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PRECEDENT OF THE TTAB

Mailed: August 4, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

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*In re MVN Entertainment L.P.*

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Serial No. 90047473  
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Glen L. Nuttall of Klein, O'Neill & Singh, LLP  
for MVN Entertainment L.P.

Tyler M. Seling, Trademark Examining Attorney, Law Office 112  
Renee Servance, Managing Attorney.

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

Opinion by Wolfson, Administrative Trademark Judge:

MVN Entertainment L.P. (“Applicant”) seeks registration on the Principal Register of the wording POWER PONY (in standard characters) for “Ride-on toys and accessories therefor; Rideable toy vehicles; Ride-on toys having a seating portion removably attached to an electrically powered wheeled device,” in International Class 28.<sup>1</sup>

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<sup>1</sup> Application Serial No. 90047473 was filed on July 10, 2020, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant’s assertion of a bona fide intent to use the mark in commerce.

The Trademark Examining Attorney 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 "POWER PONY" is merely descriptive of the goods identified in Applicant's application because the individual terms, and their composite result, merely describe a feature of Applicant's identified ride-on toys "and do not create a unique, incongruous, or nondescriptive meaning in relation to the goods." 8 TTABVUE 6.<sup>2</sup>

When the refusal was made final, Applicant appealed and requested reconsideration, which was denied. Applicant and the Examining Attorney filed briefs, and Applicant filed a Reply Brief. We affirm the refusal to register.

#### **I. Mere Descriptiveness – Applicable Law**

Section 2(e)(1) of the Trademark Act prohibits the registration of a mark which, when used on or in connection with the applicant's goods or services, is merely descriptive of them. "A term is merely descriptive if it immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used." *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (quoting *In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)); *see also In re TriVita, Inc.*, 783 F.3d 872, 114 USPQ2d 1574, 1575 (Fed. Cir. 2015); *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987).

Descriptiveness is not considered in the abstract; rather, it is analyzed in relation

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<sup>2</sup> Citations to the record are to the Trademark Status and Document Retrieval (TSDR) page in the prosecution history of Applicant's application. Citations to the briefs are to TTABVUE, the docket history system for the Trademark Trial and Appeal Board.

to an applicant's identified goods or services, "the context in which the [term] is being used, and the possible significance that the term would have to the average purchaser of the goods because of the manner of its use or intended use." *In re Bayer*, 82 USPQ2d at 1831. That a term may have other meanings in different contexts is not controlling. *Id.*

When two or more merely descriptive terms are combined, the determination of whether the composite mark also has a merely descriptive significance turns on whether the combination of terms evokes a new, non-descriptive commercial impression. "A mark comprising a combination of merely descriptive components is registrable only if the combination of terms creates a unitary mark with a non-descriptive meaning, or if the composite has a bizarre or incongruous meaning as applied to the goods or services." *In re Omniome, Inc.*, 2020 USPQ2d 3222 (TTAB 2019); *see also DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1758-9 (Fed. Cir. 2012) (SNAP SIMPLY SAFER merely descriptive of "medical devices, namely, cannulae; medical, hypodermic, aspiration and injection needles; medical, hypodermic, aspiration, and injection syringes"). Although a mark comprising more than one element must be considered as a whole and should not be dissected, we may consider the significance of each element separately in the course of evaluating the mark as a whole. *DuoProSS*, 103 USPQ2d at 1756-57 (noting that "[t]he Board to be sure, can ascertain the meaning and weight of each of the components that makes up the mark").

Evidence that a term is merely descriptive "may be obtained from any competent

source, such as dictionaries, newspapers, or surveys,” *In re Bayer*, 82 USPQ2d at 1831, as well as “labels, packages, or in advertising material directed to the goods [or services]...” *In re Mecca Grade Growers, LLC*, 125 USPQ2d 1950, 1953 (TTAB 2018) (quoting *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978)). It may also be obtained from Applicant’s own specimen of use and any explanatory text included therein. *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1710 (Fed. Cir. 2017); *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1565 (Fed. Cir. 2001).

## II. Analysis

The Examining Attorney contends that the phrase POWER PONY is merely descriptive because “[a] consumer that is aware of applicant’s goods would not require imagination to understand that the wording merely describes an electrically powered ride-on toy in the shape or form of a small horse.” Examining Attorney’s Brief, 8 TTABVUE 9. In support of this position, the Examining Attorney submitted the following:

- A definition taken from the AMERICAN HERITAGE online dictionary, defining “power” as meaning “operated with mechanical or electrical energy in place of bodily exertion.” October 27, 2020 Office Action, TSDR 2. (<https://www.ahdictionary.com/word/search.html?q=power>).
- A definition taken from Lexico.com, defining “pony” as “a horse of a small breed.” *Id.*, TSDR 6. (<https://www.lexico.com/en/definition/pony>).
- Web pages captured from various websites showing that “the wording ‘POWER’ or ‘POWERED’ is commonly used to describe electric-powered or battery-powered ride-on toys for children.” *Id.*, TSDR 1. Two of these websites offer battery-powered ride-on toys designed in the shape of a horse or pony:
  - Kid Trax offers a “battery-powered ride-on toy” in the shape of a pony that has “fully motorized eyes, ears, head, and wheels.”

*Id.*, TSDR 8.

- ECR4Kids offers a “battery-powered 12V mechanical horse” as the “perfect ride-on toy with wheels for boys and girls ages 3+ years old.” *Id.*, TSDR 10.

Applicant argues that the mark is “at best suggestive of the listed goods.” Appeal Brief, 6 TTABVUE 3. Specifically, Applicant contends that neither the word POWER nor the word PONY immediately describes a ride-on toy or rideable toy vehicle, and that there is an incongruity created when the two terms are juxtaposed. Applicant supports its position with copies of webpages from several industries.<sup>3</sup> Only one of the websites involves even somewhat relevant goods: a website offering toy action figures sold by “My Little Pony” under the trademark POWER PONIES.<sup>4</sup> The other sites show use of the wording “POWER PONY” for unrelated goods: a “hand-held threader for 12R dies”<sup>5</sup> and a small tractor;<sup>6</sup> as well as use of the word “PONY” for a lawnmower;<sup>7</sup> motorcycles;<sup>8</sup> and a type of classic subcompact car.<sup>9</sup> None of these latter references have any probative value. We are concerned here with whether the wording “POWER PONY” would immediately convey information to someone who

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<sup>3</sup> November 19, 2020, Response to Office Action, TSDR 4-13. Applicant also attached copies of 10 third-party registrations to its brief, to which the Examining Attorney has properly objected. Accordingly, we do not consider these registrations. Trademark Rule 2.142(d); *see also Rexall Drug Co. v. Manhattan Drug Co.*, 284 F.2d 391, 128 USPQ 114, 115 (CCPA 1960); *In re Quantum Foods Inc.*, 94 USPQ2d 1375, 1377 n.2 (TTAB 2010).

<sup>4</sup> *Id.*, TSDR 4.

<sup>5</sup> *Id.*, TSDR 7.

<sup>6</sup> *Id.*, TSDR 8.

<sup>7</sup> *Id.*, TSDR 9.

<sup>8</sup> *Id.*, TSDR 11.

<sup>9</sup> *Id.*, TSDR 13.

knows what the goods are, and not with the possible meanings of this wording in connection with other, unrelated goods. *See, e.g., In re Bayer*, 82 USPQ2d at 1831. *Cf. Century 21 Real Est. Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992) (“The relevant *du Pont* inquiry is “[t]he number and nature of similar marks in use *on similar goods*.”) (quoting *Weiss Assocs. v. HRL Assocs.*, 902 F.2d 1546, 14 USPQ2d 1840, 1842 (Fed. Cir. 1990) (emphasis in original); *In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1751-52 (Fed. Cir. 2017) (“Symbolic has not pointed to any record evidence to support a finding that multiple third parties use the mark I AM for the listed goods in its class 3 and 9 applications.”).

Nor does the POWER PONIES reference demonstrate the non-descriptive nature of either “power,” “pony” or “power pony.” The “My Little Pony” toy figurines are not power-operated and therefore the meaning of the term “power” differs in connotation from the meaning of the term in Applicant’s mark.

Applicant relies on its assertion that the word “POWER” has a variety of meanings, “ranging from physical strength to political strength to electricity to motors and engines to superhero powers.” Applicant’s Brief, 6 TTABVUE 5. None of these unrelated meanings are relevant. The fact that the wording “POWER PONY” may have a different meaning when applied to a variety of unrelated goods, including as Applicant notes, a living animal where “the meaning of POWER [is] related to physical strength,” *id.*, is not governing. For purposes of this appeal, Applicant has not demonstrated that toy action figures are functionally similar to ride-on toy vehicles despite that they are both intended for play by children.

Applicant argues that POWER PONY is “a somewhat incongruous word combination, as it juxtaposes the modern, electric-motor-based culture against the ancient, horse-based culture.” 6 TTABVUE 5. We disagree. A consumer who is aware of Applicant’s goods would not require imagination to understand that the wording immediately describes an electrically powered ride-on toy in the shape or form of a small horse and not act as a shorthand method of contrasting modern times with an ancient culture.

In addition, the phrase would not be considered unitary due to the alliteration simply because its two terms each begin with the letter “P.” “A unitary mark has certain observable characteristics. Specifically, its elements are inseparable.” *Dena Corp. v. Belvedere Int’l, Inc.*, 950 F.2d 1555, 21 USPQ2d 1047, 1052 (Fed. Cir. 1991). The two words of the mark are not inseparable in a manner to create a commercial impression that is not merely descriptive. *See, e.g., Duopross*, 103 USPQ2d at 1759 (“The Board, in sum, failed to cite any evidence, and the record contains none, supporting [applicant’s] view that the alliteration in SNAP SIMPLY SAFER creates a commercial impression that is more than merely descriptive.”).

Based on the above, we agree that consumers will perceive the term POWER in Applicant’s mark as merely indicating that Applicant’s ride-on toys are battery-operated, and the term PONY as merely describing the shape or form of the ride-on toy. Moreover, “view[ing] the proposed mark as a whole,” *In re Positec Grp. Ltd.*, 108 USPQ2d 1161, 1162 (TTAB 2013), we find the composite, POWER PONY, does not create a unitary mark with an incongruous or otherwise nondescriptive meaning, nor

does it create a double entendre as applied to Applicant's ride-on toys. In its entirety, the mark immediately connotes a ride-on toy in the shape of a pony that is operated under battery power.

Based on the record evidence, we find that the term POWER PONY is merely descriptive of Applicant's goods.

### **III. Conclusion**

We have carefully considered all arguments and evidence of record. Based on the record, we conclude that Applicant's mark, in its entirety, merely describes a feature of the ride-on toys sold by Applicant, namely, that they are power-operated ride-on toys in the shape of small horses or ponies. We further find that the combination of the terms does not create a double entendre or incongruity. Each component retains its merely descriptive or non-source identifying significance in relation to Applicant's goods, the combination of which results in a composite mark that is itself merely descriptive.

**Decision:** The refusal to register Applicant's mark POWER PONY on the Principal Register under Section 2(e)(1) of the Trademark Act is affirmed.