

This Opinion is Not a
Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Minky Couture

Serial No. 87589711

Bretton L. Crockett of TechLaw Ventures, PLLC for Minky Couture.

Andrew Leaser, Trademark Examining Attorney, Law Office 117,
Hellen M. Bryan-Johnson, Managing Attorney.

Before Kuhlke, Wolfson, and Coggins,
Administrative Trademark Judges.

Opinion by Wolfson, Administrative Trademark Judge:

Minky Couture (“Applicant”) seeks registration on the Principal Register of the mark MINKY COUTURE (in standard characters, “Minky” disclaimed) for “Baby blankets; Bed blankets; Children’s blankets, all made using minky fabric” in International Class 24.¹

¹ Serial No. 87589711, filed August 30, 2017 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a) on the basis of Applicant’s alleged first use and first use in commerce of the mark at least as early as June 30, 2010.

The Examining Attorney refused registration of the application under Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1), on the ground that the mark “immediately and directly conveys to consumers that Applicant offers designer blankets made of minky fabric,” and because “Applicant has failed to meet its burden in establishing that the proposed mark has acquired distinctiveness.” Examining Attorney’s Brief, 9 TTABVUE 11 and 5-6.² After the Examining Attorney issued a final descriptiveness refusal, Applicant filed a Request for Reconsideration, which was denied. Both Applicant and the Examining Attorney have filed briefs, and Applicant filed a Reply brief.

I. Evidentiary Matters

In its opening Brief, Applicant quoted from a law review article identified in a footnote, purporting to support its position that “social media followings and ‘likes’ are distinguishable from ordinary website visits as they require additional action on the part of a customer or potential customer.” Applicant’s Reply brief, 4 TTABVUE 11. Neither the law review article nor the quote taken from the article are properly of record. We note the Board has long held that the inclusion of hyperlinks is not sufficient to introduce the underlying information into the record, and likewise, while the information contained in the article is static, unlike a hyperlink, Applicant’s mere reference to the article does not make it of record. Moreover, as with other traditional

² Citations to the briefs refer to TTABVUE, the Board’s online docketing system. *See Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014). Specifically, the number preceding “TTABVUE” corresponds to the docket entry number, and any number(s) following “TTABVUE” refer to the page number(s) of the docket entry where the cited materials appear. Citations to the examination record refer to the entries in the USPTO Trademark Status and Document Retrieval system (TSDR), by document, date and page number.

forms of evidence, Applicant's reference to text from the article, provided for the first time with its brief, is untimely. Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d); *see In re Inn at St. John's, LLC*, 126 USPQ2d 1742, 1744 (TTAB 2018); *In re Fiat Grp. Mktg. & Corp. Commc'ns S.p.A.*, 109 USPQ2d 1593, 1596 (TTAB 2014).

Accordingly, we give no consideration to the law review reference included in Applicant's brief or take judicial notice of the quote taken from the article. *See, e.g., In re Sela Prods., LLC*, 107 USPQ2d 1580, 1584 (TTAB 2013) ("However, regardless of the fact that Fed. R. Evid. 201(c)(2) requires that the party desiring a tribunal to take judicial notice supply the material to the tribunal, it is simply common sense to do so; an applicant cannot simply contend that certain statements were made in material that has not been provided, and expect the Board to consider the contention established."). As for taking judicial notice of Applicant's assertion of a difference between social media sites and websites, although we may agree that "social media followings and likes" require affirmation action on the part of the viewer, we are not convinced that simply because someone follows or "likes" a social media platform, they are a potential consumer, or that such actions are inherently different from ordinary website visits where users take additional action to pursue their interest in the advertised goods or services. We also point out that the number of likes or followers should be put into context, and that user comments appearing on an applicant's social media sites may provide insight into consumers' perceptions of the mark.

II. Analysis

The Examining Attorney first argues that Applicant has admitted that MINKY COUTURE is merely descriptive by virtue of the mark's registration on the Supplemental Register for the same goods for which Applicant presently seeks registration on the Principal Register ("Baby blankets; Bed blankets; Children's blankets comprised of minky fabric.").³ Although registration of a mark on the Supplemental Register constitutes an admission that the mark was merely descriptive at the time of registration (i.e., July 3, 2012), it is not an admission that the mark has not acquired distinctiveness. Trademark Act § 27, 15 U.S.C. § 1095. Accordingly, Applicant is not precluded by its earlier registration from seeking a Principal Register registration for MINKY COUTURE. *See In re Future Ads LLC*, 103 USPQ2d 1571, 1574 (TTAB 2010) ("Registration on the Supplemental Register is prima facie evidence that, at least at the time of registration, the registered mark was merely descriptive. ... However, prima facie evidence can be rebutted."). Here, the Examining Attorney points to Applicant's prior Supplemental Registration as prima facie evidence that the proposed mark is merely descriptive and Applicant seeks to rebut that evidence.

The Examining Attorney also argues that Applicant's mark has not acquired distinctiveness. The Examining Attorney properly considered Applicant's amendment to claim acquired distinctiveness to be a concession that the proposed

³ Registration No. 4169444 issued July 3, 2012, Section 8 declaration accepted. Applicant claimed ownership of this registration in the application.

mark is not inherently distinctive. Applicant's amendment to claim acquired distinctiveness was not made in the alternative, but rather was an unconditional Section 2(f) claim. December 17, 2018 Request for Reconsideration. *See Cold War Museum, Inc. v. Cold War Air Museum, Inc.*, 586 F.3d 1352, 92 USPQ2d 1626, 1629 (Fed. Cir. 2009) ("Where an applicant seeks registration on the basis of Section 2(f), the mark's descriptiveness is a nonissue; an applicant's reliance on Section 2(f) during prosecution presumes that the mark is descriptive."); *Yamaha Int'l Corp. v. Hoshino Gakki Co. Ltd.*, 840 F.2d 1572, 6 USPQ2d 1001, 1005 (Fed. Cir. 1988). Nonetheless, in its brief, Applicant argues both that its mark is not merely descriptive and that it has acquired distinctiveness. The Examining Attorney also treated the claim as an alternative one in his brief. Accordingly, we have considered the claim of acquired distinctiveness as having been made in the alternative. *See In re Ride, LLC*, 2020 USPQ2d 39644, (TTAB 2020) (construing the applicant's Section 2(f) claim in response to a failure to function refusal as being "in the alternative" despite its original claim of acquired distinctiveness not having been so conditioned); *In re Binion*, 93 USPQ2d 1531, 1538 (TTAB 2009).

A. Whether Applicant's Mark is Merely Descriptive

A mark is "merely descriptive" within the meaning of Trademark Act Section 2(e)(1) "if it immediately conveys information concerning a feature, quality, or characteristic of the goods or services for which registration is sought." *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1709 (Fed. Cir. 2017) (citing *In re Bayer A.G.*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)); *In re Yarnell Ice Cream, LLC*, 2019 USPQ2d 265039, 5 (TTAB 2019). "A mark need not recite each feature of

the relevant goods or services in detail to be descriptive, it need only describe a single feature or attribute.” *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (citation and internal quotation omitted).

As noted above, the Examining Attorney relies on Applicant’s prior Supplemental Registration as prima facie evidence that its proposed mark is merely descriptive. In addition, the Examining Attorney argues that Applicant’s mark is merely descriptive because it is made up of two merely descriptive terms that have been combined in a manner which results in a combination that is itself merely descriptive. Applicant does not contest the Examining Attorney’s characterization of “minky” as descriptive of the material from which Applicant’s blankets are made but disagrees that the word “couture” is merely descriptive due to the “wide range of uses for the term “COUTURE.” 7 TTABVue 5. Applicant contends that the combination MINKY COUTURE is suggestive and thus inherently distinctive.

Both Applicant and the Examining Attorney submitted definitions of the term “couture.” Applicant’s definition, from Merriam-Webster, focuses on the word as a noun, that is, the business of designing fashionable custom-made women’s clothing. June 11, 2018 Response to Office Action, TSDR 2. The Examining Attorney’s definition, from Dictionary.com, focuses on the word as an adjective, that is, as “being, having, or suggesting the style, quality, etc., of a fashion designer; very fashionable.” The definition of “couture” used as a noun is defined in Dictionary.com as “the occupation of a couturier; dressmaking and designing.” Given these nuances, we find the word “couture” may be perceived as referring to the business of designing

fashionable clothes and related articles, especially those made to order. Based on its definition alone, “couture” would not be viewed as referring to Applicant’s baby, bed, and children’s blankets, none of which are clothing or related articles. Our analysis does not stop there, however.

Third-party registrations can be used to demonstrate that a term may have a commonly accepted meaning. “Such third party registrations show the sense in which the word is used in ordinary parlance and may show that a particular term has descriptive significance as applied to certain goods or services.” *Institut National Des Appellations D’Origine v. Vintners Int’l Co.*, 958 F.2d 1574, 22 USPQ2d 1190, 1196 (Fed. Cir. 1992). To support its assertion that “couture” is merely descriptive, the Examining Attorney submitted copies of three third-party registrations for marks containing the term “couture” that have been registered for, inter alia, “bed blankets” wherein the term “couture” has been disclaimed.⁴ These are: JUICY COUTURE (Reg. No. 3941099); SUITE COUTURE (Reg. No. 4114112); and CUDDLE COUTURE (Reg. No. 4502516).⁵

The Examining Attorney also submitted copies of excerpts from six online retailer websites that use “couture” descriptively in advertising: Hastens advertises “for the ultimate in bed couture”; Bearington Baby Collection shows a “Mink Couture

⁴ A fourth registration has been cancelled. A cancelled registration is not evidence of anything except that it issued; any benefits conferred by the registration, including the evidentiary presumptions afforded by Section 7(b) of the Trademark Act were lost when the registration expired. *See, e.g., Action Temporary Servs. Inc. v. Labor Force Inc.*, 870 F.2d 1563, 10 USPQ2d 1307, 1309 (Fed. Cir. 1989) (“[A] cancelled registration does not provide constructive notice of anything”); *Kemi Organics, LLC v. Gupta*, 126 USPQ2d 1601, 1606 (TTAB 2018).

⁵ Attached to December 11, 2107 Office Action at TSDR 13-22.

Blanket” (currently discontinued); Keiki Co. sells “luxury couture throws”; The Tot sells a “couture crib sheet”; and Posh Tots sells “couture baby bedding.” June 15, 2018 Office Action, TSDR 3-7. Bella Notte sells baby sheets, advertising that “the end result is an offering of couture textiles for everyday living.” January 7, 2019 Office Action, TSDR 4. Six third-party online retailers selling blankets use “Couture” as part of their company name: Classy Cameo Couture, Komfy Couture, Luxe House of Couture, Patricia’s Couture, Wool Couture, and Zandino Couture. July 22, 2019, Reconsideration Letter, TSDR 2-15. The term couture is used to describe the goods as being of a fashionable quality and characteristic.

Applicant’s mark as a whole combines two merely descriptive terms and the resulting combination does not have a non-descriptive meaning. The evidence supports a finding that Applicant’s mark MINKY COUTURE immediately informs the consumer that the goods are made from minky fabric and have a fashionable quality, and therefore is merely descriptive.

C. Whether Applicant’s Mark has Acquired Distinctiveness

“Under Section 2(f) of the Trademark Act, matter that is merely descriptive under Section 2(e)(1) may nonetheless be registered on the Principal Register if it ‘has become distinctive of the applicant’s goods . . . in commerce.’” *In re Virtual Indep. Paralegals, LLC*, 2019 USPQ2d 111512, *9-10 (TTAB 2019) (quoting 15 U.S.C. § 1052(f)). “An applicant seeking registration of a mark under Section 2(f) bears the ultimate burden of establishing acquired distinctiveness.” *Id.* (citing *In re La. Fish Fry Prods., Ltd.*, 797 F.3d 1332, 116 USPQ2d 1262, 1264 (Fed. Cir. 2015)). “To show

that a mark has acquired distinctiveness, an applicant must demonstrate that the relevant public understands the primary significance of the mark as identifying the source of a product or service rather than the product or service itself.” *Virtual Indep. Paralegals*, 2019 USPQ2d at *11 (quoting *In re Steelbuilding.com*, 415 F.3d 1293, 75 USPQ2d 1420, 1424 (Fed. Cir. 2005)).

1. The Degree of Descriptiveness of the Applied-For Mark

We begin by assessing the degree of descriptiveness of Applicant’s mark because that bears on the sufficiency of the evidence required to prove acquired distinctiveness. *See, e.g., Royal Crown Co. v. Coca-Cola Co.*, 892 F.3d 1358, 127 USPQ2d 1041, 1048 (Fed. Cir. 2018) (“[H]igher levels of descriptiveness require a more substantial showing of acquired distinctiveness.”); *Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1378 (Fed. Cir. 2018) (same). “The amount and character of evidence required to establish acquired distinctiveness depends on the facts of each case and the nature of the mark sought to be registered.” *In re Gen. Mills IP Holdings II, LLC*, 124 USPQ2d 1016, 1018 (TTAB 2017). Accordingly, the Board “must make an express finding regarding the degree of [a] mark’s descriptiveness on the scale ranging from generic to merely descriptive, and it must explain how its assessment of the evidentiary record reflects that finding.” *Royal Crown*, 127 USPQ2d at 1048.

The MINKY COUTURE mark as a whole conveys the immediate idea of fashionable blankets made to order from minky fabric. Applicant’s website shows that its blankets can be customized from fabric selected by the consumer. December 11,

2017 Office Action, TSDR 11. The term “minky” is disclaimed in recognition of its generic nature; it merely names the type of fabric from which Applicant’s blankets are made. Nonetheless, the combination of “minky” and “couture” is not highly descriptive. “Couture” typically signifies clothing fashion, as evidenced by the dictionary definitions. The use of the term in the marketplace and in three registrations shows that the term has a meaning in connection with goods other than clothing; that is, that blankets can be fashionable, made by design, or stylish. But the mark is not so highly descriptive in connection with the goods at issue that an elevated showing of acquired distinctiveness is required.

2. Evidence of Acquired Distinctiveness

Applicant has used MINKY COUTURE continuously and substantially exclusively since at least as early as June 30, 2010. *See* Sandi Hendry Declaration, attached to December 17, 2018 Request for Reconsideration, TSDR 7 (“First Hendry Decl.”). Ms. Hendry, Applicant’s founder and owner, testified that she has grown her initially home-based business into a chain of five physical retail stores located across Utah as well as into an online business. *Id.* at 8. Applicant submitted an example of one such location’s storefront:



Exhibit 5 to Second Hendry Declaration, attached to July 8, 2019 Response to Office Action, TSDR 41 (“Second Hendry Decl.”).

Applicant’s goods are also sold in a third-party boutique in Atlanta, Georgia. First Hendry Decl., TSDR 10. In addition, Applicant partners with other companies in promotional drives; including furniture stores such as RC Willey and Mattress Warehouse. Second Hendry Decl., TSDR 15. For example:



Mattress Warehouse

Get a free Minky Couture blanket with purchase of select mattresses! Visit your local Mattress Warehouse for details! #minkycouture

Timeline Photos · Sep 11, 2017 ·

Id., Exhibit 6 at TSDR 45. Sales of MINKY COUTURE blankets have exceeded one million units. First Hendry Decl., TSDR 8. There are six sizes offered, four of which

have a sales price of over \$100 (ranging from \$69 for an infant size to \$249 for a monster size). Second Hendry Decl., TSDR 13.

The company's advertising budget for 2018 included \$50,000 for direct mail advertising; in 2017 it included \$14,000 for broadcast radio advertising. First Hendry Decl., TSDR 9. Four examples of billboards that have appeared near major interstate highways demonstrate Applicant's use of such advertising. *Id.* One such advertisement is shown below:



First Hendry Decl., Exhibit 4 at TSDR 29.

Applicant also uses television advertisements to promote its brand. Ms. Hendry testified that in 2017, during the NFL football season, Applicant advertised at least 83 times in NFL football game broadcasts. In 2018, Applicant “paid for multiple television advertisement to be broadcast around the 2018 Superbowl game, including an advertisement run during the Superbowl which was broadcast in the Intermountain West [region] by KSL TV.” *Id.* at 9.

Applicant's sales revenues in its first year were over \$500,000. Second Hendry Decl., TSDR 14. By 2018, revenues had increased to nearly \$15 million. *Id.* In recognition, Ms. Hendry was awarded an "Entrepreneur of the Year 2019 Utah Region Award." *Id.* at 13. Attached to her declaration are copies of two newspaper articles regarding the award and Applicant's business. *Id.*, Exhibit 5 at TSDR 32-39.

Applicant currently produces 6,000 to 8,000 blankets each month. *Id.* at 14. Applicant donates about 1,000 blankets each month through its associated charity organization, The Heart of Minky. *Id.* Blankets are donated to neonatal intensive care units. To date, blankets have been donated in 19 states. *Id.*

Applicant has a social media presence on Facebook and Instagram. Applicant's official Facebook page has over 100,000 "likes" and more than 100,000 "followers." Its Instagram account has more than 85,000 followers. First Hendry Decl., TSDR 9.

3. The Acquired Distinctiveness Factors

The considerations to be assessed in determining whether a mark has acquired distinctiveness can be described by the following six factors: (1) association of the mark with a particular source by actual purchasers (typically measured by consumer surveys); (2) length, degree, and exclusivity of use; (3) amount and manner of advertising; (4) amount of sales and number of customers; (5) intentional copying; and (6) unsolicited media coverage of the product embodying the mark. *Virtual Indep. Paralegals*, 2019 USPQ2d 111512 at *11. All six factors are to be weighed together in determining the existence of secondary meaning. *In re Tires, Tires, Tires Inc.*, 94 USPQ2d 1153, 1157 (TTAB 2009) ("On this list, no single factor is determinative.").

Factor One – There is no direct evidence of consumer recognition such as consumer surveys, customer declarations, or posts from Facebook or other social media expressing a potential or actual customer’s perception as to the source of “minky couture” blankets.

Factor Two - Applicant has been in business for nearly a decade, selling blankets under the mark, and Applicant’s use is substantially exclusive. On the other hand, a number of third parties also use the term “couture” to describe their business as being one selling designer or highly fashionable blankets or bedding.

Factor Three - Applicant’s advertising has been multi-leveled. Applicant utilizes social media as well as traditional forms such as print, radio and television broadcasting, but also more unusual avenues such as billboard advertising and partner promotions using Applicant’s blankets as sales incentives.

Factor Four - Sales have been steadily increasing and reached approximately \$15 million in 2018. Although the record does not contain specific customer numbers, the number of blankets sold averages 7,000 per year, with the average price of a blanket being about \$100.

Factor Five - There is no evidence of intentional copying.

Factor Six - A modest amount of unsolicited media coverage has been produced. Applicant’s founder/owner was recognized as a regional “Entrepreneur of the Year” and she has been interviewed in the news, where Applicant’s product embodying the mark was publicized.

Balancing the factors, we find that Applicant satisfied its burden of establishing that the term “MINKY COUTURE” has acquired distinctiveness among its target audience. Applicant’s showing of increasing sales over nearly a decade, its expansion to five retail outlets, as well as its multi-level advertising and unsolicited media recognition provide sufficient circumstantial evidence of acquired distinctiveness despite the absence of direct evidence of consumer recognition.

III. Conclusion

Applicant's mark MINKY COUTURE is merely descriptive of "Baby blankets; Bed blankets; Children's blankets, all made using minky fabric." However, Applicant has shown that the term has acquired distinctiveness.

Decision: The refusal to register the designation MINKY COUTURE is reversed.