

This Opinion is Not a
Precedent of the TTAB

Mailed: October 30, 2014

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Flageoli Classic Limited, LLC
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Serial No. 85811333
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Daphne Sheridan Bass of Law Offices of Daphne Sheridan Bass,
for Flageoli Classic Limited, LLC.

Paul Moreno, Trademark Examining Attorney, Law Office 103,
Michael Hamilton, Managing Attorney.

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Before Bucher, Wellington and Hightower,
Administrative Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

Flageoli Classic Limited, LLC (“Applicant”) seeks registration on the Principal Register of the mark **The Egg** (*in standard character format*) for “facial toning machines for cosmetic use” in International Class 10.¹

The Trademark Examining Attorney has refused registration of Applicant’s mark under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the

¹ Application Serial No. 85811333 was filed on December 27, 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.

ground that Applicant's mark is merely descriptive of a characteristic of applicant's identified goods in that it simply describes the shape or form of Applicant's facial toning machines for cosmetic use.

After the Trademark Examining Attorney made the refusal final, Applicant appealed to this Board. We affirm the refusal to register.

I. Preliminary matter

Applicant attached copies of third-party registrations to its reply brief, which registration copies had not previously been submitted. Under our Trademark Rules, the record in an application should be complete prior to the filing of an appeal. 37 C.F.R. § 2.142(d). Inasmuch as this new evidence and arguments were submitted in an untimely manner, we have not considered these tardy submissions. *See In re Luxuria s.r.o.*, 100 USPQ2d 1146, 1147-48 (TTAB 2011); *In re Giovanni Food Co.*, 97 USPQ2d 1990, 1990-91 (TTAB 2011); *In re Van Valkenburgh*, 97 USPQ2d 1757, 1768 n.32, 1769 (TTAB 2011); and TBMP §§ 1203.02(e), 1207.01 (2014).²

II. Analysis

A term is merely descriptive if it immediately conveys knowledge of a quality, feature, function, or characteristic of the products it identifies. *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). Determining the descriptiveness of a mark is done in relation to an applicant's

² We hasten to add that our considering these registrations would not have changed the result herein. These registrations had disclaimers of the word "Egg" or had marks where the word "Egg" was a unitary part of a slogan, and one listed mark was registered under Section 2(f) of the Act.

identified goods or services, the context in which the mark is being used, and the possible significance the mark would have to the average purchaser because of the manner of its use or intended use. *See In re Chamber of Commerce of the U.S.*, 102 USPQ2d at 1219 (citing *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)). Descriptiveness of a mark is not considered in the abstract. *Bayer*, 82 USPQ2d at 1831. In other words, the question is whether someone who knows what the products are will understand the mark immediately to convey information about them. *In re MBNA America Bank N.A.*, 340 F.3d 1328, 67 USPQ2d 1778, 1780 (Fed. Cir. 2003).

The Trademark Examining Attorney made the following evidence of record:

egg (noun) ...

2. Something having the ovoid shape of an egg.

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The Examining Attorney provided several screen-prints from the Internet about Applicant's **Serious Skincare** Facial Toning System having text and images such

as "Handheld units store inside **egg-**

shaped divider,"⁴ and "this device includes

two hand-held, **egg-shaped** probes that

are gently pressed to the skin."⁵



³ Houghton Mifflin, <http://education.yahoo.com/reference/dictionary/entry/egg> as accessed by the Trademark Examining Attorney on March 18, 2013.

⁴ <http://www.ebay.com/itm/Serious-Skincare-Facial-Toning-System-WHITE-SILVER-new-/310548829237> as accessed by the Trademark Examining Attorney on March 18, 2013.

⁵ <http://www.skinstore.com/serious-skincare-tools.aspx>, <http://www.hsn.com/products/>, and <http://www.shopzilla.com/skin-care-products/>, as accessed by the Trademark Examining Attorney on September 2, 2013. At no point does Applicant contradict the Trademark

The Trademark Examining Attorney also provided examples of third-party vendors of skin care and other cosmetics products having “egg-shaped” features:

Egg Shape **Intelligent** Waterproof Treatment Head Face Lift Ultrasonic Facial Massager⁶



The **beautyblender** sponge is a simple egg-shaped non-disposable sponge for applying make-up and skin-care treatments that has a dome-like shape allowing for easy contouring of the nose and under-eye areas.⁷



Buy **Bronnley** Bath Soaps - Bronnley Egg Shaped Soap with Decorative Tin 100g/3.5oz Gold⁸



Applicant criticizes the dictionary definition as being circular, i.e., defining an “egg” as something having “the ovoid shape of an egg.” Moreover, Applicant argues that the oval shape of the device is not a “significant” characteristic of this cosmetic tool.

As argued by the Trademark Examining Attorney, a word which describes the form or shape of a product falls under the proscription of Section 2(e)(1) of the Trademark Act. *Scanwell Laboratories, Inc. v. Department of Transp., Federal Aviation Administration*, 181 F.2d 1385, 179 USPQ 238 (CCPA 1973) (**V-RING**

Examining Attorney’s implicit finding that these **Serious Skincare** products originate with Applicant.

⁶ http://www.alibaba.com/product-detail/Egg-Shape-Intelligent-Waterproof-Treatment-Head_730427131.html, as accessed by the Trademark Examining Attorney on September 2, 2013.

⁷ <http://www.b-glowing.com>, as accessed by the Trademark Examining Attorney on September 2, 2013.

⁸ <http://www.shopzilla.com/skin-care-products/>, as accessed by the Trademark Examining Attorney on September 2, 2013.

merely descriptive of directional antennas, the primary components of which were shaped in the form of a “v” and a “ring”); *In re Walker Manufacturing Co.*, 359 F.2d 474, 149 USPQ 528 (CCPA 1966) (**CHAMBERED PIPE** merely descriptive of an exhaust system consisting of a series of small tuning chambers); *J. Kohnstam, Ltd. v. Louis Marx & Co.*, 280 F.2d 437, 126 USPQ 362 (CCPA 1960) (**MATCHBOX SERIES** merely descriptive of toys sold in boxes having the size and appearance of matchboxes); *In re Gagliardi Bros., Inc.*, 218 USPQ 181 (TTAB 1983) (**BEEFLAKES** merely descriptive of frozen, thinly sliced beef); *In re H.U.D.D.L.E.*, 216 USPQ 358 (TTAB 1982) (**TOOBS**, the phonetic equivalent of the word “tubes,” merely descriptive of bathroom and kitchen fixtures in the shape of tubes); *Levi Strauss & Co. v. Plushbottom & Peabody, Ltd.*, 212 USPQ 296 (TTAB 1981) (**STRAIGHTS** merely descriptive of straight legged jeans); *In re Ideal Industries, Inc.*, 134 USPQ 416 (TTAB 1962) (**WING NUT** apt descriptive term for electrical connectors having winged projections for leverage while screwing); *In re Zephyr American Corp.*, 124 USPQ 464 (TTAB 1960) (**V-FILE** merely descriptive of card filing device in which the opening between the cards was in the form of a “v”).

In the case at bar, Applicant and a third-party manufacturer/merchant of a facial massaging system refer to components of their respective machines as being “egg-shaped.”⁹ This is a feature that is described in the textual materials and displayed in the visual imagery. Additionally, the advertisement for the

⁹ See footnotes 4 and 5, and attendant text at 3, *supra*. In its reply brief, Applicant concedes “That Applicant ... use[s] the phrase ‘egg-shaped’ to advertise the shape of a cosmetic tool ...”

beautyblender sponge points out the utility of the dome-like shaped tip as allowing for ease of use around the nose and areas under the eyes. On the other hand, inasmuch as **Bronnley** appears to make bars of soap in many different shapes, the fact that it advertises an “egg-shaped” soap is not relevant to our consideration herein.

As to the definite article “the,” this word does not add any source-indicating significance to the composite. See *In re The Place Inc.*, 76 USPQ2d 1467, 1468 (TTAB 2005) (holding **THE GREATEST BAR** merely descriptive of restaurant and bar services; “the definite article THE ... add[s] no source-indicating significance to the mark as a whole”); *Conde Nast Publ’ns Inc. v. Redbook Publ’g Co.*, 217 USPQ 356, 357, 360 (TTAB 1983) (holding **THE MAGAZINE FOR YOUNG WOMEN** a “common descriptive or ‘generic’ name of a class or type of magazine” and incapable of indicating source; “[t]he fact that the slogan also includes the article ‘The’ is insignificant. This word cannot serve as an indication of origin, even if applicant’s magazine were the only magazine for young women.”); *In re The Computer Store, Inc.*, 211 USPQ 72, 74-75 (TTAB 1981) (holding **THE COMPUTER STORE** merely descriptive of, and the common descriptive name for, computer-related services); see also *In re G. D. Searle & Co.*, 143 USPQ 220 (TTAB 1964), *aff’d*, 360 F.2d 1966, 149 USPQ 619 (CCPA 1966) (holding “**THE PILL**” a common descriptive name for pharmaceutical

preparations in tablet form, and thus does not serve as an indicator of source or origin in applicant).

III. Conclusion

Accordingly, we conclude that the record supports a *prima facie* showing by the Trademark Examining Attorney that the term **The Egg** describes sufficiently significant components of Applicant's facial massaging systems as being "egg-shaped." This term immediately and directly informs prospective purchasers and users of the shape or form of Applicant's goods and therefore we find that the mark is merely descriptive under Section 2(e)(1).

Decision: The refusal to register Applicant's mark **The Egg** under Section 2(e)(1) of the Lanham Act is hereby affirmed.