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035405

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MARK: VINTAGE PINK



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GENERAL TRADEMARK INFORMATION:

<http://www.uspto.gov/main/trademarks.htm>

TTAB INFORMATION:

<http://www.uspto.gov/web/offices/dcom/ttab/index.html>

CORRESPONDENT'S REFERENCE/DOCKET NO:

035405

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EXAMINING ATTORNEY'S APPEAL BRIEF

The applicant appeals the refusal to register the proposed mark VINTAGE PINK for “jewelry, namely, bracelets, ankle bracelets, necklaces, earrings, rings and pins” and “women's clothing, namely, dresses, shirts, pants, jeans, jackets, coats, vests, sweaters, knit tops, skirts, blouses, socks, stockings, t-shirts, sweat shirts and lingerie” pursuant to Trademark Act §2(e)(1), 15 U.S.C. §1052(e)(1).

STATEMENT OF FACTS

The applicant filed an intent-to-use based application on January 29, 2007, seeking registration of the mark VINTAGE PINK for “jewelry, namely, bracelets, ankle bracelets, necklaces, earrings, rings and pins” and “women's clothing, namely, dresses,

shirts, pants, jeans, jackets, coats, vests, sweaters, knit tops, skirts, blouses, socks, stockings, t-shirts, sweat shirts and lingerie.”

The original examining attorney issued an office action on April 16, 2007, requiring a disclaimer of the word “vintage.” The examining attorney also requested information regarding the color of the applicant’s goods.

On October 16, 2007, the applicant responded by disclaiming “vintage” and providing information regarding the color of the applicant’s goods. The application was then approved for publication on November 19, 2007.

The application was withdrawn from publication on January 18, 2008.

On February 18, 2008, the examining attorney refused registration of the mark under §2(e)(1) of the Trademark Act.

The application was assigned to the current examining attorney on July 10, 2008. The applicant’s August 18, 2008 response argued against the refusal. The examining attorney did not find the applicant’s arguments compelling and issued a final refusal as to the §2(e)(1) issue on September 18, 2008.

The applicant subsequently entered an appeal and a request for reconsideration on March 18, 2009. The examining attorney denied the request for reconsideration on April 11, 2009. The §2(e)(1) refusal is the only issue on appeal.

ISSUE ON APPEAL

The issue on appeal is whether the applicant's mark VINTAGE PINK is merely descriptive when used in connection with "jewelry, namely, bracelets, ankle bracelets, necklaces, earrings, rings and pins" and "women's clothing, namely, dresses, shirts, pants, jeans, jackets, coats, vests, sweaters, knit tops, skirts, blouses, socks, stockings, t-shirts, sweat shirts and lingerie."

ARGUMENT

The evidence proves that the proposed mark VINTAGE PINK merely describes a feature of the applicant's jewelry and clothing. As the Trademark Trial and Appeal Board (TTAB) is well aware, a mark is merely descriptive under §2(e)(1) if it describes an ingredient, quality, characteristic, function, feature, purpose or use of the specified goods and/or services. *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987); *In re Bed & Breakfast Registry*, 791 F.2d 157, 229 USPQ 818 (Fed. Cir. 1986); *In re MetPath Inc.*, 223 USPQ 88 (TTAB 1984); *In re Bright-Crest, Ltd.*, 204 USPQ 591 (TTAB 1979); TMEP §1209.01(b). The determination of whether a mark is merely descriptive is considered in relation to the identified goods and/or services, not in the abstract. *In re Abcor Dev. Corp.*, 588 F.2d 811, 814, 200 USPQ 215, 218 (CCPA 1978); *see, e.g., In re Polo Int'l Inc.*, 51 USPQ2d 1061 (TTAB 1999) (DOC in DOC-CONTROL would be understood to refer to the "documents" managed by applicant's software, not "doctor" as

shown in dictionary definition); *In re Digital Research Inc.*, 4 USPQ2d 1242 (TTAB 1987) (CONCURRENT PC-DOS found merely descriptive of “computer programs recorded on disk” where relevant trade uses the denomination “concurrent” as a descriptor of this particular type of operating system); *see* TMEP §1209.01(b). The applicant’s mark is merely descriptive because it immediately conveys to prospective consumers a feature and characteristic of applicant’s goods, namely jewelry and clothing that will be pale pink in color.

For the purpose of a §2(e)(1) analysis, a term need not describe all of the purposes, functions, characteristics or features of the goods and/or services to be merely descriptive. *In re Dial-a-Mattress Operating Corp.*, 240 F.3d 1341, 1346, 57 U.S.P.Q.2d 1807 (Fed. Cir. 2001). It is enough if the term describes only one significant function, attribute or property. *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 1173, 71 USPQ2d 1370, 1371 (Fed. Cir. 2004) (“[A] mark may be merely descriptive even if it does not describe the ‘full scope and extent’ of the applicant’s goods or services.”) (quoting *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 1346, 57 USPQ2d 1807, 1812 (Fed. Cir. 2001)). In the applicant’s response received on August 18, 2008, the applicant acknowledged that some of the applicant’s goods will be pink in color. Also, the attachments from the aforementioned response show excerpts from the applicant’s website, which illustrate the pink nature of some of the applicant’s goods.

When considered in relation to the identified goods, the applicant's mark is descriptive of the color of some of the applicant's goods. The evidence illustrates that "vintage pink" is a specific color of pale pink used in the clothing and jewelry industries. Specifically, please note the following website attachment excerpts that were attached by the examining attorney in the final refusal office action and in the denial of the request for reconsideration:

WWW.ETSY.COM website: "Vintage looking hat in vintage pink color." The caption is accompanied by a picture of a pale pink hat.

WWW.CGI.EBAY.COM website: "Antique VINTAGE PINK COLOR FLOWER BELT BUCKLE." The caption is accompanied by a picture of a belt buckle with pale pink design features.

WWW.KABOODLE.COM website: "Retro 1950's Style Pinup Nylon Panties in Rose with Black Lace Panels on the Sides. Color is a true vintage-pink color." The caption is accompanied by a picture of pale pink lingerie.

WWW.AMAZON.COM website: "Four mother-of-pearl buttons run down the back for easy dressing. Vintage pink color brings back memories of a Seaside picnic at Coney Island." The caption is accompanied by a picture of a pale pink dress.

WWW.FASHIONJEWELRYFOREVERYONE.COM website: "Vintage Pink Crystals Jewelry Adorned Lite & Dark Fushcia Pink Crystals In Silver Casting Necklace Set." The caption is accompanied by a picture of jewelry containing pale pink stones.

WWW.AMBERSATTIC.COM website: "Vintage Pink Art Glass Bracelet by Freirich." The caption is accompanied by a picture of a pale pink bracelet.

WWW.THEFARMCHICKS.COM website: “We’ve dreamed of creating a vintage pink letter pendant and finally found the perfect vintage materials! These are just too darling! (Pictured with one of our large pendants which are now sold out). Vintage pink letter on the front....” The caption is accompanied by a picture of a necklace with a pendant that has a pale pink background.

WWW.PRETTYPETALSBOUQUET.COM website: “A beautiful fine grade glass glitter from Germany in the most gorgeous vintage pink color.” The caption is accompanied by a picture of a pale pink glitter.

As illustrated by the excerpts above, the term “vintage pink” is a recognized color in the clothing and jewelry industries and is therefore descriptive of some of the applicant’s pale pink goods. The applicant disclosed in a previous response that “the clothing and accessory lines will follow a retro style, some of which items will be pink or will have some pink in color” (See Response to Office Action dated August 18, 2008).

ANALYSIS OF THE APPLICANT’S ARGUMENTS

The applicant argues that only some of its goods will be pink or will have some pink in color. However, as stated above, the fact that some of the applicant’s goods are pink or are pink in part is enough to find the mark descriptive. For the purpose of a §2(e)(1) analysis, a term need not describe all of the purposes, functions, characteristics or

features of the goods and/or services to be merely descriptive. *In re Dial-a-Mattress Operating Corp.*, 240 F.3d 1341, 1346, 57 U.S.P.Q.2d 1807 (Fed. Cir. 2001). It is enough if the term describes only one significant function, attribute or property. *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 1173, 71 USPQ2d 1370, 1371 (Fed. Cir. 2004) (“[A] mark may be merely descriptive even if it does not describe the ‘full scope and extent’ of the applicant’s goods or services.”) (quoting *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 1346, 57 USPQ2d 1807, 1812 (Fed. Cir. 2001)).

The applicant next argues that the term “pink” is used in the fashion industry to connote femininity and that the mark as a whole is suggestive of the applied for goods. It is noted that pink is sometimes used in the jewelry and clothing industries to signify femininity. However, the attached evidence clearly shows that the word “pink” in the clothing and jewelry industries is widely used to describe the color of the goods. Furthermore, the evidence plainly illustrates that “vintage pink” is a specific pale pink color that is acknowledged and used in the industry.

It is noted, as the applicant points out, that the applicant and other third parties own registrations for marks containing the term “pink” where “pink” has not been disclaimed (the applicant also attached examples of registrations for other colors where the color was not disclaimed). *See applicant’s August 18, 2008 response to office action and the March 18, 2009 request for reconsideration.* However, prior decisions and actions of

other trademark examining attorneys in registering different marks have little evidentiary value and are not binding upon the Office. TMEP §1207.01(d)(vi). Each case is decided on its own facts, and each mark stands on its own merits. *See AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 1406, 177 USPQ 268, 269 (C.C.P.A. 1973); *In re Int'l Taste, Inc.*, 53 USPQ2d 1604, 1606 (TTAB 2000); *In re Sunmarks, Inc.*, 32 USPQ2d 1470, 1472 (TTAB 1994). Additionally, the marks in most of the registrations that the applicant refers to are unique, incongruous, or have an otherwise nondescriptive meaning in relation to the goods and/or services. A mark that merely combines descriptive words is not registrable if the individual components retain their descriptive meaning in relation to the goods and/or services and the combination results in a composite mark that is itself descriptive. TMEP §1209.03(d); *see, e.g., In re King Koil Licensing Co. Inc.*, 79 USPQ2d 1048 (TTAB 2006) (holding THE BREATHABLE MATTRESS merely descriptive of “beds, mattresses, box springs and pillows”); *In re Associated Theatre Clubs Co.*, 9 USPQ2d 1660, 1662 (TTAB 1988) (holding GROUP SALES BOX OFFICE merely descriptive of theater ticket sales services). In this case, both the individual components and the composite result are descriptive of applicant’s goods and/or services and do not create a unique, incongruous or nondescriptive meaning in relation to the goods and/or services.

The applicant further argues that the term “vintage” does not describe the applicant’s goods in any meaningful way. The examining attorney notes the attached definitions and third party registrations containing the word “vintage.” *See applicant’s August 18, 2008*

response to office action and the March 18, 2009 request for reconsideration. The examiner takes notice of the meaning of the word “vintage.” However, as illustrated above, the evidence contradicts the applicant’s argument. The composite term “vintage pink” has a recognized meaning and is descriptive of the applicant’s goods in part. The fact that there are third party registrations where the word “vintage” is not disclaimed is documented. However, as stated above, prior decisions and actions of other trademark examining attorneys in registering different marks have little evidentiary value and are not binding upon the Office. TMEP §1207.01(d)(vi). Each case is decided on its own facts, and each mark stands on its own merits. *See AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 1406, 177 USPQ 268, 269 (C.C.P.A. 1973); *In re Int’l Taste, Inc.*, 53 USPQ2d 1604, 1606 (TTAB 2000); *In re Sunmarks, Inc.*, 32 USPQ2d 1470, 1472 (TTAB 1994). Furthermore, the term “vintage” in this instance is used together with the word “pink.” As the evidence shows, the composite term “vintage pink” has a common commercial meaning that is descriptive of the applicant’s goods.

The examining attorney would like to point out that one of the aforementioned attachments (definition of “vintage”) consists of an article obtained from the Wikipedia.org website. It should be noted that with respect to evidence taken from the online Wikipedia® encyclopedia, at www.wikipedia.org, the Board has noted that “[t]here are inherent problems regarding the reliability of Wikipedia entries because Wikipedia is a collaborative website that permits anyone to edit the entries,” and has stated as follows:

[T]he Board will consider evidence taken from Wikipedia so long as the non-offering party has an opportunity to rebut that evidence by submitting other evidence that may call into question the accuracy of the particular Wikipedia information. Our consideration of Wikipedia evidence is with the recognition of the limitations inherent with Wikipedia (e.g., that anyone can edit it and submit intentionally false or erroneous information)....

As a collaborative online encyclopedia, Wikipedia is a secondary source of information or a compilation based on other sources. As recommended by the editors of Wikipedia, the information in a particular article should be corroborated. The better practice with respect to Wikipedia evidence is to corroborate applicant's Wikipedia evidence....

In re IP Carrier Consulting Group, (TTAB June 18, 2007).

The applicant argues that, according to the applicant's attachments from Wikipedia and from Merriam-Webster Online Dictionary, "vintage pink" is not a known specific shade of pink. *See applicant's August 18, 2008 response to office action and the March 18, 2009 request for reconsideration.* (Please note the previous entry regarding attachments from the Wikipedia.org website.) The examining attorney notes that there is not a specific listing for the color "vintage pink" in the dictionary attachments. However, the fact that a descriptive word or term is not found in the dictionary is not controlling on the question of registrability. *In re Gould Paper Corp.*, 834 F.2d 1017, 5 USPQ2d 1110 (Fed. Cir. 1987); *In re Orleans Wines, Ltd.*, 196 USPQ 516 (TTAB 1977); TMEP

§1209.03(b). Further, the examining attorney's evidentiary attachments analyzed above clearly show that "vintage pink" is a descriptive term used in the fashion industry to denote a pale pink color.

Finally, the applicant argues that the evidence submitted by the examining attorney does not concretely establish "vintage pink" as a color. Specifically, the applicant argues that much of the language in the evidentiary attachments is modified by other wording. For example, the applicant points out the following excerpt from the FASHIONJEWELRYFOREVERYONE website: "Vintage Pink Crystals Jewelry Adorned Lite & Dark Fushcia Pink Crystals In Silver Casting Necklace Set." The applicant argues that the word "vintage" is not meant to modify "pink" and describe the color, but rather is meant to modify the term "jewelry." The applicant's interpretation is noted. However, as displayed above in the website excerpts section, there are many entries from fashion websites, that clearly state that a product is of a "vintage pink color." Thus, the examining attorney's evidence clearly contradicts the applicant's argument.

CONCLUSION

The evidence shows that the term "vintage pink" refers to a pale pink color that is widely used in the fashion industry to describe the color of goods. Consequently, the examining attorney respectfully requests that the TTAB affirm the §2(e)(1) refusal.

Respectfully submitted,

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