

This Opinion is not a
Precedent of the TTAB

Mailed: July 22, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

—
Trademark Trial and Appeal Board
—

In re Masco Corporation of Indiana
—

Serial No. 86037351
—

Edgar Zarins of Masco Corporation,
for Masco Corporation of Indiana.

Kevin G. Crennan, Trademark Examining Attorney, Law Office 113,
Odette Bonnet, Managing Attorney.

—
Before Seeherman, Bucher and Hightower,
Administrative Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Masco Corporation of Indiana has appealed from the final refusal of the Trademark Examining Attorney to register DOWNPOUR in standard characters as a trademark for “plumbing products, namely showerheads and handheld showers.”¹ Registration has been refused pursuant to Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that Applicant’s mark is merely descriptive of its identified goods.

—
¹ Application Serial No. 86037351, filed August 14, 2013, based on Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b) (intent-to-use).

A term is merely descriptive if it immediately conveys knowledge of a significant quality, characteristic, function, feature or purpose of the goods or services 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 identified goods and/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, 963-64, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)). Descriptiveness of a mark is not considered in the abstract. *In re Bayer Aktiengesellschaft*, 82 USPQ2d at 1831. In other words, the question is whether someone who knows what the goods or services are will understand the mark to convey information about them. *DuoProSS Meditech Corp. v. Inviro Medical Devices Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012).

In support of the refusal, the Examining Attorney has made of record dictionary definitions for "downpour": "a sudden heavy rain"; and "a pouring or streaming downward; *especially*: a heavy rain,"² and webpages from third-party websites, including the following:

The PlumbingSupply.com website uses the title "Downpour Shower Heads," under which is the text "Downpour showerheads, also called rainshower shower heads, come in many sizes and styles, but all offer a rain-like showering experience. A soft, gentle, but thorough spray is

² Merriam-Webster, www.merriam-webster.com, November 27, 2013 Office action, p. 2.

what you will enjoy with a downpour showerhead from PlumbingSupply.com. In addition, “The Ultimate Downpour Shower Head” appears above a photograph of a showerhead, and below the photo is the statement, “This ultimate downpour shower head features” Other pages from this website list as features of a showerhead, “Luxury 8” diameter downpour head.”³

The Home Depot website offers a “Glacier Bay Drenching 1-Spray 8 in. Downpour Showerhead in Chrome.” The Product Overview states that “The showerhead’s 8 in. downpour nozzles provide a soothing, drenching spray,” and a list of features includes, “8 in. downpour showerhead provides a soothing, drenching spray.”⁴

The homeclick website features a “Hansgrohe 28484 Axor Uno 7” Downpour Showerhead,” and also refers to it as a “Hansgrohe Axor Uno 7” Downpour Showerhead”⁵

A description of products from Building Design + Construction states, under “Full-coverage shower,” “Shower panel can be adjusted for height, providing greater coverage and comfort for users of varying height. A great hospitality application, the shower system incorporates a seven-inch downpour showerhead, a two-spray hand shower and six adjustable body sprays, plus an accessory shelf.”⁶

The bioBidet website features an “Oasis Shower Head SSL” and lists, under “Features & Functions,” “Soft downpour of luxury spa spray”⁷

The Frontgate website, which has the subtitle “Outfitting America’s Finest Homes Since 1991,” offers a “Rain Downpour Round Showerhead” and uses the text, “You’ll welcome a drenching downpour every morning with this remarkable Speakman showerhead. Twelve patented spray nozzles deliver 96 individual...”⁸

Goodman’s website offers a “Waterpik Jp-140 Aquafall Downpour 3.5 Showerhead in Chrome,” and describes the showerhead as “Waterpik

³ www.plumbingsupply.com, November 27, 2013 Office action, pp. 6-14.

⁴ www.homedepot.com, November 27, 2013 Office action, pp. 15-16.

⁵ www. homeclick.com, November 27, 2013 Office action, pp. 27-28.

⁶ www.bednetwork.com, July 3, 2014 Office action, p. 9.

⁷ www.biobidet.com, July 3, 2014 Office action, p. 13.

⁸ www.frontgate.com, July 3, 2014 Office action, p. 17.

JP-140 AquaFall downpour showerhead with adjustable arm and pivoting head. Chrome finish. Full coverage downpour spray from 36 spray channels gives you a great shower experience....”⁹

A customer review for the 8” EcoP rainshower showerhead, appearing on the Moen website, states that it has “A solid well-made head. Whether 4” or 8” selection, water pressure out of involved jets feels uniform. Head delivers a pleasing overhead downpour while conserving some of the full water line supply.”¹⁰

The foregoing evidence, and particularly the first four of the excerpts from third-party websites quoted above, show that, in some instances, DOWNPOUR is used by competitors as a term for a type of showerhead, in the same manner as “rainshower” is used to identify a type of showerhead. The remaining four excerpts show that DOWNPOUR is used to describe a characteristic of showerheads, namely, that the water comes down from the showerhead in the manner of a downpour. In both cases, consumers would immediately understand that DOWNPOUR, when used for showerheads and handheld showers, describes at the very least a characteristic of these goods, i.e., the manner in which water flows from them. As a result, the mark is merely descriptive of the goods.

Applicant argues that the dictionary definitions cited by the Examining Attorney show that the “pouring or streaming downward” is exemplified by a heavy rain, and references only some type of precipitation, rather than a showering fixture. Applicant’s position that its mark only suggests the notion of creating the feel of a heavy rain with its showerhead might be persuasive if the evidence from the various websites did not show that DOWNPOUR has come to be used, as noted, as

⁹ www.goodmans.net, July 3, 2014 Office action, p. 20.

¹⁰ www.moen.com, July 3, 2014 Office action, p. 27.

the name for a type of showerhead or as a term to describe the water flow from the showerhead.

Applicant downplays the significance of the Internet evidence by asserting that its application has been pending since August 2013, and that Applicant's adoption of the mark has been followed in the marketplace "by competitors wishing to trade off the reputation of applicant" Brief, 4 TTABVUE 2. However, although Applicant may have filed its application in August 2013, it did so on the basis of intent-to-use, and as far as the record shows, Applicant has not yet begun to use its mark. In fact, in its May 23, 2014 response to the first Office action regarding the Examining Attorney's request for information about Applicant's goods, Applicant stated that its "product line has not yet been introduced." At that point, many third parties were using DOWNPOUR as the name of a type of showerhead; the first four excerpts set forth above were made of record on November 27, 2013. Thus, we are not persuaded that the third-party usage in a descriptive manner is an attempt to trade off Applicant's reputation; Applicant has not shown that it had or indeed has any reputation for the mark DOWNPOUR for the identified goods.

Applicant also argues that the descriptiveness of its mark should be determined as of the filing date of its application, at which point Applicant claims that its mark was "a unique identifier of applicant's goods." Brief, 4 TTABVUE 2. In view of the fact that Applicant had not begun to use its mark as of the filing date of its application, we cannot conclude that Applicant's mark identified its goods at that time. Moreover, Applicant has cited to no authority for its view that descriptiveness

of a mark must be determined as of the filing date of an application. Trademark Act Section 2(e)(1) provides in part that a mark is registrable unless, “when used on or in connection with the goods of the applicant [it] is merely descriptive ... of them.” It does not say that “if at the time of filing the application,” the mark was merely descriptive. Further, Section 2(f) makes provision for the registration of a formerly merely descriptive mark if it acquires distinctiveness. That section makes it clear that the applicant may rely on activities by which a mark could acquire distinctiveness even if those activities occur after the filing date of the application. (“The Director may accept as prima facie evidence that the mark has become distinctive ... proof of substantially exclusive and continuous use thereof as a mark by the applicant ... for the five years before the date **on which the claim of distinctiveness is made.**” (emphasis added)).

Even if we accepted Applicant’s contention, the record contains an article from PlumbingSupply dated February 9, 2012, more than one year prior to the filing of Applicant’s application. It is entitled “Downpour Shower Heads,” and includes the following sentences:

What is a downpour shower head?

To put it simply, a downpour style shower head, sometimes called a rain fall shower head, is a shower head designed to imitate falling rain.

...

Downpour shower heads come in two main styles....

...

Our team members here at PlumbingSupply.com seem to be split on the opinion of downpour shower heads.¹¹

¹¹ <http://theplumbingsupplyco.wordpress.com>, November 27, 2013 Office action, pp. 24-25.

And the review of the 8" EcoP rainshower showerhead, quoted above, ("Head delivers a pleasing overhead downpour") is dated June 14, 2012, again, more than a year prior to the filing of Applicant's application.

Applicant's final argument is that DOWNPOUR "does not provide an immediate indication of the goods associated with the mark," because "there is no common association between the term DOWNPOUR and showering products." Brief, 4 TTABVUE 2. However, as we have previously said, the Internet evidence shows that DOWNPOUR is a recognized term to describe the type of showering experience provided by the showerheads and hand-held showers.

Decision: The refusal to register Applicant's mark DOWNPOUR is affirmed.