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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Halogen Lighting Products

Serial No. 78426018

Adam Sacharoff, Much Shelist, for Halogen Lighting Products.

Sandra Manios, Trademark Examining Attorney, Law Office 104, Chris Doninger, Managing Attorney.

Before Zervas, Cataldo, and Mermelstein, Administrative Trademark Judges.

Opinion by Mermelstein, Administrative Trademark Judge:

Halogen Lighting Products seeks registration of the following proposed mark for "electric lighting fixtures" in International Class 11:¹



¹ Filed May 27, 2004. Statement of Use filed January 26, 2006, alleging dates of first use and first use in commerce of May, 2005. The application contains the following description of the mark: "The mark consists of a broken wine glass within a circle and a cross bar."

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Registration has been finally refused on the ground that the proposed mark consists of purely informational matter and does not function as a trademark. Trademark Act §§ 1, 2, and 45; 15 U.S.C. §§ 1051, 1052, and 1127.

We affirm.

I. Applicable Law

The fundamental function of a trademark is to identify the source of goods in commerce, and to distinguish them from the goods of others. Trademark Act § 45, 15 U.S.C. § 1127. From this premise it directly follows that matter which would not be perceived by potential purchasers as a trademark may not be registered. *In re Bose Corp.*, 546 F.2d 893, 192 USPQ 213, 215 (CCPA 1978) ("Before there can be registration, there must be a trademark."). In this regard, it has been held that purely informational matter and commonplace phrases do not function as trademarks. For instance, the Board has found that the words USE WITH do not identify the source of metal appliance connectors, *In re Brass-Craft Mfg. Co.*, 49 USPQ2d 1849 (TTAB 1998); that DRIVE SAFELY would be perceived as a commonplace safety admonition, and not as a trademark for automobiles, *In re Volvo Cars of North Am.*, 46 USPQ2d 1455, (TTAB 1998); and that the words THINK GREEN would be seen as a phrase encouraging environmental awareness, rather than as a

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trademark for weatherstripping, *In re Manco, Inc.*, 24 USPQ2d 1938 (TTAB 1992).

Much depends, of course, on the manner of use of the proposed mark. For this reason, it is important to examine how the mark is used, and not merely what the mark is. *In re Roberts*, 87 USPQ2d 1474, 1478 (TTAB 2008).

II. Discussion

A. Applicant's Proposed Mark and Goods

Applicant's goods are identified as "electric lighting fixtures." The web page applicant originally filed as a specimen with its Statement of Use includes the following information:

SHATTERPROOF²™

A shatterproof bulb encased in a shatterproof fixture.

* * *

Shatterproof Bulbs - "The Finest"

Our shatterproof protection is achieved by directly and permanently fusing Mylon® to the entire surface area of the bulb creating a sealed beam unit guaranteeing total glass containment. The Mylon® coating is a patented compound of cross-linked polymers and nylon forming the toughest/strongest coating and shatterproof protection found in North America. Our Shatterproof protection won't distort or diminish ... the ... natural white high quality illumination. Heat sealing is maximized to 486 degrees Fahrenheit.... Bulbs are guaranteed not to yellow in this heat resistant glass containment for the life of the bulb. Our superior shatterproof bulb technology encased in the finest and most resilient fixture designed and field tested in the most abusive industrial and machine environments in the world compose

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Shatterproof2. Don't settle for less, use the best.

<http://www.halogen-lighting.com./shatterproof.htm>

(submitted Jan. 26, 2006). Applicant's proposed mark appears further down on the same web page next to (and the same size as) the Underwriter's Laboratory certification mark:

allow easy mounting. To ensure long life and maximum operator safety, our ballasts are mounted away from the fixture.

Guaranteed Quality

At Halogen Lighting Products Corporation, our entire team is dedicated to providing the highest quality industrial light fixtures in the world. We take pride in answering every call, shipping promptly and completely, providing excellent value, and listening to our customers as we develop new products. Halogen Lighting Products can supply all of your shatterproof needs.



Ships complete...Same Day

NEVER WORRY AGAIN about glass contamination in your contamination-free environment. Guaranteed.



This specimen was rejected by the examining attorney because it did not evidence use of the proposed mark on the identified goods. In response, applicant submitted the following specimen - which was deemed acceptable - described as a "scanned copy of a label that is affixed to the boxes of the goods." Response, June 5, 2006.



**This fixture exceeds all FDA,
USDA & OSHA regulations.**

B. Arguments

It is the examining attorney's contention that the proposed "mark is used purely as informational matter and does not function as a trademark...." Trademark Act §§ 1, 2, 45; 15 U.S.C. §§ 1501, 1502, 1127; Ex. Att. Br. at 1.

Applicant's proposed mark is the design of the international prohibition symbol over a broken wine glass, covering electric lighting fixtures. Both specimens on record show the mark used in connection with the wording "NO BROKEN GLASS," the very commercial impression created by the proposed mark. The January 16, 2006 specimen further explains the shatterproof feature of applicant's goods. ... The specimens of record do not show use of the proposed mark functioning as an indicator of source, but only to inform consumers that applicant's goods contain glass elements that will not break. ... The Board in *Volvo Cars of N. Am.*, 46 USPQ2d [at] 1460-61, for example, held the wording DRIVE SAFELY not registrable because it would be perceived only as an everyday, commonplace safety admonition rather than as a trademark for "automobiles and structural parts." Similarly, the Board in *In re Manco, Inc.*, 24 USPQ2d [at] 1941 (TTAB 1992)[,] held the wording THINK GREEN and design not registrable because it would be perceived only as

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an informational slogan encouraging environmental awareness and not as a trademark for weather stripping and paper products.

Ex. Att. Br. at 4-5.

Applicant advances two principal arguments in favor of registration: First, that the USPTO has registered numerous other trademarks using the international prohibition symbol, and that it would be unfair and inconsistent to refuse registration of applicant's proposed mark. Second, applicant contends that its proposed mark "is source indicative by creating an incongruity due to the complex design the broken wine glass [sic] and the relation of the design to Applicant's subject electric lighting fixtures goods." App. Br. at 2-3. Applicant contends that the examining attorney has not established a *prima facie* case "since the stated communicative matter asserted to be 'merely informational' is based on speculation divorced from the commercial and consumer context of Applicant's applied for goods...." App. Br. at 3. Finally, applicant adds that any doubts as to registrability should be resolved in its favor. *Id.*

C. Analysis

In support of its first argument, applicant submitted evidence of fourteen trademark registrations which include various matter overlaid with the "international prohibition

symbol." Applicant contends that there are some 900 similar registrations which have been registered.² App. Br. at 2.

For the reasons largely explained by the examining attorney, we are not convinced by applicant's evidence or argument. While consistency is a worthy goal, the Board is not bound by the actions of examining attorneys in assessing different marks for different goods:

The Board must decide each case on its own merits. *In re Owens-Corning Fiberglas Corp.*, 774 F.2d 1116, 1127, 227 USPQ 417, 424 (Fed. Cir. 1985). Even if some prior registrations had some characteristics similar to Nett Designs' application, the PTO's allowance of such prior registrations does not bind the Board or this court.

In re Nett Designs Inc., 236 F3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001).

Moreover, a refusal to register on the ground that the applied-for material does not function as a trademark is highly dependent on how the proposed mark is used on or in connection with the identified goods or services.

Applicant has not submitted the specimens of use for any of the registrations it has offered into evidence, and it is

² Applicant also submitted records of several cancelled registrations. We have not considered these records, as they are not evidence that the previously-registered marks were valid or in use. Further, we will not speculate on evidence that is not in the record. Accordingly, we consider only the registrations

therefore impossible to determine what - if anything - can be learned from these registrations.

Second, applicant argues that the proposed mark is incongruous and thus serves more than a purely informational function:

Applicant's MARK creates an incongruity. ... The mark is not merely informational since it has at least suggestive distinctiveness. In this regard it is noted that a term is suggestive if, when applied to goods, it requires imagination, thought, and perception to reach a conclusion as to the nature of the goods as opposed to a descriptive term which immediately tells something about the goods.

The incongruity appears when applying Applicant's MARK to its goods. Applicant's goods associated with the logo MARK are not glassware, drinking cups, or crystal drinking ware, such as one would automatically associate with the logo MARK. Applicant is associating the MARK to electric lighting fixtures. ... And it is only with the association of Applicant's goods that the consumer processes and associates the MARK to Applicant's goods. The factual nature of the meaning of Applicant's MARK, as discussed above, does not immediately convey to the consumer what goods are contained therein. It is this incongruity that allows Applicant's MARK to serve as a trademark.

App. Br. at 3-4.

The examining attorney admits that the proposed mark "creates an incongruity," but argues instead that incongruity is only relevant when deciding whether one

which applicant has submitted, and not others which applicant alleges have been registered.

element of a mark must be disclaimed. Ex. Att. Br. at 6. The examining attorney's statements indicate an apparent misunderstanding of applicant's argument. As we understand it, applicant is arguing that its proposed mark is incongruous with its goods. What the examining attorney addresses is the question of whether one element of the mark is incongruous with another element of the mark. We agree with the examining attorney that the latter concept is not relevant.³ On the other hand, we do not agree with applicant that its mark is incongruous with its goods, and thus a distinctive indicator of source.⁴

The fallacy in applicant's argument arises from the assumption that the depiction of a broken wine glass as part of a symbol on a box of applicant's goods would convey no relevant information to its customers. We disagree.

³ While applicant offered to disclaim the "international prohibition symbol" apart from the mark as shown, the examining attorney held the disclaimer to be inappropriate because the proposed mark is unitary. Applicant has made no mention of the disclaimer in its appeal brief, and we accordingly view the issue waived.

⁴ Applicant's arguments (and to some extent, the examining attorney's) rely on reasoning and cases discussing descriptiveness which - strictly speaking - is not the basis for the final refusal in this case. While a descriptiveness analysis under Trademark Act § 2(e)(1) asks whether the proposed mark conveys information about the goods, a refusal under Trademark Act §§ 1, 2, and 45 asks whether the proposed mark would be seen as an indication of source. As seen here, however, the concepts are related, and it can usually be said that purely descriptive matter does not function as a source indicator, unless it has acquired distinctiveness.

Non-literal symbols are ubiquitous in our culture, and are frequently used as a simple and easily-recognizable message, particularly where it is necessary to immediately convey a message (as with a warning), and it cannot be assured that the recipient will be able, or have time to, read a written message.

The examining attorney's evidence establishes that among other things, when used on a box, the image of a wine glass - or a broken wine glass - is used to indicate that the goods inside are fragile:



Henry Dreyfuss, *SYMBOL SOURCEBOOK: AN AUTHORITATIVE GUIDE TO INTERNATIONAL SYMBOLS*, 98 (1972). Dreyfuss also indicates that symbols "are often combined with other symbols to develop more complex meanings and instructions. Thus a kind of *grammar* of semiotics evolves." *Id.* at 28. This point is illustrated with some graphics, including the following, which is particularly relevant:



Id. It is easily seen that the "international prohibition symbol," combined with another symbol means "no" or "not" with respect to the second symbol's meaning.

Using this "grammar," the meaning of applicant's proposed mark is apparent:



We think it quite clear that when used on a box containing lighting fixtures, applicant's proposed mark - a broken wine glass under the prohibition symbol - readily, and without further thought or reasoning - conveys the information that the contents are not fragile or, as the examining attorney put it, the specimens of record serve "only to inform consumers that applicant's goods contain glass elements that will not break." Ex. Att. Br. at 5. Indeed, the wording applicant uses with its proposed mark fully supports this interpretation. In both specimens of record, the words "No Broken Glass" appear on or near the proposed mark.

It is beyond dispute that many, if not most, lighting fixtures are easily breakable, and that broken bulbs often result in hazardous shards of sharp glass. While an annoyance under any circumstance, a shattered bulb is a

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serious health and safety hazard in some settings, particularly those involving the manufacture or packaging of food or other items which come into close contact with the body. The information on the web page submitted as applicant's original specimen of use makes much of the fact that applicant's goods are "shatterproof," and therefore highly suited for use in environments where breakage is likely or problematic. The durability of applicant's goods is thus a central characteristic and a selling point of those goods.

Applicant makes much of the fact that its goods are not wine glasses or similar items, asserting that the use of a symbol including a wine glass is therefore "incongruous." We disagree. As used in the specimens of record, it is apparent that the proposed mark would be viewed symbolically, not literally. The record contains a number of examples of similar symbols, and the public is exposed to many of them on a daily basis. The examining attorney has demonstrated that the symbols comprising applicant's proposed mark have a recognized meaning. Applicant has presented no evidence that, as used by applicant, the symbols would be understood differently. Given this evidence we cannot assume that applicant's customers would believe that the mark is an arbitrary

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reference to drinking glasses. On the contrary, all evidence in the record indicates that the mark would be perceived as an indication that the contents of applicant's boxes are not fragile. Rather than indicating the source of the goods inside, applicant's proposed mark instead would simply inform the customer of this fact.

D. Request for Amendment to Supplemental Register

Finally, we note applicant's request that if not found registrable on the Principal Register, applicant's proposed mark be considered for registration on the Supplemental Register. App. Br. at 11.

An application which has been considered and decided on appeal will not be reopened except for the entry of a disclaimer ... or upon order of the Director, but a petition to the Director to reopen an application will be considered only upon a showing of sufficient cause for consideration of any matter not already adjudicated.

Trademark Rule 2.142(g).

Applicant's request to amend is accordingly denied.

III. Conclusion

After careful consideration of the record, we conclude that the proposed mark, as used by applicant, would be perceived as merely informational, and would not be perceived as an indication of source.

Decision: The refusal to register under Trademark Act §§ 1, 2, and 45 is accordingly affirmed.