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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Keiser & Associates, LLC

Serial No. 85576511

Matthew H. Swyers of The Trademark Company, PLLC for Keiser & Associates, LLC.

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Before Quinn, Cataldo and Hightower,
Administrative Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

Keiser & Associates, LLC ("applicant") filed an application
to register the mark STORMWATER NEUTRAL (in standard characters)
for

environmental consulting in the field of
environmental service regarding engineering
protocols for ascertaining and quantifying
net-zero stormwater loading status following
implementation of best management practices
with respect to a quantifiable baseline

condition for a physical stormwater drainage area (in International Class 42).¹

The trademark examining attorney refused registration under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that applicant's proposed mark, when used in connection with applicant's services, is merely descriptive thereof.

When the refusal was made final, applicant appealed. Applicant and the examining attorney filed briefs.

Applicant states the following:

Although it is clear from application [sic] that the term STORMWATER is merely descriptive of the Applicant's services, the mark as a whole, and in particular the term NEUTRAL, is not. As such even if a disclaimer is required for the term STORMWATER the second term NEUTRAL clearly should permit registration of the mark on the Principal Register with a disclaimer of STORMWATER.
(Brief, p. 8).

Applicant argues that its mark as a whole is just suggestive, asserting that "[a]lthough the "mental link" for the term STORMWATER may be instantly established the same cannot be said for NEUTRAL." (Brief, p. 12). According to applicant, some degree of imagination is required to associate the mark with applicant's services, and competitors have no need to use the

¹ Application Serial No. 85576511, filed March 22, 2012, alleging first use anywhere and first use in commerce at least as early as October 7, 2009.

exact terminology in describing their own services. Applicant also points to the existence of third-party registrations of similar marks on the Principal Register. Applicant further states that any doubt about the descriptiveness of its mark must be resolved in favor of publishing the mark for opposition. In arguing that the refusal should be reversed, applicant submitted dictionary definitions and third-party registrations.

The examining attorney maintains that the applied-for mark is merely descriptive, relying on dictionary definitions, third-party usage, and third-party registrations. According to the examining attorney, applicant's services "are for quantifying, and achieving 'stormwater neutral' loading status," that is, "the overall effect of stormwater on the environment is neither beneficial nor harmful." (Brief, unnumbered p. 5).

A mark is deemed to be merely descriptive of goods or services, within the meaning of Section 2(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 Chamber of Commerce of the United States of America*, 675 F.3d 1297, 102 USPQ2d 1217 (Fed. Cir. 2012); *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828 (TTAB 2007); and *In re Abcor Development*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). A mark need not immediately convey an idea of each and every specific feature of the applicant's goods or

services in order to be considered merely descriptive; rather, it is sufficient that the mark describes one significant attribute, function or property of the goods or services. *In re H.U.D.D.L.E.*, 216 USPQ 358 (TTAB 1982); and *In re MBAssociates*, 180 USPQ 338 (TTAB 1973). Whether a mark 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 mark would have to the average purchaser of the goods or services because of the manner of its use. *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979). Contrary to the gist of one of applicant's remarks, 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 1314, 1316-17 (TTAB 2002).

When two descriptive terms are combined, the determination of whether the composite mark also has a descriptive significance turns upon the question of whether the combination of terms evokes a new and unique commercial impression. When there is evidence that the composite mark itself has been used together to form a phrase that is descriptive of the goods or

services, it is unnecessary to engage in an analysis of each individual component. *In re Shiva Corp.*, 48 USPQ2d 1957, 1958 (TTAB 1998) (TARIFF MANAGEMENT merely descriptive of computer hardware and computer programs to control, reduce, and render more efficient wide area network usage).

The term "stormwater" means "excess water from a meteorological event which has limited interaction with the landscape and flows to surface water or to drainage systems" (agclass.nal.usda.gov); "water that is not absorbed into soil and rapidly flows downstream, increasing the level of waterways." (wordnik.com). The term "neutral" is defined as "neither good nor bad; neither beneficial nor harmful." (www.machaut.uchicago.edu).² On a page of its website (submitted as a specimen of use), applicant defined "Stormwater Neutral™" as follows:

An achievement associated with "net zero" stormwater discharge loading following implementation of best management practices with respect to a quantifiable baseline condition (including volume of runoff and/or pollutants of concern discharged to surface water).

² In arguing that the term "neutral" is suggestive, applicant points to several alternate meanings for the term, such as "not aligned with or supporting any side or position in a controversy"; "gray; without hue; of zero chroma; achromatic"; "matching well with many or most other colors or shades, as white or beige"; and "neither acidic or alkaline." Applicant's argument is immaterial to our analysis. Descriptiveness must be determined in relation to the goods or services for which registration is sought. Therefore, that a term may have a different meaning in a different context is not controlling. See *In re RiseSmart Inc.*, 104 USPQ2d 1931, 1933 (TTAB 2012).

The most probative evidence in this appeal comprises several excerpts of third-party websites submitted by the examining attorney. This evidence shows use of the terminology "stormwater neutral" in the environmental field. A representative sample of the excerpts includes the following:

The Friday workshop will bring together students and faculty of all disciplines to work together on the design of a large functional sculpture that will remediate storm water and serve to educate the campus community about the importance of reducing storm water runoff....Join us and be a part of making WMU more beautiful and storm water neutral.
(ssewmu.files.wordpress.com)

The gardens will capture rainwater in the ponds. The water will be used by the plants in the ponds and will infiltrate into its native soil, making the site storm water neutral.
(examiner.com)

The building itself will correct hundreds of years of site disruptions by reducing utility consumption with an aggressive "storm water neutral" strategy that will protect the region's waterways.
(healthcaredesignmagazine.com)

...the redevelopment of a hospital site which is 100% "storm water neutral" - meaning all storm water will be managed within the site's boundaries. Now that's a goal to aim for.
(urbanreport.com)

The developer's commitment to making the project "stormwater neutral" avoiding CSO and water quality impacts...
(brooklyn.gov)

The city has begged the Trustees to create a drainage improvement; and that based on legal requirements and the City's development standards, the development of the Holter land should be stormwater neutral.
(troyohio.gov)

The third-party uses persuade us that the terminology "stormwater neutral" is commonly used and understood in the environmental field to describe the treatment of stormwater runoff to neutralize its impact, thereby resulting in a site that is known as "stormwater neutral."

Applicant and the examining attorney submitted third-party registrations; each believes their respective evidence is helpful to their arguments. Given the third-party usage of the terminology sought to be registered, we see no reason to focus on how the Office has treated (at times, inconsistently) the terms "stormwater" or "neutral" in the past. In any event, these registrations are not conclusive on the question of mere descriptiveness of the involved mark inasmuch as each case must stand on its own merits. *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 theDot Commc'ns Network LLC*, 101 USPQ2d 1062, 1067 (TTAB 2011). *See also In re International Taste Inc.*, 53 USPQ2d 1604, 1606 (TTAB

2000) ("With respect to third-party registrations which include disclaimers ... we do not have before us any information from the registration files as to why an Examining Attorney required and/or why the applicant/registrant offered such disclaimers."); and *In re Scholastic Testing Service, Inc.*, 196 USPQ 517 (TTAB 1977).

In a similar manner, applicant points to several precedential decisions wherein certain marks were found to be just suggestive. Suffice it to say that "the great variation in facts from case to case prevents the formulation of specific rules for specific fact situations." Trademark Manual of Examining Procedure (TMEP) § 1209.01(b) (October 2013). As just indicated above, each case involving the issue of mere descriptiveness must be decided on its own merits.

No imagination is required by a prospective purchaser or user to discern that a purpose or feature of applicant's environmental consulting services is to provide advice to achieve a condition known and understood as "stormwater neutral." That is, applicant's consulting services feature practices that render neutral the impact of runoff of stormwater. Based on the record, we find that the proposed mark STORMWATER NEUTRAL, when considered as a whole, is merely descriptive of applicant's services.

Decision: The refusal to register is affirmed.