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PRECEDENT OF THE TTAB

Mailed: February 6, 2009
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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Halftime Live LLC

Serial No. 77144094

J. Tucker Barr of Arnall Golden Gregory LLP for Halftime Live LLC.

Mark Sparacino, Trademark Examining Attorney, Law Office 103 (Michael Hamilton, Managing Attorney).

Before Hairston, Bucher and Cataldo, Administrative Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

On March 29, 2007, Halftime Live LLC filed an intent-to-use application to register the mark DRUMLINE LIVE (in standard character form) for "entertainment services in the nature of live musical performances" in International Class 41.

The trademark examining attorney has refused registration under Section 2(e)(1) of the Trademark Act,

15 U.S.C. 1052(e)(1), on the ground that applicant's mark is merely descriptive of the identified services.

When the refusal was made final, applicant appealed. Applicant and the examining attorney have filed briefs.

Before turning to the merits of the refusal, we must address an evidentiary matter. Attached to applicant's brief is a copy of its application Serial No. 76563002. Applicant argues that this allowed application, now abandoned, strongly supports applicant's position in this case. This application was not made of record prior to the appeal, and the examining attorney has objected to the late introduction of the application with applicant's brief.

Trademark Rule 2.142(d) provides that the record in an application should be complete prior to the filing of an appeal. Evidence filed after an appeal normally will be given no consideration. Thus, the application does not form part of the record and has not been considered. We hasten to add that even if the application had been considered, it would not have been persuasive of a different result.¹

¹ It is well settled that even if an applicant can point to other applications or registrations that have some characteristics similar to its application, the PTO's allowance of such prior applications or registrations does not bind the Board. In re Nett Designs Inc., 236 F.3d 1339, 57 USPQ2d 1564 (Fed. Cir. 2001).

The examining attorney maintains that the individual terms DRUMLINE and LIVE have descriptive significance when used in connection with applicant's identified services, and that the combined phrase DRUMLINE LIVE is equally descriptive. Specifically, the examining attorney contends that DRUMLINE LIVE describes the nature of the identified services, that is, live drumline performances. Insofar as the word DRUMLINE is concerned, the examining attorney submitted an excerpt from "Wikipedia" which states, in pertinent part:

A drumline or drum line is a group of percussion instruments usually played as part of a marching ensemble. Drumlines are usually incorporated into high school or college marching bands, drum and bugle corps or drum and lyre corps, indoor percussion ensembles, and pipe bands, but also can exist independent of these ensembles.

In addition, the examining attorney submitted Internet articles which discuss the drumlines at several universities. These articles indicate that university drumlines consist of a group of percussion instruments usually played as part of a marching band. Finally, he submitted a printout of the homepage of the American Drum Line Association indicating that the association has "over 127 member drum lines representing approximately 2,000 young musicians and performers." With respect to the descriptive significance of the term LIVE, the examining

attorney points to applicant's recitation of services which indicates that applicant's identified services are "live musical performances." Thus, it is the examining attorney's position that DRUMLINE LIVE is merely descriptive of applicant's identified services.

Applicant, in urging reversal of the refusal to register, argues that the examining attorney's analysis is faulty because it is based on the incorrect assumption that applicant's services consist solely of live drumline performances. Rather, according to applicant, its live musical performances involve a large and diverse touring group of vocalists, musicians and other entertainers, and many of the performances do not include percussion instruments. Applicant also contends that thought and imagination are required to make a connection between the term "drumline" and applicant's services because the term "drum" has meanings other than a musical instrument. Applicant has submitted an entry from The Merriam-Webster Online Dictionary which includes the following alternative definitions for the the term "drum" - (1) any of the cylindrical blocks that form the shaft of a column (2) a round wall or structure that supports a dome.

A term is deemed to be merely descriptive of goods or services, within the meaning of Trademark Act Section

2(e)(1), if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services. See, e.g., *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987), and *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). A term need not immediately convey an idea of each and every specific feature of the applicant's goods or services in order to be considered merely descriptive; it is enough that the term describes one significant attribute, function or property of the goods or services. See *In re H.U.D.D.L.E.*, 216 USPQ 358 (TTAB 1982); *In re MBAssociates*, 180 USPQ 338 (TTAB 1973).

Whether a term is merely descriptive is determined not in the abstract, but in relation to the goods or services for which registration is sought, the context in which it is being used on or in connection with those goods or services, and the possible significance that the term would have to the average purchaser of the goods or services because of the manner of its use; that a term may have other meanings in different contexts is not controlling. *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979). It is settled that "the question is not whether someone presented with only the mark could guess what the goods or services are. Rather, the question is whether someone who

knows what the goods or services are will understand the mark to convey information about them." In re Tower Tech Inc., 64 USPQ2d 1314, 1316-17 (TTAB 2002).

When two or more descriptive terms are combined, the determination of whether the composite mark also has descriptive significance turns on the question of whether the combination of terms evokes a new and unique commercial impression. If each component retains its descriptive significance in relation to the goods or services, the combination results in a composite that is itself descriptive. See, e.g. In re Tower Tech, Inc., supra [SMARTTOWER merely descriptive of commercial and industrial cooling towers]; In re Sun Microsystems Inc., 59 USPQ2d 1084 (TTAB 2001) [AGENTBEANS merely descriptive of computer programs for use in development and deployment of application programs]; In re Putnam Publishing Co., 39 USPQ2d 2021 (TTAB 1996) [FOOD & BEVERAGE ONLINE merely descriptive of news information services for the food processing industry]; and In re Copytele Inc., 31 USPQ2d 1540 (TTAB 1994) [SCREEN FAX PHONE merely descriptive of facsimile terminals employing electropheric displays].

We find that DRUMLINE LIVE is merely descriptive as it immediately conveys that applicant's identified services involve live drumline performances. Applicant has

disclaimed, and does not dispute that the term "live" merely describes the identified services, i.e., "entertainment services in the nature of live musical performances." Furthermore, we find that the evidence submitted by the examining attorney suffices to establish that the term "drumline" is merely descriptive in the context of the identified services. Specifically, the evidence shows that a drumline consists of a group of percussions instruments usually played as part of a marching ensemble. Applicant's argument that the term "drum" has meanings other than a musical instrument and, thus, the term "drumline" is not merely descriptive is ill-founded. Mere descriptiveness is determined in relation to the goods or services for which registration is sought. Accordingly, as indicated earlier, that a term may have a different meaning in a different context is not controlling. See *In re Chopper Industries*, 222 USPQ 258 (TTAB 1984). The fact that the term "drum" also means any of the cylindrical blocks that form the shaft of a column and a round wall or structure that supports a dome is simply irrelevant in the context of applicant's identified services. Moreover, the term at issue here is "drumline," not "drum." In sum, we find that the individual terms

DRUMLINE and LIVE have descriptive significance as used in connection with applicant's identified services.

We also find that these individual terms do not somehow lose this descriptiveness in the combination DRUMLINE LIVE. While a combination of words may be registrable if it creates a unitary mark with a unique, nondescriptive meaning or incongruous meaning, in this case each component of applicant's mark retains its descriptive significance when used in the combination, and the combination as a whole is also merely descriptive of applicant's services.

Applicant argues that its live musical performances involve a large and diverse touring group of vocalists, musicians and other entertainers, and do not always include percussion instruments. This argument, however, is not persuasive of a different result. As indicated, the issue of mere descriptiveness must be determined on the basis of the goods or services as identified in the application, and not on the basis of what applicant's actual goods or services might be. The "live musical performances" identified in the application must be presumed to include live drumline performances, as a drumline is a type of musical performance. That applicant's actual performances include performers other than percussionists, and

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frequently exclude percussion instruments, is not dispositive and does not negate the descriptiveness of DRUMLINE LIVE as used in connection with applicant's services as broadly recited in the application.

In view of the foregoing, we find that DRUMLINE LIVE is merely descriptive of applicant's recited services.

Decision: The refusal to register under Section 2(e)(1) is affirmed.