

This Opinion is Not a  
Precedent of the TTAB

Mailed: May 8, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board

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*In re Arkive Information Management LLC*

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Serial No. 87487874

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Erik M. Pelton of Erik M. Pelton & Associates PLLC  
for Arkive Information Management LLC.

Paul A. Moreno, Trademark Examining Attorney, Law Office 103,  
Stacy Wahlberg, Managing Attorney.

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Before Mermelstein, Ritchie and Adlin, Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

Applicant Arkive Information Management LLC seeks a Principal Register registration for the proposed mark ARKIVE, in standard characters, for:

Storage of paper documents, files, and records; physical storage of electronically-stored data or documents; relocation, namely, transportation of goods in the nature of documents, computer hardware and software for business records and other records; Facsimile retrieval services for business in International Class 39; and

Conversion of business data and other documents from physical to electronic media; Electronic scanning of business records, visual material, documents, photographic images, artwork, paintings, and printed materials; Computer programming for others in the fields of organization, maintenance, storage, management, retention and destruction of business records, vital records,

computer data, audiotapes, medical records, films, master recordings, archival materials and records; Leasing computer facilities, namely, provision of disaster recovery computer facilities; computer services, namely, data backup and recovery services; Computer security threat analysis for protecting data; data migration; data restoration; Computer services, namely, cloud computing backup services; Computer disaster recovery planning; Providing internet based data capture services that enable storage, retention, and retrieval of data in International Class 42.<sup>1</sup>

The Examining Attorney refused registration under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that the proposed mark is merely descriptive of the identified services. After the refusal became final, Applicant appealed and Applicant and the Examining Attorney filed briefs.

### **I. The Record and Arguments**

The Examining Attorney argues that “Applicant’s mark is a novel spelling of, and the phonetic equivalent to, the word ‘archive.’” 6 TTABVue 6 (Examining Attorney’s Appeal Brief at 5). Thus, he relies on an American English dictionary which defines “archive,” when used as a noun, as “a place where public records, documents, etc. are kept.” According to the same definition, when used as a verb, “archive” means “to place or keep (records, papers, etc.) in or as in archives.” September 18, 2017 Office Action TSDR 8 (printout from “collinsdictionary.com”). The Examining Attorney concludes that because “Applicant is providing the service of storing and archiving

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<sup>1</sup> Application Serial No. 87487874, filed under Section 1(a) of the Trademark Act, based on first use in November 2016 and first use in commerce in December 2016.

documents and data ... applicant's mark merely describes the field and subject matter of applicant's services." 6 TTABVUE 6-7 (Examining Attorney's Appeal Brief at 5-6).

Applicant does not dispute the definitions of "archive" upon which the Examining Attorney relies. Applicant contends, however, that its mark is a "creative double entendre." 4 TTABVUE 8 (Applicant's Appeal Brief at 7).

ARKIVE is a creative combination and play on the words "ark" and "archive" to create a unique unitary word that has multiple meanings, any of which may be interpreted and impressed differently by the consumer. Specifically, Applicant's mark plays on the word "ARK," which is in reference to the Ark of the Covenant and Noah's Ark. Applicant's mark, therefore, conveys that its services are as secure as the ark that Noah built for himself, his family, and hundreds of animals, who were sheltered from the flood. Likewise, the term "ARK" in Applicant's mark may be interpreted as referencing the safety and protection of Applicant's file sharing and data storage services. Alternatively, consumers may be under the impression that Applicant's data sharing and cloud computing backup services are as secure and sturdy as the Ark of the Covenant, a gold-covered wooden chest with a lid cover described [in] the Book of Exodus as containing the two stone tablets of the Ten Commandments.

*Id.* at 9-10 (Applicant's Appeal Brief at 8-9) (citations omitted). Applicant points out that "ark" is defined as: "a boat or ship held to resemble that in which Noah and his family were preserved from the Flood"; and "the sacred chest representing to the Hebrews the presence of God among them." March 16, 2018 Office Action Response TSDR 11 (printout from "merriam-webster.com"). Moreover, the Merriam-Webster dictionary entry goes on to explain that "the figurative meaning of *ark* as something that affords protection or safety" derives from Noah's Ark. *Id.* at 13.

## II. Analysis

The record leaves no doubt that ARKIVE is merely descriptive, because it immediately conveys knowledge of a quality, feature, function, characteristic or purpose of the services for which it is used. *In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007) (quoting *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987)); *In re Abcor Dev.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). Specifically, ARKIVE, which looks and is spelled almost the same, and sounds exactly the same, as the word “archive,” immediately conveys Applicant’s: “storage of paper documents, files and records” and “physical storage of electronically-stored data or documents” in Class 39; and its “computer programming for others in the fields of ... storage ... retention ... of business records, vital records, ... archival materials and records,” “computer services, namely, data backup and recovery services,” “computer services, namely, cloud computing backup services” and “providing internet based data capture services that enable storage, retention, and retrieval of data” in Class 42. It is settled that if a proposed mark is descriptive of any of the services identified in a particular class, registration is properly refused. *See In re Stereotaxis Inc.*, 429 F.3d 1039, 77 USPQ2d 1087, 1089 (Fed. Cir. 2005) (quoting *In re Richardson Ink Co.*, 511 F.2d 559, 185 USPQ 46, 48 (CCPA 1975) (“registration should be refused if the mark is descriptive of any of the goods [or services] for which registration is sought.”)); *In re Quik-Print Copy Shop, Inc.*, 616 F. 2d 523, 205 USPQ 505, 507 (CCPA 1980).

While ARKIVE and the word “archive” are not identical, as the Examining Attorney points out, Applicant’s slight misspelling of “archive” as its phonetic

equivalent ARKIVE does not make ARKIVE non-descriptive. *Nupla Corp. v. IXL Mfg. Co.*, 114 F.3d 191, 42 USPQ2d 1711, 1716 (Fed. Cir. 1997) (“Nupla’s mark [CUSH-N-GRIP], which is merely a misspelling of CUSHION-GRIP, is also generic as a matter of law”); *In re Quik-Print*, 205 USPQ at 507 n.9 (finding QUIK-PRINT merely descriptive of printing and copying services, stating “[t]here is no legally significant difference here between ‘quik’ and ‘quick.’”); *In re Carlson*, 91 USPQ2d 1198, 1203 (TTAB 2009) (“applicant’s applied-for mark, URBANHOUSING in standard character form, will be immediately and directly perceived by consumers as the equivalent of the admittedly descriptive term URBAN HOUSING, rather than as including the separate word ZING”); *In re Ginc UK Ltd.*, 90 USPQ2d 1472, 1475 (TTAB 2007) (“The generic meaning of ‘togs’ is not overcome by the misspelling of the term as TOGGS in applicant’s mark. A slight misspelling is not sufficient to change a descriptive or generic word into a suggestive word.”).

Applicant’s argument that ARKIVE is a double entendre is not well-taken. “A double entendre is registrable only if the second, non-descriptive meaning would be readily apparent to the consumer from the mark itself.” *In re S. Malhotra & Co., AG*, 128 USPQ2d 1100, 1105 (TTAB 2018); *In re Calphalon* 122 USPQ2d at 1163 (“The multiple interpretations that mark an expression a ‘double entendre’ must be associations the public would make fairly readily ....”). Here, as in *Calphalon*, Applicant’s mark “does not readily evoke the alternative meaning claimed by

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Applicant, in the manner in which marks such as SUGAR & SPICE<sup>2</sup> and NO BONES ABOUT IT<sup>3</sup> readily evoked associations with familiar matter from the American English vernacular, and is thus not a double entendre.” *In re Calphalon*, 122 USPQ2d at 1164. *See also In re Ethnic Home Lifestyles Corp.*, 70 USPQ2d 1156, 1158-59 (TTAB 2003) (“[I]n the context of applicant’s services, it is unlikely that viewers or potential viewers of applicant’s programs will discern a double entendre in the word ‘accents.’ To have a double entendre, both meanings must be readily apparent, but the meaning suggested by applicant is not apparent upon seeing the mark in connection with the services.)”

Moreover, there is no evidence (or reason to believe) that consumers would construe ARKIVE as a reference to Noah’s Ark, the Ark of the Covenant or for that matter any other type of “ark.” To the contrary, Applicant’s use of the mark makes clear that ARKIVE conveys the same descriptive meaning as “archive,” as illustrated by the following excerpts from Applicant’s website:

#### How Can **ARKIVE Data Protection** Help?

Quality data protection provides backup and security of your organization’s most important digital and media assets. Data is important for the functionality of businesses, governments, and associations, and must remain secure to mitigate data losses and not having enough onsite staff to protect your data can lead to devastating costs. To assist you with data protection, ARKIVE can help you with the following:

- N **Off-site tape storage and rotation**
- N **Tape archiving**
- N **Data conversion and restoration**
- N **Cloud services**

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<sup>2</sup> *See In re Colonial Stores Inc.*, 394 F.2d 549, 157 USPQ 382 (CCPA 1968).

<sup>3</sup> *See In re Nat’l Tea Co.*, 144 USPQ 286 (TTAB 1965).

### Cloud Services, Backup & Disaster Recovery Solutions

ARKIVE offers state of the art cloud backup services and disaster recovery solutions to help your business stay secure. Cloud backup solutions allow enterprises to store data and computer files with a storage service provider instead of storing data locally on a physical disk. Relying on cloud services is beneficial when your organization is under massive constraints and lacks the in-house resources to manage large swaths of data. As a business owner, you need partner with a vendor with enough flexibility with regards to storing and encrypting your assets and data, and we have the skills and expertise to back up your most important information.

April 17, 2018 Office Action TSDR 7, 9. While Applicant’s website does reference “disaster recovery,” which was arguably the purpose of Noah’s Ark, and “security,” which is arguably the purpose of the Ark of the Covenant, the connection between “disaster recovery” and “security” on the one hand and Noah’s Ark or the Ark of the Covenant on the other is not by any means “readily apparent” from Applicant’s proposed mark, especially where the letters “a-r-k” are used only as part of the term ARKIVE in standard characters, and Applicant uses the phonetically identical, common and descriptive or generic term “archive” (as well as equivalent terms such as “backup”) repeatedly throughout its website. Similarly, Applicant’s website refers to its services as “storage solutions,” as shown below:

<https://myarkive.com/arkive-services/arkive-storage/> 04/17/2018 08:32:40 AM



### Keep Your Information Secure and Accessible with ARKIVE Storage

Addressing the daunting task of handling growing volumes of highly sensitive business information and documents is one of the greatest challenges businesses face. Business information is the cornerstone of business growth and the many business decisions you will make. ARKIVE understands the importance of harnessing the power of strong, secure information management to reduce storage costs and maximize your business revenue. We have secure storage solutions to keep your information easily accessible and safe.

ARKIVE'S highly experienced and qualified information management professionals will help you secure and store your business documents. Whether you need to meet the latest standards in compliance or completely declutter your office space, we'll provide the absolute highest standard in customer service, top-of-the-line storage facilities and transport vehicles, experience, and technology to help you achieve tangible results.

*Id.* TSDR 19. In other words, it is clear that ARKIVE is being used to refer to the “storing” of data or materials, rather than Noah’s Ark or the Ark of the Covenant.<sup>4</sup> “[T]he meaning suggested by applicant is not apparent upon seeing the mark in connection with the services.” *In re Ethnic Home Lifestyles*, 70 USPQ2d at 1159.

### III. Conclusion

Because the record reveals that Applicant’s proposed mark ARKIVE is nothing more than a slight misspelling of and the phonetic equivalent to “archive,” the term is merely descriptive of a characteristic, feature, function or purpose of Applicant’s identified services.

**Decision:** The refusal to register Applicant’s proposed mark under Section 2(e)(1) of the Trademark Act is affirmed.

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<sup>4</sup> In any event, even if, as Applicant argues, the letters “a-r-k” are perceived as a reference to the “safety and protection” of Noah’s Ark, or as indicating that Applicant’s services are “as secure and sturdy as the Ark of the Covenant,” these alternative meanings may be merely descriptive as well. In fact, Applicant’s website touts the safety, protection and security Applicant’s identified services provide. In other words, “to the extent [ARKIVE] does present two meanings,” they may both be merely descriptive of Applicant’s services. *In re RiseSmart Inc.*, 104 USPQ2d 1931, 1934 (TTAB 2012).