This Opinion is Not a Precedent of the TTAB

Mailed: April 27, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Lloyd

Serial No. 85639318

Lisa N. Kaufman of the Law Office of Lisa N. Kaufman, P.A., for David Lloyd.

Mary J. Rossman, Trademark Examining Attorney, Law Office 109, Dan Vavonese, Managing Attorney.

Before Seeherman, Bergsman and Masiello, Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

David Lloyd ("Applicant") seeks registration on the Principal Register of the mark ARTISTS COLLECTIVE ENTERPRISE (in standard characters) for the goods and services listed below:¹

Digital materials, namely, downloadable graphic novels and comic books; downloadable podcasts in the field of graphic novels and comic books, in Class 9;

¹ Application Serial No. 85639318 was filed on May 31, 2012, based upon Applicant's allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act.

Subscriptions to digital and electronic graphic novels and comic books, in Class 35; and

Entertainment services, namely, providing online non-downloadable comic books and graphic novels; providing podcasts in the field of graphic novels and comic books; multimedia publishing of graphic novel and comic book magazines; digital graphic novel and comic book publishing services; providing a website featuring non-downloadable graphic novels and comic books; publishing of comic book web magazines, in Class 41.

The Trademark Examining Attorney has issued a final refusal of registration of Applicant's mark under Section 2(e)(1) of the Trademark Act of 1946, 15 U.S.C. § 1052(e)(1), on the ground that Applicant's mark is merely descriptive of Applicant's goods and services, and Applicant has appealed that refusal. According to the Trademark Examining Attorney, "the identified goods and services are a collection of graphic novels and comics by artists gathered together (e.g., collected) by applicant and put out as an online magazine. A magazine is a collective work and here is provided by an enterprise, applicant, who collects the works of artists, including himself and other artists." Applicant argues, to the contrary, that the mark is suggestive because even the Trademark Examining Attorney had to use a multiple-step reasoning process to explain why Applicant's mark is merely descriptive.

We affirm the refusal to register.

A term is 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,

² Trademark Examining Attorney's Brief, 10 TTABVUE 4.

³ Applicant's Brief, 8 TTABVUE 7-10.

characteristic, feature, function, purpose or use of the goods or services. In re Chamber of Commerce of the U.S., 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012). See also In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987). A term that describes the source of the goods or services is also considered merely descriptive under Section 2(e)(1). In re Major League Umpires, 60 USPQ2d 1059, 1060 (TTAB 2001) ("It is well-established that a term which describes the provider of goods or services is also merely descriptive of those goods and services."). See also In re Omaha Nat'l Bank, 819 F.2d 1117, 2 USPQ2d 1859, 1861 (Fed. Cir. 1987) (rejecting argument that descriptiveness should be limited to a quality or characteristic of the good or service itself and holding that it includes a designation descriptive of the service provider (i.e., FirsTier is descriptive of banking services because the mark describes a "large high-quality bank")). In this appeal, the issue before us is whether the mark describes the source of the goods and services.

Whether a mark is merely descriptive is determined in relation to the goods or services for which registration is sought and the context in which the term is used, not in the abstract or on the basis of guesswork. In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978); In re Remacle, 66 USPQ2d 1222, 1224 (TTAB 2002). This requires consideration of the context in which the mark is used or intended to be used in connection with those goods or services, and the possible significance that the mark would have to the average purchaser of the goods or services in the relevant marketplace. See In re Chamber of Commerce of the U.S., 102 USPQ2d at 1219; In re Bayer Aktiengesellschaft, 488 F.3d 960, 82 USPQ2d

1828, 1831 (Fed. Cir. 2007); In re Abcor Dev. Corp., 200 USPQ at 218; In re Venture Lending Assocs., 226 USPQ 285 (TTAB 1985).

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, nondescriptive 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. In re Oppedahl & Larson LLP, 373 F.3d 1171, 71 USPQ2d 1370, 1371 (Fed. Cir. 2004), quoting, Estate of P.D. Beckwith, Inc. v. Commissioner, 252 U.S. 538, 543 (1920). See also In re Tower Tech, Inc., 64 USPQ2d at 1318 (SMARTTOWER merely descriptive of commercial and industrial cooling towers); In re Sun Microsystems Inc., 59 USPQ2d 1084 (TTAB 2001) (AGENTBEANS merely descriptive of computer programs for use in developing and deploying application programs); In re Putman Publishing Co., 39 USPQ2d 2021 (TTAB 1996) (FOOD & BEVERAGE ONLINE merely descriptive of news and information services in 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 non-descriptive meaning, or a double entendre with one meaning being non-descriptive, or if the composite has an incongruous meaning as applied to the goods or services. See In re Colonial Stores Inc., 394 F.2d 549, 157 USPQ 382 (CCPA 1968) (SUGAR & SPICE for "bakery products"); In re Shutts, 217 USPQ 363 (TTAB 1983) (SNO-RAKE for "a snow removal hand tool

having a handle with a snow-removing head at one end, the head being of solid uninterrupted construction without prongs").

"If one must exercise mature thought or follow a multi-stage reasoning process in order to determine what characteristics the term identifies, the term is suggestive rather than merely descriptive." In re Tennis in the Round, Inc., 199 USPQ 496, 497 (TTAB 1978). See also In re Shutts, 217 USPQ at 364-365; In re Universal Water Systems, Inc., 209 USPQ 165, 166 (TTAB 1980).

According to the article "How to Start an Artist Collective," "An artist collective is a group of artists who work together to achieve a common goal. The common goal is what defines the collective. It can be anything from sharing studio space [,] the cost of materials, to working collectively to inspire socio-political awareness in the community through exhibits and gallery openings. In an artist collective of any type, equally sharing ownership, status, expenses and risk is expected." See also the Wikipedia entry for "artist collective" attached to the September 24, 2012 Office Action ("An artist collective is an initiative that is the result of a group of artists working together, usually under their own management, towards shared aims.").5

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⁴ "How to Start an Artist Collective," article from eHow website (ehow.com), attached to the April 25, 2013 Office Action.

⁵ Applicant objected to our consideration of the Wikipedia entry on the ground that Wikipedia is unreliable. Applicant's Brief, 8 TTABVUE 13-14. Applicant's objection is overruled. With respect to evidence taken from the online Wikipedia encyclopedia, www.wikipedia.org, although the Board has noted that "[t]here are inherent problems regarding the reliability of Wikipedia entries because Wikipedia is a collaborative website that permits anyone to edit the entries," we will accept such evidence in certain circumstances:

[[]T]he Board will consider evidence taken from Wikipedia so long as the non-offering party has an opportunity to rebut that evidence by submitting other evidence that may call into

The record includes numerous examples of the term "artist collective" used to describe such an enterprise. The examples listed below are representative:

- 1. Twilight Artist Collective (twilightart.net): "an eclectic group of contemporary artists (largely based in Seattle)."
- 2. Arroyo Arts Collective (arroyoartscollective.com): "The Arroyo Arts Collective is a grassroots, community-based organization of artists, poets, musicians, craftspersons [sic] and supporters of the creative community in Northeast Los Angeles."
- 3. Smithsonian Institution Traveling Exhibition Service webpage (sites.si.edu/exhibitions/exhibits/newcombPottery):

Women, Art, and Social Change

The Newcomb Pottery Enterprise

question the accuracy of the particular Wikipedia information. Our consideration of Wikipedia evidence is with the recognition of the limitations inherent with Wikipedia (e.g., that anyone can edit it and submit intentionally false or erroneous information)....

As a collaborative online encyclopedia, Wikipedia is a secondary source of information or a compilation based on other sources. As recommended by the editors of Wikipedia, the information in a particular article should be corroborated. The better practice with respect to Wikipedia evidence is to corroborate the information with other reliable sources, including Wikipedia's sources.

In re IP Carrier Consulting Grp., 84 USPQ2d 1028, 1032–33 (TTAB 2007). Subsequent to the time the Trademark Examining Attorney submitted the Wikipedia evidence in her September 24, 2013 Office Action, Applicant filed two responses, on March 20, 2013 and October 24, 2013, and, therefore, had an opportunity to rebut the Wikipedia evidence if he believed it was incorrect.

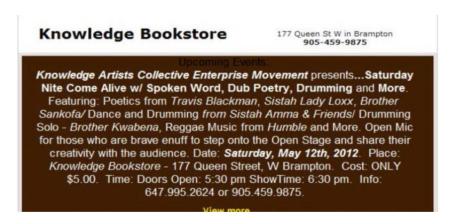
⁶ September 24, 2012 Office Action.

 $^{^7}$ Id.

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In 1895, the H. Sophie Newcomb Memorial College, Tulane University's women coordinate college, established the Newcomb Pottery in New Orleans, and conceived it as part artist collective, part social experiment, and part business enterprise initiative under the auspices of an educational program.⁸

4. Knowledge Artists Collective Enterprise Movement advertisement:9



In his March 20, 2013 response to an Office Action, Applicant referenced his ACES WEEKLY website (acesweekly.co.uk/about) in response to the Trademark Examining Attorney's request for information and materials:

In response to the Examining Attorney's request for information and materials, because this is an intent to use application, the products and services set forth in the application have not yet been launched. Various graphic novelists will make contributions to the online digital podcast versions of the graphic novels to be published and disseminated on a regular basis, as yet to be determined. The Applicant, however, does offer similar products and services in the UK which can be found at the following website: http://www.acesweekly.co.uk/about.

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⁸ *Id*.

⁹ April 25, 2013 Office Action.

The ACES WEEKLY website referenced by Applicant indicates that Applicant's proposed services are in the nature of an artist collective because it is a group of graphic novel artists joining together to publish their works.¹⁰ The website provided the following information regarding Applicant's services:

ACES WEEKLY is an exclusively digital comic art magazine which features some of the world's finest creators of comic art. The guy who brought you V FOR VENDETTA – David Lloyd – has gathered together top talents from around the globe to bring you this revolutionary publishing project!

An interview with Applicant posted on the Forbidden Planet International Blog (forbiddenplanet.co.uk) further supports the finding that Applicant's services are in the nature of an artist collective. The interviewer asked Applicant how he persuaded other graphic novel artists to contribute to his publication:

FPI: You've assembled quite a team of top-notch creators – how did persuade them to take part? Was the fact that the strips are all creator-owned a big factor for them, and the fact it is essentially all fellow creators doing the running?

David: Great artists like to take great risks, if they have the chance to. And they like the new and the different. On top of that, the model works – not to its best effect yet, but it works. And, yes, everyone owns everything they do – I just ask for a period of exclusivity for the story they do for us, not the concept or characters, just that one story for a length of time. They can also do whatever they like – which is probably the most radical thing that we actually do on Aces Weekly – we trust them completely within the parameters of some very modest restrictions on their freedom, and publish what they come up with. Because of that they can often do things they'd never get a chance to do anywhere else. Some of it experimental, some of it just extremely exotic! We share all the income equally on each volume. It's a bit like a collective except I'm yet to get them all to act collectively in fully promoting Aces, which is a stick I'm always beating them with!

Finally, the word "Enterprise" is defined, *inter alia*, as "a unit of economic organization or activation; especially a business organization" or "a systematic

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¹⁰ April 25, 2013 Office Action.

¹¹ December 16, 2013 Office Action.

purposeful activity <agriculture is the main economic enterprise among these people>."12

The term "Artists Collective" means a group of artists working together - in this case, to publish a graphic novel magazine - and the word "Enterprise" means a business organization. The composite mark ARTISTS COLLECTIVE ENTERPRISE, when used in connection with the identified goods and services, directly conveys the meaning of a group of artists working together to publish a graphic novel magazine. That is consistent with the information Applicant discussed about his business through his website at acesweekly.co.uk: that is, Applicant "has gathered together top talents from around the globe [i.e., an artist collective to bring you this revolutionary publishing project" (i.e., an enterprise). The composite mark ARTISTS COLLECTIVE ENTERPRISE describes the provider of the identified goods and services. Thus, the combination of the terms "Artists Collective" and "Enterprise" forming Applicant's mark when used in connection with graphic novels and the publishing of graphic novels retains the descriptive significance of the individual terms in the combined term, such that the mark as a whole directly describes the provider of the goods and services. Accordingly, the mark ARTISTS COLLECTIVE ENTERPRISE when used in connection with Applicant's goods and services is merely descriptive.

¹² Merriam-webster.com attached to the September 24, 2012 Office Action. *See also* the definition at education.yahoo.com/reference/dictionary ("an undertaking, especially one of some scope, complication, and risk" or "a business organization") attached to the December 16, 2013 Office Action.

In reaching this conclusion, we have considered Applicant's argument that his mark is suggestive because each of the component words has multiple meanings and that even the Trademark Examining Attorney was not able to settle on which of the multiple definitions applied.¹³

Applicant reiterates that simply because each individual term in Applicant's mark is descriptiveon [sic] on its own, this does not lead to the conclusion that the combination of terms is merely descriptive of Applicant's downloadable and non-loadable online graphic novels and the digital publishing and podcasting of its graphic novel magazines offered by subscription.¹⁴

Applicant further contends that *In re Major League Umpires* is inapposite because the mark MAJOR LEAGUE UMPIRE does not contain any ambiguous language.¹⁵

As discussed above, when applied to graphic novels and their various means of publication, the mark ARTISTS COLLECTIVE ENTERPRISE directly describes the provider of the goods and services. Here, the evidence shows that Applicant is working with a group of graphic novel artists (*i.e.*, an artist collective) to publish graphic novels as a business enterprise.

¹³ Applicant's Brief, 8 TTABVUE 12-14. The Trademark Attorney's ability to articulate why the mark is merely descriptive is not at issue. The facts in evidence are what is critical in our determination of whether the mark is merely descriptive. "The Board need not find that the examining attorney's rationale was correct in order to affirm the refusal to register, but rather may rely on a different rationale." TBMP § 1217 (June 2014). See also In re AFG Industries Inc., 17 USPQ2d 1162, 1163 (TTAB 1990) ("we note that the Board reviews an Examining Attorney's decision on appeal to determine if the refusal to register was correctly made. In doing so, the Board need not adopt the rationale of the Examining Attorney."); In re Avocet, Inc., 227 USPQ 566, 567 (TTAB 1985) ("the Trademark Trial and Appeal Board, when exercising its appellate jurisdiction under Section 20 of the Lanham Act (15 USC §1070), reviews the 'decision' of the Examining Attorney for its correctness and need not adopt the Examining Attorney's rationale in every respect in order to affirm the decision of the Examining Attorney.").

¹⁴ Applicant's Brief, 8 TTABVUE 17.

¹⁵ Applicant's Brief, 8 TTABVUE 11.

Applicant argues that the average purchaser of his graphic novels, namely comic book enthusiasts, will not view the mark as being descriptive because they will have to exercise thought and perception to associate graphic novels with ARTISTS COLLECTIVE ENTERPRISE. 16 We are not persuaded by this argument. Assuming that the consumers of the identified goods and services are comic book enthusiasts, we see no reason why they would be unfamiliar with the meaning of the terms ARTISTS COLLECTIVE or ENTERPRISE, or would not immediately understand, when these terms are combined in the mark ARTISTS COLLECTIVE ENTERPRISE, that the mark describes the source of the goods and services.

Finally, Applicant argues that competitors have no need to use ARTISTS COLLECTIVE ENTERPRISE to describe their similar goods and services.¹⁷ The Board has previously addressed such an argument:

Further, with respect to applicant's statement that "the Examiner has also failed to show that any competitor has used, or will ever have need to use, the terms URBANHOUZING or HOUZING in connection with real estate services," brief, pp. 5-6, the test for descriptiveness is set out in the preceding sentence [referring to the test for descriptiveness set forth *supra*]. There is no requirement that the Office prove actual competitor use or need; it is well established that even if an applicant is the only user of a merely descriptive term, this does not justify registration of that term. See In re BetaBattInc., 89 USPQ2d 1152, 1156 (TTAB 2008); In re Sun Microsystems, Inc., 59 USPQ2d 1084, 1087 (TTAB 2001); In re Acuson, 225 USPQ 790, 792 (TTAB 1985).

In re Carlson, 91 USPQ2d 1198, 1203 (TTAB 2009).

¹⁶ Applicant's Brief, 8 TTABVUE 17.

 $^{^{\}rm 17}$ Applicant's Brief, 8 TTABVUE 18.

Decision: The refusal to register Applicant's mark
ARTISTS COLLECTIVE ENTERPRISE is affirmed.