

THIS OPINION
IS NOT A PRECEDENT OF
THE T.T.A.B.

Mailed: 9/1/09

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Top Grade Construction, Inc.

Serial No. 77315118

David H. Jaffer of Pillsbury Winthrop Shaw Pittman for Top Grade Construction, Inc.

Alyssa Paladino Steel, Trademark Examining Attorney, Law Office 107 (J. Leslie Bishop, Managing Attorney).

Before Quinn, Cataldo and Wellington, Administrative Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

Top Grade Construction, Inc. filed, on October 26, 2007, an intent-to-use application to register the mark TOP GRADE MATERIALS for "aggregate rock composed of crushed stone and alluvium sand and gravel" in International Class 19.

The trademark examining attorney 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, when

applied to applicant's goods, is merely descriptive thereof.

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

Applicant argues that its applied-for mark is a unique composite mark that is suggestive. Even if the individual terms of the mark are descriptive, applicant contends that the terms form a distinctive combination that, as a whole, is suggestive. To the extent that there is any doubt on the issue, applicant urges that the doubt be resolved in its favor.

The examining attorney maintains that the mark sought to be registered "is comprised of laudatory wording followed by descriptive or generic wording." (Brief, p. 5). Thus, the examining attorney concludes, the proposed mark as a whole describes the high quality of applicant's goods or materials. Specifically, the term "top grade" is indicative of the quality of applicant's goods, and the word "materials" identifies the goods as being a form of non-metallic building materials. In support of the refusal the examining attorney relied upon two registrations owned by applicant of the marks TOP GRADE and TOP GRADE CONSTRUCTION ("CONSTRUCTION" disclaimed), both covering services and both registered under Section 2(f) upon a

showing of acquired distinctiveness. The examining attorney also introduced dictionary definitions of "top grade" and "material"; excerpts from applicant's website; search result summaries using Google's search engine; one third-party registration of the mark TOP GRADE FLOORS showing that the registration issued pursuant to Section 2(f); and copies of other third-party registrations covering goods identical or similar to those herein. These registrations are of marks that include the term "MATERIALS" showing that the term is disclaimed.

A term is deemed to be merely descriptive of goods or services, within the meaning of 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. *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828 (TTAB 2007); and *In re Abcor Development*, 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; rather, it is sufficient that the term describes one significant attribute, function or property of the goods or services. *In re H.U.D.D.L.E.*, 216 USPQ 358 (TTAB 1982); and *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 the 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. *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979). It is settled that "[t]he 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). The "average" or "ordinary" consumer is the class or classes of actual or prospective customers of applicant's goods or services. *In re Omaha National Corporation*, 819 F.2d 1117, 2 USPQ2d 1859 (Fed. Cir. 1987).

The examining attorney's dictionary evidence shows that the term "top grade" is defined as "surpassing in quality: 'top-grade ore'; high-grade; top-quality; best." (www.thefreedictionary.com). The term "material" is defined as "the substance or substances out of which a thing is or can be made."

Based on the evidence of record, we conclude that TOP GRADE MATERIALS is merely descriptive of applicant's aggregate rock. The term "top grade" describes high quality, and the term "materials," as defined, is broad enough to encompass applicant's "aggregate rock composed of crushed stone and alluvium sand and gravel." The individual merely descriptive terms "top grade" and "materials" retain their descriptive character when combined to form the entirety of applicant's mark. The mark immediately informs prospective customers that applicant's aggregate rock is made of high-grade or the best materials. No imagination is required to discern this purported feature or characteristic of the goods.

Our finding of mere descriptiveness with respect to applicant's goods is consistent with the manner in which applicant describes itself on its website as "the *premier* grading and paving contractor" in its area. [emphasis added]. Further, although applicant's earlier registrations do not control the merits of this appeal (as is also the case with the third-party registrations showing disclaimers of "MATERIALS"), our finding is also consistent with applicant's registrations that issued under Section 2(f) upon a showing of acquired distinctiveness:

Registration No. 3461268 of TOP GRADE CONSTRUCTION

("CONSTRUCTION" disclaimed) and Registration No. 3461269 of TOP GRADE, both for "paving contractor services; construction grading services." See, e.g., *Yamaha Int'l Corp. v. Hoshino Gakki Co. Ltd.*, 840 F.2d 1572, 6 USPQ2d 1001, 1005 (Fed. Cir. 1988). See also TMEP §1212.02(b) (5th ed. 2007) ["For procedural purposes, a claim of distinctiveness under §2(f), whether made in the application as filed or in a subsequent amendment, may be construed as conceding that the matter to which it pertains is not inherently distinctive (and thus not registrable on the Principal Register absent proof of acquired distinctiveness). Once an applicant has claimed that matter has acquired distinctiveness under §2(f), the issue to be determined is not whether the matter is inherently distinctive but, rather, whether it has acquired distinctiveness."]

We have made our determination without giving any probative value to the GOOGLE search results submitted by the examining attorney. A search of "top grade quality" resulted in 732,000 hits, and the summary shows excerpts of the first ten hits. Searches of "top grade materials" and "top grade" and "materials" revealed 26,400 hits and 501,000 hits, respectively, and each summary shows excerpts of the first ten hits. This evidence, however, does not

Ser. No. 77315118

provide the context within which the terms are used.

"Search engine results - which provide little context to discern how a term is actually used on the webpage that can be accessed through the search result link - may be insufficient to determine the nature of the use of a term or the relevance of the search results to registration considerations." *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1833 (Fed. Cir. 2007).

Decision: The refusal to register is affirmed.