone who knows what the products are will understand the mark to convey information about them. *In re Tower Tech, Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002); *In re Patent & Trademark Servs. Inc.*, 49 USPQ2d 1537, 1539 (TTAB 1998).

Applicant's identified goods are "archery arrows; archery equipment, namely, arrow nocks, nock inserts, arrow points, arrow tips, arrow shafts and fletching." Among the evidence submitted by the examining attorney is the following:

- A definition of “armor-piercing” meaning “Of ammunition, bombs, bullets, and projectiles, designed to penetrate armor and other resistant targets.”³
- Definitions of the noun “armor”⁴ meaning:
 1. defensive covering for the body; *especially* : covering (as of metal) used in combat
 2. a quality or circumstance that affords protection <the *armor* of prosperity>
 3. a protective outer layer (as of a ship, a plant or animal, or a cable)
 4. armored forces and vehicles (as tanks)⁵
- Definitions of the verb “pierce,” the first of which is “to run into or through as a pointed weapon does : stab.”⁶
- Online discussions regarding the ability of arrows to penetrate body armor.⁷ Comments were mixed, but some participants stated that arrows can penetrate contemporary body armor because of their ability to cut, as opposed to bullets, which exert blunt force. Examples of some of the comments include:
 - “arrows will pierce body armor like an arrow will pierce a bucket of sand but a 30-06 will not”⁸

³ Final Office action at 38 (from TheFreeDictionary.com). It appears that the examining attorney submitted the identical Office action and evidence on succeeding days, September 11, 2012 and September 12, 2012.

⁴ We note that “armour” is defined as a “chiefly British variant of armor.” Merriam-Webster Online Dictionary, retrieved from merriam-webster.com/dictionary/armour. The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imps. Co.*, 213 USPQ 594, 596 (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, 1378 (TTAB 2006).

⁵ May 15, 2012 Office action at 2-3 (from Merriam-Webster.com).

⁶ *Id.* at 8 (from Merriam-Webster.com).

⁷ Final Office action at 2-20.

⁸ *Id.* at 5 (from SurvivalistBoards.com).

- “In medieval days, there were suits of armor called ‘proof’ which had been shot at with crossbows (later, with firearms), and not been penetrated. . . . Crossbows were so effective in penetrating most armor that the Pope ruled it illegal for use against Christians. Fast forward to today: Modern body armor comes in a wide range of levels of effectiveness, but none are readily available that will stop a strong cross bow (or any strong bow, for that matter) unless the arrow hits a trauma plate.”⁹
- “During a seven year stint as an MP we tested this. . . . Round field tips on carbon arrows didn’t go through but sharp mechanical broad heads had no problems tearing a large hole in the vest.”¹⁰
- “I contacted one of the guys in our test lab. He said that none of our ballistic soft body [armor] that he has tested can stop an arrow. It would require armor piercing steel reinforcement (trauma plate) to stop it.”¹¹
- A Wikipedia article titled “Ballistic vest” describing such vests as items of personal armor and stating: “Vests designed for bullets offer little protection against blows from sharp implements, such as knives, arrows or ice picks”¹²
- A patent issued in 1978 for an “armor piercing projectile.”¹³ The patent includes the following statements in the description of the background of the invention:
 - “An armor-piercing projectile is a round intended to pierce the sheet plating which provides protection for a wide variety of vehicles or shelters. These sheet plates, called armor-plating, are made of a material such as steel, suitably alloyed and treated.”¹⁴

⁹ *Id.* at 11 (from the Straight Dope Message Board “Can a Cross-Bow (etc.) Penetrate Kevlar Body Armor?”).

¹⁰ *Id.* at 15 (from a Discovery.com Mythbusters message forum titled “bow and arrow and body armor”).

¹¹ *Id.* at 16 (from Yahoo! Answers discussion “Arrow vs Bulletproof Vest?”).

¹² *Id.* at 21-22.

¹³ May 15, 2012 Office action at 14-18 (from patentgenius.com/patent/4075946).

¹⁴ *Id.* at 15.

- “Armor-piercing munition can be divided into two main classes; Armor-piercing projectiles . . . [and] Armor-piercing arrows, characterized by a length having an aspect ratio of ten to fifteen times the diameter, fired or ejected from a cannon with a smooth bore, stability during the trajectory being obtained by the addition of stabilizer fins.” The patent goes on to state that it “concerns the latter class more particularly,” and describes three elements that an armor-piercing arrow generally possesses.¹⁵

The examining attorney also made of record printouts from third-party websites evaluating the penetrating abilities of arrows sold under applicant’s mark.¹⁶ These include an article on the Rokslide Archery Gear site that begins: “Penetration is a crucial element to consider when choosing an arrow.”¹⁷ In addition, the examining attorney made of record websites offering replica medieval weapons, including arrows and other archery equipment.¹⁸

Applicant, in turn, submitted evidence including a Wikipedia article discussing the armour-penetrating capabilities of the bodkin point, characterized as a type of arrowhead that was used extensively during the Middle Ages.¹⁹

The essence of the examining attorney’s argument is that ARMOUR PIERCING is merely descriptive of applicant’s goods “because the wording immediately identifies to potential purchasers the archery products applicant provides are designed to penetrate armor and other resistant targets such as the

¹⁵ *Id.* at 16.

¹⁶ Final Office action at 45-61 (including from garysbowhunting.com, outdoorproductreview.com, and bowhunting.net).

¹⁷ *Id.* at 47 (from rokslide.com).

¹⁸ *Id.* at 65-73 (from a2armory.com, medievalcollectibles.com, and knightsedge.com).

¹⁹ Response to Office action at 24-26.

bodies of animals or targets.”²⁰ This argument is supported by the dictionary definitions. In particular, the record includes a definition of “armor-piercing” meaning “Of . . . projectiles, designed to penetrate armor and other resistant targets.” Applicant’s website emphasizes the penetrating ability of its arrows offered under the mark, and, as the examining attorney argues, the “other resistant targets” included in the definition of “armor-piercing” could include animals shot in hunting and targets used in archery competition. The dictionary definitions standing alone thus demonstrate the descriptive significance of the term ARMOUR PIERCING in association with applicant’s goods.

Applicant makes the following three arguments that the phrase is not descriptive:

1. ARMOUR PIERCING has no significance in relation to the identified goods because they are designed and used for archery as a recreational activity, not combat.
2. ARMOUR PIERCING does not describe a feature of applicant’s goods because modern-day archery arrows are not designed, built, or used to pierce armour.
3. ARMOUR PIERCING is not used by any of applicant’s competitors on or in connection with their archery products.²¹

Applicant’s first two arguments are undercut by the evidence. First, although modern-day archery is used in competitive sport and in hunting,²² the record also demonstrates that a market exists for medieval-style goods including archery arrows and other archery equipment. Applicant’s identification is broad

²⁰ Examining Attorney’s Brief at unnumbered p. 7-8.

²¹ See Applicant’s Brief at 3.

²² See definition of “archery,” final Office action at 40 (from TheFreeDictionary.com).

enough to include such replica goods, and ARMOUR PIERCING can be used to describe a feature of them.

Second, applicant ignores the record evidence relating to modern uses of the word “armor.” This includes not only the dictionary definitions, but also the definition in the cited patent for a type of armor-piercing arrow “intended to pierce the sheet plating which provides protection for a wide variety of vehicles or shelters. These sheet plates, called armor-plating, are made of a material such as steel, suitably alloyed and treated.” The evidence also includes the extensive online discussions concerning the abilities of arrows to pierce the body armor used today. Some of these discussions address the use of archery against human beings, *e.g.*: “Two years ago, after our swat team encountered a subject armed with a crossbow, they asked me to do some testing.”²³ “Unless it’s a specific silent threat elimination leave the bow to silent hunting not self defense.”²⁴ The term ARMOUR PIERCING is descriptive of arrows that can pierce body armor, which the record shows to exist.

Finally, turning to applicant’s third argument, absence of use of ARMOUR PIERCING by any of applicant’s competitors on or in connection with their archery products is not dispositive. It is well-established that a mark may be merely descriptive even if applicant is the first or only user of it. *See In re Nat’l Shooting Sports Found., Inc.*, 219 USPQ 1018, 1020 (TTAB 1983).²⁵

²³ September 11, 2012 final Office action at 8.

²⁴ *Id.* at 9.

²⁵ Although the application was not made of record, applicant states that its application for the same mark with the more common spelling of “armor” (VICTORY ARMOR PIERCING, application Serial No. 85182765) has been published, presumably without disclaimer.

C. Conclusion

We have carefully considered all of the evidence and arguments of record, including any we have not specifically discussed. We conclude that the term ARMOUR PIERCING is merely descriptive of applicant's identified goods, and that it must be disclaimed pursuant to Trademark Act Section 6(a).

Decision: The refusal to register applicant's mark in the absence of a disclaimer of ARMOUR PIERCING under Section 2(e)(1) is affirmed.

However, this decision will be set aside if, within thirty days of the mailing date of this order, applicant submits to the Board the required disclaimer of ARMOUR PIERCING. *See In re Country Music Ass'n, Inc.*, 100 USPQ2d 1824, 1835 (TTAB 2011); Trademark Rule 2.142(g), 37 C.F.R. § 2.142(g); TBMP § 1218. The disclaimer should be worded as follows: "No claim is made to the exclusive right to use ARMOUR PIERCING apart from the mark as shown." Trademark Manual of Examining Procedure (TMEP) § 1213.08(a)(i) (April 2013).

Applicant's Brief at 9. A decision to allow another application is not controlling. *See In re Omega SA*, 494 F.3d 1362, 83 USPQ2d 1541, 1544 (Fed. Cir. 2007). The Board must assess each mark on its own facts and record. *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001); *see also In re Rodale Inc.*, 80 USPQ2d 1696, 1700 (TTAB 2006) ("Although consistency in examination is a goal of the Office, the decisions of previous Trademark Examining Attorneys are not binding on us, and we must decide each case based on the evidence presented in the record before us.").