

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed:
May 13, 2013

UNITED STATES PATENT AND TRADEMARK OFFICE

—
Trademark Trial and Appeal Board

—
*In re Ronald Bennett and Jacob Fakouri*¹

—
Serial No. 85485633

—
Matthew H. Swyers of The Trademark Company PLLC for Ronald Bennett and Jacob Fakouri.

Dawn Han, Trademark Examining Attorney, Law Office 107 (J. Leslie Bishop, Managing Attorney).

—
Before Bucher, Wellington, and Hightower, Administrative Trademark Judges.

Opinion by Hightower, Administrative Trademark Judge:

On December 2, 2011, applicants Ronald Bennett and Jacob Fakouri applied to register the following mark:



—
¹ The application was originally filed in the name of GNC Distributors, LLC. The October 18, 2012 assignment from GNC Distributors, LLC to Messrs. Bennett and Fakouri is recorded in the Office Records at Reel/Frame Numbers 4884/0009.

Serial No. 85485633

on an intent-to-use basis pursuant to Trademark Act Section 1(b), 15 U.S.C. § 1051(b), for “insect-repellants” in International Class 5.² The application included a voluntary disclaimer of the literal portion of the mark, “THE MOSQUITO PATCH.”

The examining attorney has refused registration on the ground that the applied-for mark is merely descriptive of applicants’ goods pursuant to Trademark Act Section 2(e)(1), 15 U.S.C. § 1052(e)(1). Applicants timely appealed.

Analysis

A mark 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 Engineering Sys. Corp.*, 2 USPQ2d 1075, 1076 (TTAB 1986); *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979).

² Application Serial No. 85485633.

When two or more merely descriptive terms are combined, the determination of whether the composite mark also has a merely descriptive significance turns on the question of whether the combination of terms evokes a new and unique commercial impression. If each component retains its merely descriptive significance in relation to the goods or services, the combination results in a composite that is itself merely descriptive. *See, e.g., In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370, 1372 (Fed. Cir. 2004) (PATENTS.COM merely descriptive of computer software for managing a database of records that could include patents for tracking the status of the records by means of the Internet); *In re Carlson*, 91 USPQ2d 1198, 1203 (TTAB 2009) (URBANHOUSING merely descriptive of real estate brokerage, consultation, and listing services); *In re Tower Tech, Inc.*, 64 USPQ2d 1314, 1318 (TTAB 2002) (SMARTTOWER merely descriptive of commercial and industrial cooling towers); *In re Putman Publ'g Co.*, 39 USPQ2d 2021, 2022 (TTAB 1996) (FOOD & BEVERAGE ONLINE merely descriptive of online news and information service for the food processing industry).

However, a mark comprising a combination of merely descriptive components is registrable if the combination of terms creates a unitary mark with a unique, nondescriptive meaning, or if the composite has a bizarre or incongruous meaning as applied to the goods. In other words, we must consider the issue of descriptiveness by looking at the mark in its entirety.

Applicants have conceded the common, descriptive nature of the phrase “THE MOSQUITO PATCH” by disclaiming exclusive rights in that phrase apart from the

mark as a whole. *In re J.M. Originals Inc.*, 6 USPQ2d 1393, 1394 (TTAB 1987). Thus, we examine the remaining components of the mark, its stylization and design, to determine whether the composite mark as a whole is merely descriptive.

As can be seen more clearly below, applicants' mark features a realistic image of a mosquito underlying the universal prohibition symbol:



The applicants make two main arguments. First, applicants contend that a mosquito logo could be used in connection with a number of different products and services, “such as a fly swatter, insecticides for plants, exterminator services, education services regarding the dangers of certain kinds of insects, a campaign against harming insects, etc.”³ Similarly, applicants argue, the mark considered in its entirety “conjures up other possible ideas. The term, ‘Patch’ may refer to a garden patch where vegetables are grown, or a patch worn on clothing for fashion or to cover up a hole or stain in a garment.”⁴

³ Appeal Brief at 6.

⁴ *Id.* at 7.

These arguments do not address the proper descriptiveness analysis. It is settled that “[t]he question is not whether someone presented with only the mark could guess what the goods or services are. Rather, the question is whether someone who knows what the goods or services are will understand the mark to convey information about them.” *In re Tower Tech, Inc.*, 64 USPQ2d at 1316-17. Viewing applicants’ mark in relation to their goods, it is clear that a universal prohibition symbol superimposed over a realistic image of a mosquito, in combination with the descriptive, if not generic, wording “THE MOSQUITO PATCH,” conveys information about applicants’ insect repellants – that is, that their function is to repel mosquitoes. In addition, applicants voluntarily disclaimed the literal portion of the mark, THE MOSQUITO PATCH. Thus, their argument now that the term “patch” is ambiguous and could be a reference to a garden or clothing patch is not well taken.

Second, applicants argue that several registrations have issued that incorporate images of an insect along with the universal prohibition symbol for insect repellent and extermination products and services. Applicants provide the following seven examples in their appeal brief:⁵

⁵ Appeal Brief at 7-9. Copies of each of these registrations were attached as Exhibit A to both of applicants’ two responses to Office actions, submitted May 7, 2012 and October 3, 2012. Applicants also rely on application Serial No. 85282109, but pending applications are evidence only of the fact that they were filed. *In re 1st USA Realty Prof’ls, Inc.*, 84 USPQ2d 1581, 1583 (TTAB 2007) (citing *Juleigh Jeans Sportswear Inc.*, 24 USPQ2d 1694, 1699 (TTAB 1992)).

Mark	Reg. No.	Disclaimer	Goods
	3381873	None	Insect repellants
	3248387	"Mosquito"	Electric devices for attracting and killing insects
	3291853	None	Delivery system comprised of power-operated pump, tank and nozzle for delivery of chemical treatment for protection and cessation of flying insect attacks and flying insect stings
	3366867	"Mosquito"	Mosquito repellent kits, comprised primarily of sprayer nozzles, tubes, connectors along with insecticide which attach to power-operated yard blowers
	3153877	"Bug Zone"	Bag of liquid that repels bugs and insects of all types without any sprays or harmful chemicals, works off light and frequency
	2573982	"Insect" and "Natural"	Insect repellent for the skin that also functions as a sun screen preparation
	4057684	None	Jellyfish sting kit, comprised of a topical first aid gel and plastic gloves for applying the gel, sold as a unit

Applicants argue that it would be inconsistent for the Office to refuse registration of their mark in view of the fact that these registrations issued.⁶



The examining attorney distinguishes each registration cited by applicants, primarily on the basis of the degree of stylization and the fact that they are unitary and not descriptive of the identified goods.⁷ The examining attorney, in turn, provides five examples of marks registered for similar goods and services in which the universal registration symbol and/or a realistic bug depiction is disclaimed:⁸

Mark	Reg. No.	Disclaimer	Goods / Services
	2630492	“Bug,” the international prohibition symbol and the mosquito design	Insect protective garments comprising pants and tops for use over outer clothing
	3242404	“Bug,” the international prohibition symbol, or the representation of the mosquito and the spider	Termite and pest control
	4055185	“Bed Bug, the universal prohibition symbol logo and the bed bug insect depiction”	Insecticides for domestic use and insect repellent

⁶ Appeal Brief at 9.

⁷ Examiner’s Brief at unnumbered p. 8-9.

⁸ *Id.* at unnumbered p. 9-10. The fourth registration was attached to the August 6, 2012 Office action, the fifth was attached to the November 25, 2012 final Office action, and the first three registrations were attached to both Office actions.

Mark	Reg. No.	Disclaimer	Goods / Services
	4071237	Universal prohibition symbol	Insect repellants
	3579023	“Skeeter” and representation of a mosquito	Aerosol insecticide contained in a portable housing apparatus that automatically sprays to control insects outdoors, especially mosquitoes

Prior decisions in other applications are not binding on the Board, and each case must stand on its own merits. *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001); *In re Scholastic Testing Serv., Inc.*, 196 USPQ 517, 519 (TTAB 1977). However, third-party registrations featuring the same or similar goods as applicants’ goods are probative evidence on the issue of descriptiveness where the relevant word or term is disclaimed. *See Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 4 USPQ2d 1793, 1797 (Fed. Cir. 1987); *In re Box Solutions Corp.*, 79 USPQ2d 1953, 1955 (TTAB 2006). The registrations submitted by the examining attorney are some evidence of the descriptive nature of marks featuring images of realistic bugs overlaid by the universal prohibition symbol when used in association with insect repellants and similar goods and services.

Moreover, the examining attorney argues that the mosquito design creates no distinct commercial impression other than that of its legal equivalent, and thus is treated the same as the descriptive word “mosquito.”

A visual representation that consists merely of an illustration of the goods, or of an article that is an important feature or characteristic of the goods, is merely descriptive under Section 2(e)(1) of the Act. *See In re Soc’y for Private & Commercial Earth Stations*, 226 USPQ 436, 438 (TTAB 1985) (requiring disclaimer of non-fanciful design of earth station for services of association promoting interests of members of earth station industry); *In re Underwater Connections, Inc.*, 221 USPQ 95, 96 (TTAB 1983) (holding pictorial representation of compressed gas tank merely descriptive of travel tour services involving underwater diving); *In re Eight Ball, Inc.*, 217 USPQ 1183, 1184 (TTAB 1983) (holding mark comprising pictorial representation of cue stick and eight ball merely descriptive of billiard parlor services); *Thistle Class Ass’n v. Douglass & McLeod, Inc.*, 198 USPQ 504, 511-12 (TTAB 1978) (finding pictorial representation of a thistle merely descriptive of class of sailboats sold by applicant).

We find the design component of applicants’ mark, displaying a non-fanciful image of a mosquito within the universal prohibition symbol, to be merely descriptive for an important feature or characteristic of their goods, that is, that they repel mosquitoes. In its wording and design, the mark thus comprises two merely descriptive elements that in combination retain their descriptive significance in relation to the goods.

Finally, the examining attorney contends – and we agree – that the degree of stylization in applicants’ mark is not sufficiently striking, unique, or distinctive so as to create a commercial impression separate and apart from the other components of the mark. *See In re Sambado & Son Inc.*, 45 USPQ2d 1312, 1316 (TTAB 1997); *In re Bonni Keller Collections Ltd.*, 6 USPQ2d 1224, 1227 (TTAB 1987).

Viewing applicants’ mark as a whole, we find that consumers who know that applicants’ goods are insect repellants will understand the mark to convey information about them; that is, that the goods will be patches with the intended function of repelling mosquitoes. We therefore find that applicants’ mark is merely descriptive within the meaning of Section 2(e)(1) in association with applicants’ goods.

Decision: The examining attorney’s refusal to register applicants’ mark under Section 2(e)(1) of the Trademark Act is affirmed.