

**This Opinion is Not a
Precedent of the TTAB**

Mailed: December 7, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Republic Technologies (NA) LLC
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Serial No. 90053762
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Antony J. McShane of Neal, Gerber & Eisenberg LLP,
for Republic Technologies (NA) LLC.

Robert J. Struck, Trademark Examining Attorney, Law Office 109,
Michael Kazazian, Managing Attorney.

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Before Bergsman, Greenbaum and Thurmon,
Administrative Trademark Judges.

Opinion by Greenbaum, Administrative Trademark Judge:

Republic Technologies (NA) LLC (“Applicant”) seeks registration on the Principal
Register of the proposed mark 4:20 (in standard characters) for

tobacco; cigarette papers; cigarette filters; cigarette tubes;
cigarette rolling machines; handheld machines for
injecting tobacco into cigarette tubes; machines allowing
smokers to make cigarettes by themselves; none of the
foregoing containing or for use with cannabis, in
International Class 34.¹

¹ Application Serial No. 90053762 was filed on July 15, 2020, based upon Applicant’s allegation of a bona fide intention to use the proposed mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

The Trademark Examining Attorney finally refused registration of Applicant's proposed mark under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), because it is deceptively misdescriptive of the identified goods.

The appeal is fully briefed. 9, 11 and 12 TTABVUE. We affirm the refusal to register.

I. Applicable Law

Section 2(e)(1) of the Trademark Act prohibits registration on the Principal Register of designations that are deceptively misdescriptive of the goods or services to which they are applied absent a showing of acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f).² *See, e.g., In re Hinton*, 116 USPQ2d 1051, 1051-52 (TTAB 2015) (proposed mark "THCTea" deceptively misdescriptive of tea-based beverages not containing THC); *In re Shniberg*, 79 USPQ2d 1309, 1312 (TTAB 2006) (proposed mark SEPTEMBER 11, 2001 deceptively misdescriptive of history books and entertainment services not pertaining to the events of September 11, 2011).

A term is considered deceptively misdescriptive if (1) the term misdescribes a quality, feature, function, or characteristic of the goods or services with which it is used; and (2) consumers would be likely to believe the misrepresentation. *In re Dolce Vita Footwear, Inc.*, 2021 USPQ2d 479, at *9 (TTAB 2021), *appeal dismissed*, No. 2021-2114, 2021-2115 (Fed. Cir. May 6, 2022) (citing *In re Budge Mfg. Co.*, 857 F.2d 773, 8 USPQ2d 1259, 1260 (Fed. Cir. 1988)); *Hinton*, 116 USPQ2d at 1052; *In re White*

² Applicant does not seek registration under Section 2(f) of the Trademark Act.

Jasmine, LLC, 106 USPQ2d 1385, 1394 (TTAB 2013) (citing *In re Quady Winery, Inc.*, 221 USPQ 1213, 1214 (TTAB 1984)).

A. Does the Proposed Mark Misdescribe the Identified Goods?

“As to the first part of the test, a mark is misdescriptive when it is merely descriptive, rather than suggestive, of a significant aspect of the goods ... which the goods ... plausibly possess but in fact do not.” *Dolce Vita Footwear*, 2021 USPQ2d 479, at *9 (citing *Hinton*, 116 USPQ2d at 1052 (citing *Shniberg*, 79 USPQ2d at 1312); *In re Phillips-Van Heusen*, 63 USPQ2d 1047, 1048 (TTAB 2005)).

“A term is merely descriptive if it immediately conveys knowledge of a quality, feature, function, or characteristic of the goods ... 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 A.G.*, 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).³ This determination must be made in relation to the goods for which registration is sought, not in the abstract. *Chamber of Commerce*, 102 USPQ2d at 1219; *Bayer*, 82 USPQ2d at 1831. This requires consideration of the context in which the proposed mark is used or intended to be used in connection with those goods, and the possible significance that the proposed mark would have to the average purchaser

³ By contrast, a mark is suggestive if it “requires imagination, thought, and perception to arrive at the qualities or characteristic of the goods.” *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987). Suggestive marks, unlike merely descriptive terms, are registrable on the Principal Register without proof of acquired distinctiveness. See *Nautilus Grp., Inc. v. Icon Health & Fitness, Inc.*, 372 F.3d 1330, 71 USPQ2d 1173, 1180 (Fed. Cir. 2004).

of the goods in the marketplace. *Chamber of Commerce*, 102 USPQ2d at 1219; *Bayer*, 82 USPQ2d at 1831; *In re Omaha Nat'l Corp.*, 819 F.2d 1117, 2 USPQ2d 1859 (Fed. Cir. 1987) Evidence that a term is merely descriptive to the relevant purchasing public “may be obtained from any competent source, such as dictionaries, newspapers, or surveys,” *Bayer*, 82 USPQ2d at 1831, as well as “labels, packages, or in advertising material directed to the goods.” *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978).

To show that 4:20 merely describes a significant aspect that Applicant’s identified goods could plausibly possess, the Examining Attorney submitted an entry from DICTIONARY.COM UNABRIDGED (based on THE RANDOM HOUSE UNABRIDGED DICTIONARY (2020)) of “420 or 4/20 or 4:20,” which defines “4:20” as a slang term for marijuana/cannabis:⁴

1. marijuana: Are you carrying any 420 on you?
2. marijuana drug use: Police presence at the concert discouraged 420. The guys at the party were all 420-friendly.
3. the twentieth day of the fourth month, or the time 4:20, when referenced as a day or time for cannabis consumption or the celebration of marijuana culture: The head shop has a big pipe sale every year on 420.

November 23, 2020 Office Action, TSDR 2.

⁴ We take judicial notice that Thesaurus.com (based on ROGET’S 21ST CENTURY THESAURUS, 3rd ed. (2013), accessed November 28, 2023) lists “cannabis” as a synonym for “marijuana.” See, e.g., *White Jasmine*, 106 USPQ2d at 1392 n.23 (Board may take judicial notice of online dictionaries that exist in printed format or have regular fixed editions). We use the terms interchangeably in this decision.

There is no dictionary definition or other evidence demonstrating that “420 or 4/20 or 4:20” has any other established meaning.⁵

The Examining Attorney also introduced evidence showing that it is plausible for tobacco and smoking paraphernalia of the type identified in the application to contain or to be used with cannabis. The evidence includes screenshots from several third-party websites showing use of the proposed mark 4:20 and variants thereof to describe smoking paraphernalia such as cigarette papers, rolling papers, and rolling trays for use with cannabis. The following examples are illustrative:

- Everythingfor420.com offers “an entire collection” of “cheap smoking accessories” including dropdown menus for the “\$4.20 store,” “pink 420” and “rolling,” and a webpage devoted to rolling papers and rolling trays. The website states: “Our online smoke shop is dedicated to making sure everyone can get high quality, yet affordable 420 accessories. We’re the best online headshop to buy cheap smoking accessories ... Starting at just \$4.20 ... we’ve got you covered for all of your smoking needs.” June 24, 2021 Final Office Action, TSDR 2-23.
- Cannabox.com offers “The #1 Smoking Subscription Box. Since 2012, Cannabox has been the leader in 420 subscription boxes by providing an amazing selection of innovative products, the best customer service in the business and all at an affordable price.” The “420 subscription boxes” include

⁵ We discuss below Applicant’s contention that the proposed mark is suggestive or incongruous in the context of the identified goods.

“6-8 seriously useful accessories like premium glass pipes & bongs, rigs for dabs, rolling papers, rolling trays, snacks, and gear.” *Id.* at TSDR 24-31.

- LiveStoner.com offers “Premium & Luxury smoking kits and 420 kits.” The “420 Smoking Pipe Kit” includes “420 rolling tray, glass pipe, plastic grinder and pipe screens.” *Id.* at TSDR 32.
- 420packaging.com offers various rolling papers and states: “There will never be a day where rolling papers go out of style. Packs of cigarette paper are a quintessential item in any smoke shop, dispensary, 420-friendly household, and a staple in pop culture.” November 1, 2022 Subsequent Final Office Action, at TSDR 2.
- Honestmarijuana.com (undated) blog post by Anthony Franciosi titled “Rolling Papers: The Ultimate Guide” states: “Choosing what rolling paper to buy will either bake or break your next 4:20 session.” *Id.* at TSDR 3.
- TokeTank.org (undated) blog post by ElevatedOwl titled “Roll 420 Joints for 4/20!” describes various cigarette rolling papers and rolling paraphernalia for use with marijuana/cannabis. *Id.* at TSDR 4.

The evidence also includes a March 24, 2016 blog posted on the “Cannabis 101” webpage of the Leafly.com website titled “Consider the Spliff,” in which the author discusses the benefits of a “spliff,” which combines ground cannabis and tobacco for smoking:

The Spliff in Theory and Practice

Spliffs are easier to roll. Cannabis can be unpredictable. Its texture depends on a lot of factors, such as the strain, how old it is and how it’s been stored, the way it’s been

ground, and so on. Rolling a joint with cannabis alone mean you have to take all those factors into account, and it means they differ from time to time. Tobacco mediates that. If the flower is too dry, fresh tobacco adds some springiness. If the bud is too sticky, the tobacco keeps the mixture more workable. Staying with the same kind of tobacco also adds an element of consistency, allowing you to hone your rolling skills instead of trying to hit a moving target.

They smoke better, too. Here are two annoying things about joints: They often run (another term for this is canoe), meaning one side burns faster than the other. They also have a tendency to self-extinguish. (“Can I borrow your lighter again?”) Adding tobacco mitigates both problems. Because rolling tobacco is cut fine, it fills in those air pockets within the ground cannabis. And because it’s less sticky, it’s less likely than cannabis alone to clump together and prevent a smooth draw. The result: A spliff is more likely to offer a uniform smoke from beginning to end.

Your cannabis lasts longer. Say, for the sake of argument, a gram of quality flower costs about \$12. A pouch of high-quality rolling tobacco contains about 35 grams – and costs the same amount. Assuming a joint and a spliff weigh roughly the same, the spliff is far cheaper. This also means you can stretch a gram of cannabis much further.

...

June 24, 2021 Final Office Action, TSDR 33 (emphasis in original).

This evidence demonstrates that the designation 4:20 is a slang term for cannabis and its use; tobacco and smoking paraphernalia can contain or be used with cannabis; and consumers and users of cannabis have encountered and are familiar with use of the term 420 and variants, including the proposed mark 4:20, to describe cannabis, its use and paraphernalia for use therewith. On this record, we have no doubt that consumers and users of cannabis immediately will perceive the designation 4:20 to

describe a feature or attribute that Applicant's tobacco and smoking paraphernalia plausibly could have, namely, that such goods contain or are for use with cannabis.

Because Applicant's identification of goods specifies "none of the foregoing containing or for use with cannabis," the proposed mark 4:20 misdescribes a significant characteristic or feature of the goods. *See Dolce Vita Footwear*, 2021 USPQ2d 479, at *10-11. ("Applicant's restriction of its identification of goods to non-transparent or non-clear goods is sufficient to show (and in fact conclusively establishes) that the proposed CLEAR mark misdescribes a feature of attribute of the goods in that Applicant's identified footwear and clothing items do not possess the characteristic of being 'clear.'). The first part of the test for deceptive misdescriptiveness therefore has been satisfied.

B. Would Consumers Likely Believe the Misrepresentation?

For the second part of the test, "[t]he Board [applies] the reasonably prudent consumer test in assessing whether a proposed mark determined to be misdescriptive involves a misrepresentation consumers would be likely to believe." *Hinton*, 115 USPQ2d at 1052 (citing *R. J. Reynolds Tobacco Co. v. Brown & Williamson Tobacco Corp.*, 226 USPQ 169, 179 (TTAB 1985)). *See also Dolce Vita Footwear*, 2021 USPQ2d 479, at *9-10. To demonstrate consumers are likely to believe the misdescription, the Examining Attorney points to evidence showing that cannabis smoking products are common and available to consumers in the marketplace. In addition to the third-party website evidence summarized above, we note the following examples:

- 420Packaging.com offers for sale numerous products for use in connection with cannabis, including rolling papers. The website states: “Cigarette rolling papers are also the most cost-efficient method of consuming cannabis.” November 1, 2022 Subsequent Final Office Action, TSDR 2.
- HonestMarijuana.com blog post titled “Rolling Papers: The Ultimate Guide” states: “Whether machine-rolled or made one-handed while the other hand cradles a beer, each cannabis connoisseur will have his or her own preferred rolling methods.” *Id.* at TSDR 3.
- Marijuanapackaging.com offers various smoking accessories for use in connection with cannabis, including rolling trays and rolling attachments, and states: “Smoking accessories are requisite and beloved components of the cannabis industry.” *Id.* at TSDR 6.

This evidence shows that consumers are accustomed to encountering in the marketplace smoking paraphernalia for use with cannabis. It is therefore likely that the reasonably prudent consumer (i.e., someone who consumes cannabis) would believe that Applicant’s goods, promoted under the proposed 4:20 mark, could contain or could be for use with cannabis.

C. 4:20 is not Suggestive or Incongruous When Used With Tobacco and Smoking Paraphernalia not Containing or for use With Cannabis

Applicant contends that the proposed mark 4:20 “is used to refer to a smokers’ happy hour, much like 5:00 has, for many years, been a way to refer to happy hour for alcohol (e.g., ‘It’s 5:00 somewhere.’),” and that it “can refer to a ‘happy hour’ generally—including for non-cannabis smokers.” App. Br., 9 TTABVUE 8-9.

Applicant argues that 4:20 is suggestive because it intends to use the term to “invoke this trending ‘happy hour’ time, and suggest to traditional, roll-your-own cigarette smokers that they too can participate in the trending happy hour even if they do not smoke cannabis.” *Id.* at 9. As support, Applicant points to a single article by Brett Konen, dated August 3, 2017, posted in the “Lifestyle” section of the Leafly.com website, titled “Forget 5:00, 4:20 Is the New Happy Hour.” May 21, 2021 Response to Office Action, TSDR 6-18.

We agree that this article is replete with references to 4:20 in the context of cannabis, and to describe happy hours and food and drink specials featuring cannabis or that have a cannabis theme. For example, the article states: “Upscale establishments in both L.A. and San Francisco have launched happy hours beginning at 4:20 p.m., a sign of cannabis’s ever-expanding place in mainstream consciousness” that feature “deep-fried bites ... and cocktails named after cannabis strains.” May 21, 2021 Response to Office Action, TSDR 6-7.

Likewise, in discussing various substances that have been featured in other “happy hours” throughout history (e.g., absinthe, alcohol), the article states: “Now, as cannabis consumption and acceptance of it both continue to skyrocket, cannabis’s own version of happy hour – 4:20 – may be the new five o’clock. Although the alcohol is still present, elements of cannabis culture as well as cannabis itself are defining this new trend.” *Id.* at TSDR 10. The article also mentions “copious dispensaries” that “have celebrated 4:20 as a happy hour for years,” and a “bud and breakfast” in Maine

that “offers a complimentary 4:20 happy hour ... featuring a bud bar and edibles at no extra cost.” *Id.* at TSDR 11.

This article provides further support for our finding above that 4:20 is a slang term for cannabis and its use. But it does not discuss tobacco or any smoking paraphernalia, and it therefore does not support Applicant’s argument that 4:20 is suggestive of the identified goods.

Applicant also argues that the term 4:20 is incongruous when used in connection with Applicant’s identified goods because the identification specifically excludes cannabis and use with cannabis, “and 4:20 is seen as a term used to refer to a smokers’ happy hour.” App. Br., 6 TTABVUE 9-10. This argument is unavailing. “We cannot assume that consumers of Applicant’s goods will be aware that its identification is so restricted, and the restriction is not controlling of public perception.” *Dolce Vita Footwear*, 2021 USPQ2d 478, at *11 (citing *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1187-88 (TTAB 2018)).

D. Conclusion

Having reviewed the evidence of record, we find that both parts of the deceptive misdescriptive test have been satisfied and are unrebutted and, accordingly, Applicant’s proposed mark is deceptively misdescriptive of the identified goods within the meaning of Trademark Act Section 2(e)(1).

Decision: The refusal to register Applicant’s proposed mark 4:20 for the identified goods on the ground that it is deceptively misdescriptive under Trademark Act Section 2(e)(1) is affirmed.