

This Opinion is not a
Precedent of the TTAB

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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 Free-Flow Packaging International, Inc.
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Serial No. 85679090
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Edward S. Wright, Esq. for Free-Flow Packaging International, Inc.

Kim Saito, Trademark Examining Attorney, Law Office 102, Mitchell Front,
Managing Attorney.
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Before Kuhlke, Mermelstein, and Masiello, Administrative Trademark Judges.

Opinion by Masiello, Administrative Trademark Judge:

Free-Flow Packaging International, Inc. (“Applicant”) filed an application for registration on the Principal Register of the mark POWER PAK’R in standard characters for “Machines for manufacturing and dispensing packing material,” in International Class 7.¹ Applicant has disclaimed the exclusive right to use PACKER apart from the mark as shown.

¹ Application Serial No. 85679090 was filed on July 17, 2012 under Trademark Act § 1(b), 15 U.S.C. § 1051(b). Applicant subsequently filed an allegation of use, stating the date of first use and first use in commerce as January 31, 2013.

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 mark merely describes the identified goods. When the refusal was made final, Applicant appealed. Applicant and the Examining Attorney have filed briefs.

Section 2(e)(1) of the Trademark Act provides for the refusal of registration of a mark "on account of its nature" if it "[c]onsists of a mark which, (1) when used on or in connection with the goods of the applicant is merely descriptive or deceptively misdescriptive of them." 15 U.S.C. § 1052(e)(1). A term is merely descriptive 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. *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). Whether a mark is merely descriptive is determined in relation to the goods 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). A mark need not immediately convey an idea of each and every specific feature of the goods in order to be considered merely descriptive; it is enough if it describes one significant attribute, function or property of the goods. *See In re Gyulay*, 3 USPQ2d at 1010; *In re H.U.D.D.L.E.*, 216 USPQ 358 (TTAB 1982); *In re MBAssociates*, 180 USPQ 338 (TTAB 1973).

It is the Examining Attorney's burden to show, *prima facie*, that a term is merely descriptive of an applicant's goods or services. *In re Gyulay*, 3 USPQ2d at 1010; *In re Accelerate s.a.l.*, 101 USPQ2d 2047, 2052 (TTAB 2012). If such a showing is made, the burden of rebuttal shifts to Applicant. Our determination must be based upon "substantial evidence." *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007). The Board resolves doubts as to the mere descriptiveness of a mark in favor of Applicant. *In re The Stroh Brewery Co.*, 34 USPQ2d 1796, 1797 (TTAB 1994).

The Examining Attorney's position is that the individual words "power" and "packer" are merely descriptive of features of Applicant's goods; that PAK'R is the phonetic equivalent of "packer" and is, therefore, similarly descriptive of the goods; and that the combination of these words into the mark POWER PAK'R does not result in any nondescriptive meaning.² She contends that the mark "immediately conveys the idea of a power-operated packing machine."³

We agree that if the phrase "power packer" is merely descriptive of the goods, the mark POWER PAK'R would also likely be merely descriptive. PAK'R is the phonetic equivalent of "packer" and would, in such circumstances, be immediately and directly perceived by consumers as the equivalent of that word. *See In re Carlson*, 91 USPQ2d 1198 (TTAB 2009) (URBANHOUSING found to be perceived as the phonetic equivalent of the merely descriptive term URBAN HOUSING).

² Examining Attorney's brief, 6 TTABVUE 5.

³ *Id.*, 6 TTABVUE 8.

Accordingly, we will begin by considering whether the phrase “power packer” is merely descriptive of Applicant’s goods.

The Examining Attorney has made of record definitions of “power” and “packer” from <collinsdictionary.com> (using “English Worldwide” rather than “American English” definitions).⁴ The definition of “power” does not include any meanings of the word in adjectival form and, accordingly, are not directly relevant to the facts in this case, where the Examining Attorney contends that POWER, as it appears in the mark, is used as an adjective meaning “power-operated.” The definition of “packer” is as follows:

1. a person or company whose business is to pack goods. esp food => a meat packer
2. a person or machine that packs.⁵

Applicant has submitted the following relevant definitions of “power” and “packer”:

power

adjective : of or relating to electrical power

: operated by using electricity rather than a person’s strength

: having great strength or power

: operated mechanically or electrically rather than manually <a car with *power* locks> <*power* tools>

⁴ The Board has found this resource to be unreliable, as it is published in Glasgow, Scotland and includes definitions that do not necessarily reflect United States usage. *In re Manwin/RK Collateral Trust*, 111 USPQ2d 1311, 1313, fn.18 (TTAB 2014). In this case, inasmuch as the definition of “packer” is consistent with those made of record by Applicant, we do not exclude the Examining Attorney’s dictionary definitions.

⁵ Office Action of November 19, 2012 at 15.

: of, relating to, or utilizing strength <plays a power game>; *also* : POWERFUL <a *power* critic>.⁶

packer n. : One that packs: *a packer of boxes in a warehouse*

: One whose occupation is the processing and packing of wholesale goods, usually meat products: meat packers.

: a person or machine that packs

: a workman employed to pack things into containers.⁷

The Examining Attorney has also submitted the results of a product search for the word “packer” on the website <made-in-china.com>.⁸ The search results include 14 machines that are described as “packers.” Only fragmentary descriptions of these products are set forth in the search results, but the information provided indicates that the function of “packer” devices is to put items or material into containers or to seal them within a package:

Wrap Around Packer is mainly used for packing of products carried out by the beer and beverage labeling machine in the following process. It can automatically fold the paper board into shape, spray ... [*sic*]

Carton packer is a type of packer used to automatically erect, pack, close, and seal cases or trays.

This machine is used for packing toothpick [*sic*].

Carton Packer ... The machine can arrange the products according to the requirement of the package.

Case packer will transport and pack the finished product in to [*sic*] paper box according to the required arrange [*sic*].

⁶ Definition from <m-w.com>, Applicant’s response of January 2, 2014 at 8.

⁷ Definition from The Free Dictionary, Applicant’s response of January 2, 2014 at 11.

⁸ Office Action of November 19, 2012 at 28-35.

This auto liquid packer is suitable for the sachet back-sealed packing of various liquid or pastes, like shampoo packing, honey packing, sauce packing, ketchup packing, oil packing ect. [*Sic.*]

Applicant's goods, as identified, are machines that manufacture and dispense packing material but do not actually pack other goods. Evidence supplied by Applicant shows that the "packing material" dispensed by Applicant's machines consists of inflated plastic air cushions suitable for filling the spaces in containers so as to protect the packaged items. Applicant's goods include certain electrical and electronic features, so that it can be safely assumed that they are power-operated. The evidence also shows that the goods can be used as part of "fully integrated pack lines, feeding air cushions to multiple pack stations throughout the fulfillment center."⁹

The dictionary definitions of record do not persuade us that Applicant's goods are "packers" or "packing machines." Applicant's goods do not place items into boxes or other containers, nor do they wrap or enclose items in any other kind of packaging. Rather, they manufacture and dispense materials that are used in the packaging process, *i.e.*, air cushions that will be later enclosed with packaged items to protect them from breakage.¹⁰ This manufacturing and dispensing function is not a "packing" process. Thus, although we do not doubt that Applicant's goods are

⁹ Brochure, Applicant's response of May 16, 2013 at 5-6.

¹⁰ We have entertained the possibility that "packer" may suggest the function of these air cushions, but there is no evidence to indicate that such packing materials are called "packers."

“power-operated machines,”¹¹ they are not power-operated “packers.” Considering that Applicant’s product does not appear to be an actual “packer,” the likelihood that customers would immediately perceive PAK’R to describe the machine itself is cast into doubt.

The Examining Attorney points out that Applicant has voluntarily entered a disclaimer of the properly spelled word PACKER, and that Applicant earlier disclaimed the word PACKER in connection with its applications to register the marks PILLOW PAK’R, FASTTRACK PAPER PAK’R, MINI PAK’R, MINI PAK’R PRO and PRO PAK’R, all for goods similar to those now at issue.¹² The Examining Attorney argues that these disclaimers are evidence that the word “packer” is not inherently distinctive.¹³ We agree that the disclaimer concedes that “packer” is not inherently distinctive, but it does not concede that Applicant’s goods are packing machines. A term may be disclaimable because it describes any significant feature of a product, for example, that it is used in the packing process for producing packaging material. Applicant argues that “a mark which is in some ways descriptive may still be registrable as long as it is not merely descriptive.”¹⁴ This is true in the sense that a mark may be registrable despite communicating information that suggests to the customer something about the nature of the goods.

¹¹ Examining Attorney’s brief, 6 TTABVUE 5.

¹² Office Action of February 4, 2014 at 6-12; Office Action of July 1, 2013 at 5-14. In the FASTTRACK PAPER PAK’R registration, the disclaimed term is PAPER PACKER; in the MINI PAK’R PRO application, the disclaimed term is MINI PACKER.

¹³ Examining Attorney’s brief, 6 TTABVUE 6.

¹⁴ Applicant’s brief, 4 TTABVUE 6.

On the record before us, PAK'R does not convey to customers that the goods *are* packing machines, as the Examining Attorney seems to argue, but rather, at best, that the goods are for use in the packing industry.

Ultimately, the question before us is not whether either word “power” or “packer” has descriptive meaning, but whether the mark POWER PAK'R, as a whole, is merely descriptive of the goods. As we have discussed, the mark as a whole is not descriptive in the sense suggested by the Examining Attorney, because the goods are not power-operated packers or power-operated packing machines. The Examining Attorney has not proposed any other way to interpret the mark as merely descriptive. To the extent that PAK'R might refer to the packing material produced by Applicant's goods, the word POWER does not appear to have any descriptive meaning, because such inflated plastic air cushions are neither power-operated nor powerful in any other way. Applicant has proposed the competing interpretation that Applicant's goods “are powerful machines in the sense of being high performance machines that produce air cushions 60% faster than other machines on the market”¹⁵ The Examining Attorney ripostes that “Applicant has not provided any evidence that POWER would be interpreted to mean powerful in the context of a machine.”¹⁶ In fact, Applicant has made of record dictionary definitions showing that POWER may mean “powerful” or “having great strength or power,” making plausible Applicant's contention that the mark is at most

¹⁵ *Id.*

¹⁶ Examining Attorney's brief, 6 TABVUE 5.

suggestive of a powerful machine that is used in the packing process. In any event, the burden of proof does not rest with Applicant.

On the present record, we find that the USPTO has not demonstrated that Applicant's mark is merely descriptive of Applicant's goods within the meaning of Trademark Act § 2(e)(1). "When doubts exist as to whether a term is descriptive as applied to the goods or services for which registration is sought, it is the practice of this Board to resolve doubts in favor of the applicant and pass the mark to publication with the knowledge that a competitor of applicant can come forth and initiate an opposition proceeding in which a more complete record can be established." *In re The Stroh Brewery Co.*, 34 USPQ2d at 1797; *see also In re Merrill Lynch, Pierce, Fenner, and Smith Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1144 (Fed. Cir. 1987), *citing In re Gourmet Bakers, Inc.*, 173 USPQ 565 (TTAB 1972).

Decision: The refusal to register is reversed.