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Precedent of the TTAB

Mailed: July 14, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Jeremy C. Southgate

Serial No. 86537663

Jeremy C. Southgate, appearing *pro se*.

Andrea Hack, Trademark Examining Attorney, Law Office 108,
Andrew Lawrence, Managing Attorney.

Before Wellington, Ritchie and Heasley,
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Jeremy C. Southgate (“Applicant”) seeks registration on the Principal Register of
the mark

SOUND STREAM

for:

Delivery of digital music by electronic transmission; Providing access to
digital music websites on the Internet; Providing multiple-user access to

data on the Internet in the nature of music entertainment, news reporting, television series, feature film in International Class 38.¹

The wording “SOUND STREAM” has been disclaimed and the mark is described in the application as “consist[ing] of the words ‘SOUND STREAM,’ stylized as follows: the leading alliterated letter (‘S’) is gold, and the following alliterated letter (‘S’) is red; vowels (‘OU’ and ‘EA’) are red, and the remaining consonants are blue.” The colors are also claimed as features of the mark.

The Examining Attorney has refused registration on the basis that the mark is merely descriptive of Applicant’s services, and stylization and color feature elements are insufficient for purposes of making the mark, as a whole, inherently distinctive, under Section 2(e)(1) of the Trademark Act (“the Act”), 15 U.S.C. § 1052(e)(1).

After the Examining Attorney made the refusal final, Applicant filed a series of six requests for reconsideration, all denied by the Examining Attorney, before appealing to this Board. Applicant and the Examining Attorney have filed appeal briefs, including a reply brief from Applicant. For the reasons given in this decision, we affirm the refusal to register.

Whether the wording SOUND STREAM is merely descriptive

A mark is deemed to be merely descriptive within the meaning of Section 2(e)(1) if it immediately conveys knowledge of a quality, feature, function, characteristic or purpose of the goods or services for which it is used. *In re Bayer Aktiengesellschaft*,

¹ Application Serial No. 86537663, filed on February 17, 2015, is based on Applicant’s allegation of a bona fide intent to use the mark in commerce, pursuant to Section 1(b) of the Trademark Act.

488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007) (citing *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987)); *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978).

Here, there is ample evidence showing that the wording SOUND STREAM is merely descriptive of Applicant's services. Particularly, the Examining Attorney provided the following definition:²

streaming sound

Part of the *Multimedia and graphics glossary*:

Streaming sound is sound that is played as it arrives. The alternative is a sound recording (such as a WAV file) that doesn't start playing until the entire file has arrived. Support for streaming sound may require a [plug-in](#) player or come with the [browser](#). Leading providers of streaming sound include Progressive Networks' RealAudio and Macromedia's Shockwave for Director (which includes an animation player as well).

The record also includes third-party usage showing that the wording SOUND STREAM is merely descriptive of Applicant's services, including the "delivery of digital music by electronic transmission." For example, the Samsung website offers tips and "Options for Streaming Sound," with its devices:³

² From the WhatIs.com website, www.whatis.techtarget.com; attached to Office Action issued on December 22, 2015, p. 2.

³ Attached to Office Action issued on December 22, 2015, p. 5.

Options for Streaming Sound



[Pin it](#) [Tweet](#) [1](#)

Whether you want to stream audio for your [computer](#) to your wireless speakers or from a [tablet](#) to an HDTV, you basically have two options today: Bluetooth or Wi-Fi®. (Wires and cables can also be used, but these technically

In addition, the Examining Attorney attached a copy of an article “MPEG-H Audio Brings New Features to TV and Streaming Sound,” discussing new technology in the field of streaming audio.⁴

Contrary to Applicant’s arguments, we find no “double entendre”⁵ present in the wording SOUND STREAM nor can we conclude that there is only a “suggestive

⁴ *Id.* p. 5.

⁵ In his brief, Applicant quotes TMEP Section 1213.05(c) for the proposition that a mark comprising a double entendre will not be refused registration as merely descriptive. However,

nature of Applicant's mark."⁶ Rather, the record overwhelmingly shows the merely descriptive nature of the wording. Consumers, viewing the mark in the context of services that involve the electronic transmission of digital music, will immediately understand the term SOUND STREAM as describing the purpose or precise nature of those services. Although the component terms are usually verbalized in opposite order, *i.e.*, one can stream music or stream sound, there is no doubt that SOUND STREAM is the combination of two merely descriptive terms in relation to the services, and the composite has no other non-descriptive meaning. *See, e.g., In re Putman Publishing Co.*, 39 USPQ2d 2021 (TTAB 1996) (FOOD & BEVERAGE ON-LINE merely descriptive of online news and information services in the food processing industry). Hence, the wording of the proposed mark is merely descriptive.

Whether the mark, in its entirety, is distinctive

The remaining issue is whether the stylization and color selection of the lettering in the mark creates a separate and inherently distinctive commercial impression apart from the words themselves, such that the mark as a whole is not merely descriptive. There are situations where the literal components of a mark are combined in a distinctive design or display such that it is possible to disclaim those literal components and still have a mark that is registrable as a whole. *In re Jackson Hole Ski Corporation*, 190 USPQ 175, 176 (TTAB 1976). This can occur where the design features of the proposed mark create an impression on purchasers separate

Applicant does not explain what possible other meaning(s) the mark may possess other than its descriptive nature.

⁶ Applicant's Brief, 4 TTABVUE 18.

and apart from the descriptive meaning of the words, or where the display has acquired distinctiveness. *In re Guilford Mills Inc.*, 33 USPQ2d 1042, 1043 (TTAB 1994). Because there is no claim of acquired distinctiveness before us,⁷ our focus rests solely on whether elements of the mark, apart from the descriptive wording, create a separate and inherently distinctive impression. Our determination in this regard involves subjective matter that is based on what a consumer's first impression of the mark is likely to be. *In re Grande Cheese Co.*, 2 USPQ2d 1447, 1449 (TTAB 1986); *In re Jackson Hole Ski Corporation*, 190 USPQ at 176 (“[D]istinctive display’ is in the eyes of the beholder, and usually depends upon the viewer's first impression of the matter in question.”).

In making the argument that his mark is inherently distinctive, Applicant has relied on the slight alliteration in its mark, both terms beginning with the letter S, as well as the color features of the proposed mark. In addition, Applicant has set forth an argument that the term STREAM in its mark connotes a “stream of water” and that this is “readily apparent” based on the colored letters:⁸

That “SOUND STREAM” as applied-for qualifies as a double entendre (incongruity exception to mere descriptiveness) may be established by the

⁷ Applicant claimed in his application, as initially filed, that “the word SOUND and the colors red, blue, and gold, has (sic) become distinctive of the goods/services as evidenced by the ownership on the Principal Register for the same mark for related goods or services of U.S. Registration No(s). 4606004.” In the first Office Action, issued on May 23, 2015, the Examining Attorney commented that the claim of acquired distinctiveness is “unnecessary because the literal and design elements in the mark appear to be inherently distinctive rendering the mark eligible for registration on the Principal Register without proof of acquired distinctiveness.” She further noted that any acquired distinctiveness claim based on the Reg. No. 4606004 is inappropriate because that registration covers the mark SOUND SPARK STUDIOS which is not the legal equivalent of the involved mark. Applicant eventually withdrew the claim of acquired distinctiveness. See response dated June 22, 2016.

⁸ Applicant's request for reconsideration filed on July 19, 2016.

following: (a) "STREAM" connotes a river, creek, or continuous flow of a *tangible* substance such as water or air, which is not descriptive of *intangible* services like delivery of digital music by electronic transmission or provision of information via global computer networks. Such an understanding of *tangible*, distinctive "stream" is readily apparent from (b) the applied-for Mark's unique highlighting of vowels ("OU", "EA") and consonants ("S", "ND", "STR", "M"), for speech consists of a continuous flow of air (and air is a *tangible* substance) from the lungs, vowels, which are disrupted by a closed-mouth, consonants -- but, the letter "S", although a closed-mouth consonant, is analogous to a vowel in the respect that it consists of a somewhat open, unimpeded, continuous flow of air via a "hiss" or sibilance; hence, its design is special. Applicant has attached evidence that demonstrates the secondary non-descriptive meaning of the applied-for mark as hereby invoked. Because the applied-for Mark suggests the physical, mechanical, tangible facets of "sound, " it elicits mental pause/a multi-step reasoning process and surpasses mere technical descriptiveness of the more particular, intangible services as now identified.

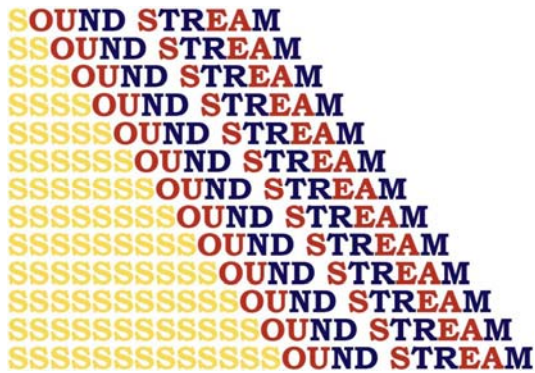
In support of this argument, Applicant attached Google search engine printouts showing images of streams as well documents (shown below) that Applicant contends shows the "secondary meaning of the applied-for Mark SOUND STREAM demonstrating that 'the leading alliterated letter ('S')' (see Mark Description) in gold can 'lead' consumers to (1) trace a border/circuit encompassing or (2) follow a flow/vector designating the origin of, rather than merely describing, goods and services. e.g."ssssssssssoundstreamssssssssssoundstreamssssssssssoundstream."

⁹

⁹ *Id.*



and



Applicant's arguments are not persuasive. The aforementioned images showing potential (or actual) usage of Applicant's mark is irrelevant inasmuch as the images depict the applied-for mark with significant additional design elements. We are only concerned with the mark as depicted in the application's drawing page and the commercial impression formed thereby.

We further disagree with Applicant's contention that the mark is distinctive based on a "unique" coloring feature of the vowels and consonants in the words SOUND STREAM. While it is evident that Applicant has given considerable thought into his selection of colors, we cannot agree that the "design is special." Rather, consumers are likely to perceive the colored letters as an arbitrary and simplistic choice of colors intended to be merely ornamental. Ultimately, we find that the color selection in the

applied-for mark fails to create a separate commercial impression. See TMEP § 807.14(e)(ii) (Apr. 2017) (“Marks that Include Color and Other Elements”).

As to Applicant’s argument that the term STREAM may conjure a water stream, we find this implausible given the context of Applicant’s services. When viewing the mark in the context of electronic transmission of sound (or “streaming”) services, consumers are likely to think of the very same services recited in the application, not creeks or water streams. The fact that a term may have other meanings in disparate, unrelated contexts is not controlling. *In re Franklin County Historical Society*, 104 USPQ2d 1085, 1087 (TTAB 2012); *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979); TMEP § 1209.03(e).

Finally, we address Applicant’s assertion that the Examining Attorney “conceded on the record that ‘the literal and design elements in the mark appear to be inherently distinctive rendering the mark eligible for registration on the Principal Register without proof of acquired distinctiveness.’” Applicant refers to a statement made by the Examining Attorney in the first Office Action (see Note 7). However, the Examining Attorney, in subsequent Office Actions,¹⁰ acknowledged that she mistakenly included that one sentence and that it was “at complete odds” with the remainder of the first Office Action.¹¹ We agree with the Examining Attorney that

¹⁰ See, e.g., Office Action issued on October 3, 2016 wherein the Examining Attorney explains that “the line was mistakenly included when the examining attorney failed to delete it from a form paragraph used to explain how applicant’s Section 2(f) claim of acquired distinctiveness was insufficient because it was based on registrations for substantially different marks for goods insufficiently related to the services in the present application.”

¹¹ 6 TTABVUE 11, referring to Office Action issued on May 23, 2015.

this error was an oversight and, in any event, “[t]he USPTO has a duty to issue valid registrations and has broad authority to correct errors made by examining attorneys and other USPTO employees.” TMEP § 706.01.

Applicant refers to previous decisions where the Board found that proposed marks had distinctive design elements and the Examining Attorneys’ refusals were reversed. The Examining Attorney has, as well, cited to decisions involving whether a particular stylization or design element in a mark creates a separate and distinct commercial impression and thus carries it out of the merely descriptive refusal realm. We have reviewed these decisions, as well as several others not cited by Applicant and the Examining Attorney. *See In re Sadoru Grp. Ltd.*, 105 USPQ2d 1484 (TTAB 2012) (reviewing stylizations found not registrable on Principal Register) *cited in In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1639 (Fed. Cir. 2016).

We do not discuss these decisions herein, but note that the Board strives for consistency and it behooves us to have a sense of the stylizations that were (or were not) found to create separate and inherently distinctive impressions. Based on our review, and keeping in line with previous decisions, we find the stylization and choice of color in Applicant’s proposed mark to be “relatively ordinary.” *In re Bonni Keller Collections, Ltd.*, 6 USPQ2d 1224, 1227 (TTAB 1987). Here, Applicant’s presentation of its mark is in an unremarkable font style. The only feature not entirely ordinary about the presentation of the terms SOUND STREAM is the fact that they are shown in three different, albeit fairly common, primary colors – yellow, red and blue. As discussed, the color of each letter would appear to consumers as arbitrary and merely

ornamental. We do not conclude that this feature creates such an impression that it would convert the merely descriptive, non-registrable term into an inherently distinctive one.

Conclusion

Because we have found the wording SOUND STREAM to be merely descriptive of Applicant's services and there is no additional inherently distinctive element present in the mark, we find the entire mark is merely descriptive.

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