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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Bird Brain, Inc.

Serial No. 77817178

Christopher A. Mitchell of Dickinson Wright for Bird Brain, Inc.

Cheryl Clayton, Trademark Examining Attorney, Law Office
102 (Karen M. Strzyz, Managing Attorney)

Before Bucher, Kuhlke and Wolfson, Administrative Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

On September 1, 2009, Bird Brain, Inc. filed an application to register FIREPOT in standard characters on the Supplemental Register for goods identified as "decorative tabletop torches" in International Class 4.

The examining attorney refused registration on the Supplemental Register on the ground that FIREPOT is generic for applicant's goods under Section 23(c) of the Trademark Act, 15 U.S.C. §1091(c).

When a proposed mark is refused registration as generic, the examining attorney has the burden of proving genericness by "clear evidence." In re Merrill Lynch, Pierce, Fenner & Smith, Inc., 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987); see also In re Gould Paper Corp., 834 F.2d 1017, 5 USPQ2d 1110, 1111 (Fed. Cir. 1987); In re Wm. B. Coleman Co., 93 USPQ2d 2019 (TTAB 2010). The critical issue is to determine whether the record shows that members of the relevant public primarily use or understand the term sought to be registered to refer to the category or class of goods or services in question. H. Marvin Ginn Corp. v. International Ass'n of Fire Chiefs, Inc., 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986); In re Women's Publishing Co. Inc., 23 USPQ2d 1876, 1877 (TTAB 1992). Making this determination "involves a two-step inquiry: First, what is the genus of goods or services at issue? Second, is the term sought to be registered ... understood by the relevant public primarily to refer to that genus of goods or services?" Ginn, 228 USPQ at 530. Evidence of the public's understanding of a term may be obtained from any competent source, including testimony, surveys, dictionaries, trade journals, newspapers and other publications. Merrill Lynch, 4 USPQ2d at 1143, and In re

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Northland Aluminum Products, Inc., 777 F.2d 1556, 227 USPQ 961, 963 (Fed. Cir. 1985).

We find that the genus of goods at issue in this case is adequately defined by applicant's identification of goods, specifically, "decorative tabletop torches." The evidence of record, including applicant's specimen of use, provides further clarification that the genus includes ceramic pots used to house fire. See, e.g., printout of web pages from www.thesoothingcompany.com, attached to the May 26, 2010 Office Action. In addition, the relevant purchasers would be members of the general purchasing public.

Turning to the second inquiry, the examining attorney argues that "the applied-for mark, FIREPOT, is generic as used in connection with the decorative table top torches because it identifies a class of goods that are both decorative and function for holding fire." Br. p. 5.

In support of her position, the examining attorney attached the following printouts from third-party websites to her May 26, 2010 Office Action:

Esschert Design Low Firepot ... Esschert Design offers a diversity of products - inspired by nature - uniquely combined with practicality. ... This guarantees our products are unique to our customers. This firepot is constructed of cast iron with a black finish. (www.amazon.com);

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FSI For all your Fire Entertainment Needs! ... Navajo Fire Pot The 33 inch Navajo Firepot (shown here in moonstone) is the newest in our line. (www.fire-science.com)

Aqua Superstore ... Bohe 24" Copper Fire Pot Details ... The Bohe 24" Copper Fire Pot brings an element of fire to your back yard ... This fire pot brings an exclusive display of fire ... This 24" fire pot comes fully polished with all seams fully welded. (www.aquasuperstore.com);

Northline express ... Firepot - Black ... This all black Firepot is both decorative and functional. Fill the firepot with kerosene then light the ceramic dipper to make lighting the logs easier. (www.northlineexpress.com);

The Soothing Company ... Real Flame Gel Fuel Firepot ... gives the coziness and warmth of a real fire without the hassle of woods ... A ventless, clean-burning decorative fire pot that sets the perfect mood for any occasion, indoors and out. (www.thesoothingcompany.com); and

BackyardCity.com ... Delni Aluminum Patio Firepot ... Decorative Patio Table Torch ... The Delni Aluminum Patio Firepot is a hand crafted zinc fire pot with unique hand painted copper finish. This outdoor accent piece is perfect for lining walkways or using as center piece on tables. ... Available in two sizes; small firepot is 17 inches tall and the medium firepot is 25 inches tall. (www.backyardcity.com).

In addition, the examining attorney relies on the following definitions:

Firepot 1. a clay pot filled with combustibles formerly used as a missile in war; 2. a vessel used in eastern Asian cuisine for cooking foods in broth at the table (www.merriam-webster.com, attached to December 14, 2009, Office Action);

Firepot may refer to - A method of cooking, as in Steamboat (food) - A device for carrying fire

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(en.wikipedia.org, attached to December 14, 2009, Office Action); and

Fire pot - A fire pot is a container, usually earthenware, for carrying fire. Fire pots have been used since prehistoric times to transport fire from one place to another, for warmth while on the move, for cooking, in religious ceremonies and even as weapons of war. (en.wikipdia.org attached to May 26, 2010, Office Action).

The examining attorney contends that "the very nature and essence of the applicant's goods are named" in the submitted definitions inasmuch as they are "merely decorative devices which hold fire." Br. p. 5. Further, based on this evidence, she asserts that the term "'Firepot' refer[s] to the entire genus of vessels, pots, pits, etc. that hold fire for decorative and functional purposes. The term firepot refers to multiple styles and uses of vessels for holding or containing fire. The applicant's decorative torches or decorative devices that hold fire are simply one style of fire pot of the entire genus of fire pots." Br. p. 8.

In traversing the refusal, applicant argues that the definitions do not support a finding that the public would "primarily refer to or understand a 'fire pot' to be a 'decorative tabletop torch' - if anything, they demonstrate the opposite." Br. p. 8. With regard to the website evidence, applicant argues that "the vast majority of these

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products are applicant's own ARANI FIREPOT-, JARDINIERE FIREPOT-, or, FIREPOT-branded goods [and the remaining examples are for] outdoor fireplaces, fire pits or cooking devices." Further, applicant argues that "the fire-related characteristics associated with FIREPOT-brand decorative tabletop torches and shared with the identified fireplaces and fire pits do not make the term generic. ... the examining attorney here simply presents examples of devices that both use the term 'fire pot' and relate to fire. These characteristics alone do not demonstrate that the public refers to *decorative tabletop torches* collectively as 'firepots.'" Br. p. 11 (emphasis in original).

In support of its position, applicant submitted a declaration from Courtney A. King, applicant's president attesting that the website printouts presented in the first Office Action contained references to applicant's goods. Shown below is one of the printouts depicting applicant's firepot and describing the goods:

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Bird Brain - FIRE JARDINIERE FIREPOT - Red Toned Fire Pot- 11504217

Other [Bird Brain](#) products

Price: **\$82.95**

In Stock.

Ships from and sold by [CreekTreeUSA](#).

Only 2 left in stock--order soon.

Ordering for Christmas? Based on the shipping schedule of CreekTreeUSA, choose **Standard Shipping** at checkout for delivery by December 24. See [CreekTreeUSA](#) shipping details.

Product Description

Here's a new form for firepots, a tall ceramic amphora with elegant, graceful lines, and subdued colors with a reddish tone. A removable ceramic snuffer adds to the ambience. A stainless steel reservoir holds the fuel. It uses either Bird Brain **Firepot** Fuel Gel or **Firepot** Fuel Gel with Citronella (Note: the Citronella should not be used indoors). Dancing flames will burn 2-1/2 to 3 hours, without smoke or embers. If you want to use the **firepot** as a vase, just remove the reservoir and you have a beautiful container for your flowers. As these are hand glazed, there will be artisan inconsistencies, adding to the uniqueness of the ceramic.

www.amazon.com (attached to December 14, 2009 Office Action).

In this example, while the term "Firepot" could arguably be viewed as being used as a source identifier in the phrase FIRE JARDINIERE FIREPOT, it is also used as the generic name of the goods.

In addition, Ms. King states that applicant's goods are "decorative tabletop torches for display purposes only ... [and] are not for cooking purposes [nor] are they clay pots filled with combustibles and formerly (or presently) used as missiles in war." King Decl. p. 2 (attached to April 26, 2010 Response).

Applicant also asserts that while the Wikipedia entries are admissible "their unverified, unprofessional nature renders them highly susceptible to challenge from professional sources." Reply Br. p. 6.

The Board considers 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." In re IP Carrier Consulting Group, 84 USPQ2d 1028, 1032 (TTAB 2007). In this case, applicant has not submitted any evidence to rebut the veracity of the entries.

Applicant further argues that we should "discount the [Wikipedia] entries' inconsistent elements and ... instead only consider them as support for the authoritative Merriam-Webster's 'method of cooking' definition ... [and] 'weapons of war' meaning." Reply Br. p. 7. Of course, the more probative submission is the Merriam-Webster definition. However, just as the Wikipedia evidence serves as support to the Merriam-Webster reference, it also corroborates the website printouts that show various devices for "carrying fire."¹

¹ We note that our determination here is not dependent on the Wikipedia evidence.

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We find FIREPOT to be a compound term and properly analyzed under the Gould analysis. Gould Paper Corp., 5 USPQ2d at 1111-1112; Wm. B. Coleman Co., Inc., 93 USPQ2d 2019; In re DNI Holdings Ltd., 77 USPQ2d 1435 (TTAB 2005); In re Eddie Z's Blinds and Drapery, Inc., 74 USPQ2d 1037 (TTAB 2005).

We take judicial notice of the following dictionary definitions:²

FIRE The phenomenon of combustion manifested in light, flame, and heat; and

POT usu. Rounded metal or earthen container used chiefly for domestic purposes (as in cooking or for holding liquids or growing plants).

Merriam-Webster's Collegiate Dictionary (10th ed. 1999).

Thus, under the Gould standard the term FIREPOT is generic for a pot that holds fire. This is specifically corroborated by the website printout from www.soothingcompany.com. Applicant's firepot and the third-party firepot are shown below.

² In re CyberFinancial.Net Inc., 65 USPQ2d 1789, 1791 n.3 (TTAB 2002); In re Total Quality Group Inc., 51 UPQ2d 1474, 1476 (TTAB 1999).



Real Flame Gel Fuel Firepot



Applicant's Firepot

The several other examples of firepots evidence use of the term for the broader array of pot-like vessels that contain fire for decorative and functional purposes. The fact that applicant's firepot is a subset of goods that are referred to as firepots does not transform it into a term capable of source-identifying significance for applicant's firepots.

The record establishes that the individual components of applicant's mark are generic for the goods, specifically pots that hold fire, and their combination lends "no additional meaning to the term." *Dial-A-Mattress Operating Corp.*, 57 USPQ2d at 1810. The definitions for the combined

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term "firepot" and third-party uses support this conclusion.

Applicant's reliance on *In re Trek 2000 Int'l*, 97 USPQ2d 1106 (TTAB 2010), is misplaced. The Board distinguished the circumstances of that case from exactly the circumstances we have in this case, "where the term in question is simply a combination of generic terms." *Trek*, 97 USPQ2d at 1114. Finally, with regard to the evidence showing uses of the term FIREPOT in connection with applicant's goods, no amount of evidence can transform a generic term into a registrable trademark. See *In re Half Price Books, Records, Magazines, Inc.*, 225 USPQ 219, 222 (TTAB 1984). Moreover, this case does not present a record sufficient to rebut the examining attorney's prima facie showing that the term FIREPOT is generic for applicant's goods. *Merrill Lynch*, 4 USPQ2d at 1141.

Decision: The refusal to register on the Supplemental Register based on genericness under Section 23 is affirmed.