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Mailed: October 16, 2014

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re DM CTW, LLC

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Serial No. 85746575

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James R. Menker of Holley & Menker, P.A. for DM CTW, LLC.

Kimberly Boulware Perry, Trademark Examining Attorney, Law Office 112 (Angela Wilson, Managing Attorney).

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Before Zervas, Shaw and Adlin, Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

DM CTW, LLC ("Applicant") seeks registration of THE BEST APP TO DATE, in standard characters, alleging a bona fide intention to use the mark in commerce for "Downloadable software applications for mobile telecommunications devices and handheld computing devices for organizing personal relationships and dating, for providing coupons, rebates, discounts, vouchers or special offerings on goods and services from participating merchants and for receiving information on events, activities and attractions."[1] The Examining Attorney refused registration on the

[1] Application Serial No. 85746575, filed October 5, 2012, under Section 1(b) of the Trademark Act.

ground that Applicant's mark is merely descriptive of the identified goods under Section 2(e)(1) of the Act. After the refusal became final, Applicant appealed and filed a request for reconsideration which was denied. Applicant and the Examining Attorney filed briefs.

The Evidence

The Examining Attorney relies on the following dictionary definitions of the proposed mark's constituent terms:

> **BEST**—"of the highest quality, excellence, or standing; *the best work; the best students*."
>
> **APP**—"an application, typically a small, specialized program downloaded onto mobile devices; *the best GPS apps for your iPhone*."
>
> **DATE**—
>
> "Time stated in terms of the day, month, and year."
>
> and
>
> "An engagement to go out socially with another person, often out of romantic interest."

Office Actions of February 5 and March 18, 2013.[2] The Examining Attorney also argues that the inclusion of the definite article "the" has no source identifying significance.

In addition, the Examining Attorney relies on Internet evidence that both "best app" and "best app to date" are used to refer to software applications, including:

[2] The definitions of "best" and "app" are from "dictionary.com," while the definition of "date" is from "thefreedictionary.com."

> A printout from the "iPhone and iPod touch Games" forum on "toucharcade.com" in which the original post asks "Whats (sic) your **best app to date**? It doesnt (sic) have to be a game. Mine would have to be Bike or Die 2 and Touchgrind." One of the responses to this post was "this week my **best apps** were touchgrind and rogue."
>
> A printout from the "apptrain.com" website about a Horizon Mobile application for Android phones or tablets, in which one commenter stated "Horizon mobile Best ever. I have no desire for anything else. This does it all **Best app to date**."
>
> A printout from the "**bestapp**ever.com" website describing its "5th Annual **Best App** Ever Awards" in various fields, most of which are unrelated to dating.
>
> An article from the "t3.com" website entitled "**Best Apps** 2013: This year's hottest apps."
>
> A listing from the Google Play Store ("play.google.com") for an Android application entitled "**Best Apps** Market – for Android," which is "Focused on FREE Top Apps & Top Games, hand picked by experts from the Google Play store …."
>
> A listing from the **BestApp**Site website ("**bestapp**site.com") for the B&H Photo Now for iPad application.

Office Actions of February 8 and July 18, 2013 (emphasis supplied).

The Examining Attorney also relies on "hit lists" of Google searches for "'best app to date' software" and "best app." Some of the results are duplicative of the evidence summarized above. Moreover, Internet search engine "hit lists" often have little probative value because they do not reveal the full context in which the term is used on the listed web pages. *See In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1833 (Fed. Cir. 2007); *In re Tea and Sympathy, Inc.*, 88 USPQ2d 1062, 1064 n.3

(TTAB 2008); *In re Thomas*, 79 USPQ2d 1021, 1026 (TTAB 2006). However, in this case, portions of each "hit list" have some probative value because there is sufficient context to reveal that in some instances the uses of the searched terms are descriptive or relate to software applications other than those provided by Applicant, including:

> An "itunes.apple.com" listing for the Xtrail application in which one poster refers to it as the "**best app to date** and I cycle a lot."
>
> The following statement on the "advenio.com" website: "The **best app to date** has to be Mangia, an older classic app from Mangia Software. It had everything in it but the kitchen sink."
>
> The following statement on the "crackberry.com" website: "yeah caustic 2 is the **best app to date**, bought full version and made three songs already."
>
> The following statement on the "prweb.com" website: "pMD native Android app is their **best app to date** …."
>
> A website called "**bestapp**daily.com."
>
> The following statement on the "zagg.com" website: "There might be a lot of debate over what the **best app** ever is …."

Office Actions of February 8 and July 18, 2013. Finally, the Examining Attorney relies on a printout from Applicant's website which describes Applicant's software application and concludes "Discover … Details Matter, the **best app to date**!" Office Action of February 8, 2013.

Decision

A mark is deemed to be merely descriptive of goods, 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 Bayer*, 82

USPQ2d at 1828; 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 in order to be considered merely descriptive; rather, it is sufficient that the mark describes one significant attribute, function or property of the goods. *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 for which registration is sought, the context in which it is being used on or in connection with the goods, and the possible significance that the mark would have to the average purchaser of the goods because of the manner of its use. *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979). 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). Slogans such as Applicant's proposed mark may be merely descriptive, and are analyzed in the same manner as any other proposed mark. *See In re Standard Oil Co.*, 275 F.2d 945, 125 USPQ 227 (CCPA 1960).

Here, the dictionary definitions of Applicant's slogan's constituent terms, and Applicant's own descriptive use of the slogan on its website, reveal that the proposed mark conveys the superiority of Applicant's software for mobile devices or "app," in that it is claimed to be the "best" application "to date," or developed thus

far.[3] This is not disputed. "Applicant concedes that one of the connotations is laudatory in that it is a claim that it excels other (sic) apps currently available." Applicant's Motion for Reconsideration; *see also*, Applicant's Appeal Brief at 5-6 ("Generally speaking, Applicant's goods can be categorized as a dating app. Applicant naturally believes that its app is distinctive within that category and therefore is superior to other dating apps. In that sense, the first meaning of the applied-for mark is laudatory."). It is settled that laudatory terms, such as "best" which attribute superiority to the identified goods, are merely descriptive. *In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001); *In re Boston Beer Co. L.P.*, 198 F.3d 1370, 53 USPQ2d 1056, 1058 (Fed. Cir. 1999).

Applicant argues, however, that its slogan is a "double entendre" having a "second connotation," specifically "the suggestive connotation that Applicant's software will lead users to successfully find dates and to successfully manage their dating life." Applicant's Appeal Brief at 6. We do not agree that this "second connotation" constitutes a "double entendre" so much as it is merely a more specific laudatory claim about Applicant's "app." Nor do we agree that any "double entendre" is sufficient to make the slogan registrable.

Indeed, no matter which connotation we consider, the slogan is laudatory. It either conveys that Applicant's app is superior to, in Applicant's words, "other apps currently available," or that Applicant's app is superior to all other dating apps.[4]

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[3] The definite article "the" has no source-identifying significance in Applicant's slogan. *See*, *In re The Place Inc.*, 76 USPQ2d 1467, 1468 (TTAB 2005).

[4] In fact, Applicant's identification of goods indicates that the slogan would be used for "applications … for organizing … dating." *See generally*, *In re Taylor & Francis*

Because the mark is laudatorily descriptive under either the first, more general connotation of all apps released "to date" or thus far, or the second, more specific connotation of all dating apps, it is merely descriptive.

Furthermore, even assuming that the second more specific connotation is in fact substantively different than the first, and that the slogan is therefore a true "double entendre," the second meaning remains merely descriptive. By Applicant's admission, it intends to use its slogan with a "dating app," and the second meaning of the slogan is laudatorily descriptive of an app which helps users "to date." As Applicant explains, its "software will lead users to successfully find dates and to successfully manage their dating life." Applicant's Appeal Brief at 6. Accordingly, the second meaning of Applicant's slogan is not suggestive, as no thought or imagination is required to determine, in the context of a dating application, that THE BEST APP TO DATE conveys that Applicant's dating application is superior to other dating applications. Indeed, "to the extent [Applicant's proposed mark] does present two meanings they are both merely descriptive of the [goods] in that both asserted meanings refer to the customers' needs being met by the provision of the appropriate capabilities/qualities." *In re RiseSmart, Inc.*, 104 USPQ2d 1931 1934 (TTAB 2012); *see also*, TMEP § 1213.05(c) (2014) ("If all meanings of a 'double

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(Publishers) Inc., 55 USPQ2d 1213, 1215 (TTAB 2000) (PSYCHOLOGY PRESS & Design found merely descriptive of nonfiction books in the field of psychology, in part because the applicant's "identification of goods expressly states that the series of non-fiction books upon which applicant uses its mark are 'in the field of psychology.' The word PSYCHOLOGY therefore is merely descriptive of the subject matter of applicant's books, as identified in the application ….").

entendre' are merely descriptive in relation to the goods, then the mark comprising the 'double entendre' must be refused registration as merely descriptive.").

To the extent that Applicant's slogan is "inventive and cleverly-constructed," or that its second meaning is conveyed through "unusual phraseology," as Applicant argues, that does not mean that the slogan is not merely descriptive. At bottom, Applicant's slogan remains laudatorily descriptive of its dating app, and the evidence reveals that others have a need to describe apps, including dating apps, as "the best" available or of a certain type. "Likewise, the fact that applicant may be the first and/or only entity using the phrase [THE BEST APP TO DATE] is not dispositive where, as here, the term unequivocally projects a merely descriptive connotation." *In re Sun Microsystems, Inc.*, 59 USPQ2d 1084, 1087 (TTAB 2001). As we stated in finding BRAND NAMES FOR LESS merely descriptive of retail store services in the clothing field:

> In an environment where consumers are accustomed to the use by merchants of similar informational phrases, we believe that consumers are not likely to view applicant's slogan as a service mark but rather as a merchandising slogan using common ordinary words merely to convey information about applicant's services … Such a highly descriptive and informative slogan should remain available for other persons or firms to use to describe the nature of their competitive services.

In re Melville Corp., 228 USPQ 970, 971-71 (TTAB 1986).[5]

Conclusion

[5] In this regard, it is worth noting that dictionary.com's definition of "app" includes, as an example of how the term is used, "the **best GPS apps** for your iPhone." Office Action of February 5, 2013 (emphasis supplied).

While Applicant is correct that we must resolve doubt in its favor, here we have no doubt. On this record, it is clear that consumers immediately understand, upon seeing the slogan THE BEST APP TO DATE in connection with a dating app, that the app is claimed to be superior to other apps, including dating apps, in the marketplace. Furthermore, the evidence reveals that consumers are interested in the "best apps" in various fields, so much so that there is an app which itself curates the "best apps" for its users. Accordingly, Applicant's competitors should, like Applicant, be free to claim that their apps are also superior. *In re Boston Beer Co., L.P.*, 47 USPQ2d 1914, 1920-21 (TTAB 1998), *aff'd*, 198 F.3d 1370, 53 USPQ2d 1056 (Fed. Cir. 1999) ("These words, as well as such other expressions as 'Best Car in America,' 'Best Hotel in the State' and 'Best Restaurant in Town,' for example, are slogans which can be referred to as mere 'puffery.' Such claims of superiority should be freely available to all competitors in any given field to refer to their products or services ….").

Decision: The refusal to register is affirmed.