

**This Opinion is Not a
Precedent of the TTAB**

Mailed: May 12, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

—————
Trademark Trial and Appeal Board
—————

In re Blunt Wrap U.S.A., Inc.
—————

Serial No. 85938790
—————

Brett A. North of Garvey Smith Nehrbass & North LLC,
for Blunt Wrap U.S.A., Inc.

Chrisie Brightmire King, Trademark Examining Attorney, Law Office 109,
Dan Vavonese, Managing Attorney.

—————
Before Taylor, Greenbaum and Goodman,
Administrative Trademark Judges.

Opinion by Greenbaum, Administrative Trademark Judge:

Blunt Wrap U.S.A., Inc. (“Applicant”) seeks registration on the Principal
Register of the mark ERILLO (in standard characters) for

Tobacco products and accessories, namely electronic
cigarettes and electronic cigars in International Class 34.¹

¹ Application Serial No. 85938790 was filed on May 21, 2013, based upon Applicant’s allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act.

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 ground that the mark is merely descriptive of the identified goods.

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

I. Evidentiary Issue

The Examining Attorney has objected to Applicant's submission of third-party registrations with its appeal brief as untimely. "The record in the application should be complete prior to the filing of an appeal. The Trademark Trial and Appeal Board will ordinarily not consider additional evidence filed with the Board by the appellant or by the examiner after the appeal is filed." 37 C.F.R. § 2.142(d). *See In re Giovanni Food Co.*, 97 USPQ2d 1990, 1990-91 (TTAB 2011). The applicant has the responsibility to make sure that the record is complete prior to filing a notice of appeal. *In re Van Valkenburgh*, 97 USPQ2d 1757, 1768 n.32, 1769 (TTAB 2011). Accordingly, the objection is sustained, and the evidence attached to Applicant's brief has been given no consideration. *See, e.g., In re Fiat Group Marketing & Corporate Communications S.p.A.*, 109 USPQ2d 1593, 1596 (TTAB 2014) (examining attorney's objection to applicant's submission of registrations with appeal brief sustained).²

² The Board's practice is not to take judicial notice of third-party registrations. *See* TBMP § 1208.02 (2014) and authorities cited therein.

II. Applicable Law

“A mark is merely descriptive if it ‘consist[s] merely of words descriptive of the qualities, ingredients or characteristics of the goods or services related to the mark.” *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 MBNA America Bank N.A.*, 340 F.3d 1328, 67 USPQ2d 1778, 1780 (Fed. Cir. 2003). The determination of whether a mark is merely descriptive is whether it immediately conveys information concerning a significant quality, characteristic, function, ingredient, attribute or feature of the product or service with which it is used, or intended to be used. *In re Engineering Systems Corp.*, 2 USPQ2d 1075 (TTAB 1986); *In re Bright-Crest, Ltd.*, 204 USPQ 591 (TTAB 1979). It is not necessary, in order to find a mark merely descriptive, that the mark describe each feature of the goods or services, only that it describe a single, significant ingredient, quality, characteristic, function, feature, purpose or use of the goods or services. *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987).

Where a mark consists of multiple words, the mere combination of descriptive words does not necessarily create a nondescriptive word or phrase. *In re Associated Theater Clubs Co.*, 9 USPQ2d 1660, 1662 (TTAB 1988). 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. *Oppedahl*, 71 USPQ2d at 1371. However, a mark comprising a combination of merely descriptive components is registrable if the combination of terms creates a unitary mark with a

unique, nondescriptive meaning, or if the composite has a bizarre or incongruous meaning as applied to the goods or services. *See In re Colonial Stores Inc.*, 394 F.2d 549, 157 USPQ 382 (CCPA 1968); *In re Shutts*, 217 USPQ 363 (TTAB 1983); and TMEP § 1209.03(d) (January 2015).

A mark is suggestive if, when the goods or services are encountered under the mark, a multi-stage reasoning process, or the utilization of imagination, thought or perception, is required in order to determine what attributes of the goods or services the mark indicates. *See, e.g., In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978). As often has been stated, there is a thin line of demarcation between a suggestive mark and a merely descriptive one, with the determination of which category a mark falls into frequently being a difficult matter involving a good measure of subjective judgment. *See, e.g., In re Atavio*, 25 USPQ2d 1361 (TTAB 1992), and *In re TMS Corp. of the Americas*, 200 USPQ 57, 58 (TTAB 1978). The distinction, furthermore, is often made on an intuitive basis rather than as a result of precisely logical analysis susceptible of articulation. *See In re George Weston Ltd.*, 228 USPQ 57, 58 (TTAB 1985). The examining attorney bears the burden of showing that a mark is merely descriptive of the identified goods or services. *See In re Merrill, Lynch, Pierce, Fenner, and Smith Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987).

III. Analysis

The Examining Attorney contends that “rillo is merely a type of cigar and an erillo is another word for electronic cigar,”³ similar to e-cigarette for an electronic cigarette, and e-cigar for an electronic cigar, and therefore registration must be refused. In support of the refusal, the Examining Attorney attached to the September 28, 2013 Office Action the following evidence:

- A dictionary definition of the letter “e” from *Cambridge Dictionaries Online* as an abbreviation for “electronic.”
- A search result from the ChaCha.com search engine showing the following answer to the question “what is a rillo?”: “a small narrow cigar which typically has the tobacco emptied so it can be refilled with weed to make a blunt.”
- An entry for “rillo” from The Rice University Neologisms Database explaining that a “rillo” is

[a] really long and thin cigarette, wrapped in tobacco leaves, so it is somewhat classified as a little cigar, called a cigarillo. A rillo is when one takes a cigarillo and cuts it down the middle to take out the tobacco. After one takes out the tobacco they then replace it with cannabis. After the cannabis is added, then the rillo is closed back up using saliva. After the rillo is closed back up, the rillo is smoked like a regular cigarette.

In addition, the Examining Attorney attached to the December 14, 2013 Final Office Action the following evidence:

³ 8 TTABVUE 7. Citations to Applicant’s and the Examining Attorney’s briefs in this opinion also include citations to the TTABVUE docket entry number, and the electronic page number where the argument appears. TTABVUE is the Board’s electronic docketing system.

- A printout from the grasscity.com website, which the Examining Attorney describes in her brief as follows: “Grasscity.com posts a community that responds to their preferences of ‘blunt wraps or real cigars/rillos.’”⁴
- A copy of the sole use-based third-party registration that includes the word “rillo” or “rillos” on the Trademark Register: PT RILLOS for “cigars,” with the word “rillos” disclaimed.⁵
- Internet evidence consisting of screenshots from several websites in which “e-cigarette” and “e-cigs” refer to electronic cigarettes, and “e-cigar” refers to electronic cigars.
- A definition of “cigarillo” as “a small narrow cigar” from the <education.yahoo.com> dictionary.
- A printout from <answers.yahoo.com> where the “Best Answer” to the question whether a cigar, cigarillo, water bong or pipe “will give me a better high” discusses the pros and cons of each, and uses the terms “blunt” and “rillo” synonymously.

There is no question that the letter “e” is a commonly recognized prefix abbreviation for the word “electronic,” and that Applicant’s goods are electronic cigarettes and electronic cigars. The question is whether the term “rillo” is merely descriptive of the identified goods such that when the terms are combined, the result is a merely descriptive term. *See In re SPX Corp.*, 63 USPQ2d 1592 (TTAB 2002) (E-AUTODIAGNOSTICS merely descriptive of an electronic engine analysis system consisting of a hand-held computer and related computer software); *In re Styleclick.com Inc.*, 57 USPQ2d 1445 (TTAB 2000) (E-FASHION merely descriptive of software for consumer use in shopping via the Internet and of electronic retailing services); TMEP § 1209.03(d). We cannot make such a finding based on the record evidence.

⁴ 8 TTABVUE 5-6.

⁵ Registration No. 3908223 registered on January 18, 2011.

In addition to being few in number, the above-mentioned “definitions” and uses of the term “rillo” are from websites that provide no source attribution, and therefore have little probative value. Moreover, there is no information in the record as to whether the general population has been exposed to any of the websites, and, in the case of the ChaCha.com and Rice University Neologisms Database, whether anyone other than the Examining Attorney has searched for the term “rillo.” The term “rillo” appears to be a slang term for a cigarillo with altered contents, and as noted above, a cigarillo is defined as “a small, thin cigar,” but that is not enough evidence on which to base a finding that the mark ERILLO is merely descriptive of electronic cigars and electronic cigarettes.

In addition, Applicant argues that “electronic cigarettes and electronic cigars do not include the use of tobacco, and consumers of Applicant’s goods would not be inclined to empty and refill the product, as described by the Examining Attorney’s evidence of ‘rillo.’”⁶ We agree. Even if we were to consider “rillo” and “cigarillo” to be legally equivalent terms, we do not understand on this record how an electronic cigar or electronic cigarette, which include neither tobacco nor cannabis (the defining ingredients of a “rillo”), could be altered to include those ingredients. The mark ERILLO therefore is incongruous when used on Applicant’s “tobacco products and accessories, namely electronic cigarettes and electronic cigars.”

In making this determination, we are aware of the increasing prevalence of e-cigarettes and e-cigars in the marketplace; an “e-cigarillo” does not defy

⁶ 9 TTABVUE 7.

imagination. However, on this record, it is not readily apparent how the term ERILLO directly and immediately conveys information about a characteristic or feature of the identified goods. Rather, as discussed above, we view Applicant's mark as incongruous in the context of Applicant's goods. We further find that purchasers of Applicant's goods would be required to engage in a multi-stage reasoning process to understand that ERILLO could refer to "tobacco products and accessories, namely electronic cigarettes and electronic cigars." This is not to say that, on a different record, we might not reach a different result.

Decision: The refusal to register under Section 2(e)(1) of the Trademark Act is reversed.