

This Opinion is not a
Precedent of the TTAB

Mailed: October 27, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Fabtech Industries, Inc.
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Serial No. 86916673
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Kit M. Stetina of Stetina Brunda Garred & Brucker,
for Fabtech Industries, Inc.

Saima Makhdoom, Trademark Examining Attorney, Law Office 101,
Ronald R. Sussman, Managing Attorney.

—
Before Cataldo, Kuczma and Goodman,
Administrative Trademark Judges.

Opinion by Goodman, Administrative Trademark Judge:

Fabtech Industries, Inc. (“Applicant”) seeks registration on the Principal Register of the mark CRAWLER (in standard characters) for “light truck and sport utility vehicle aftermarket suspension parts, namely, link arms and coil springs” in International Class 12.¹

¹ Application Serial No. 86916673 was filed on February 23, 2016, based upon Applicant’s claim of first use anywhere and use in commerce since at least as early as November 30, 2004.

The Trademark Examining Attorney has refused registration of Applicant's mark under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the basis of mere descriptiveness.

After the Trademark Examining Attorney made the refusal final, Applicant appealed to this Board. We reverse the refusal to register.

I. Mere Descriptiveness

Section 2(e)(1) of the Trademark Act precludes registration of a mark that, when applied to the goods or services of the applicant, is merely descriptive of them. 15 U.S.C. § 1052(e)(1). "A term is merely descriptive if it immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used." *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (quoting *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)); *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 217-218 (CCPA 1978) (A term has been held to be merely descriptive if it describes the ingredients, qualities, characteristics, features or parts of the goods or services).

Whether a term is merely descriptive is determined not in the abstract, but "in relation to the particular goods [or services] for which registration is sought, the context in which it is being used, 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 or intended use." *In re Bayer*, 82 USPQ2d at 1831. *See also In re Chamber of Commerce*, 102 USPQ2d at 1219. The determination that a mark is merely

descriptive is a finding of fact and must be based upon substantial evidence. *In re Bayer*, 82 USPQ2d at 1831.

We consider the nature of Applicant's goods, "light truck and sport utility vehicle aftermarket suspension parts, namely, link arms and coil springs." Applicant has stated that "its goods may be used in off-road vehicles which may be referred to as Rock Crawlers." Response to Office Action p. 3.² Applicant's specimen displays the mark as follows:³



**2007-15 JEEP JK
5" CRAWLER SYSTEM**

The Examining Attorney has provided the following website evidence in connection with the refusal to register:

With respect to off-road vehicles:

(offroadshocks.com)

² Page references to the application record refer to the PDF version of the Trademark Status and Document Retrieval System (TSDR). References to the briefs refer to the Board's TTABVUE docket system.

³ In her brief, the Examining Attorney has referenced page 33 of the specimen; however, in the TSDR system, the specimen is only 31 pages.

A webpage for “Rock Crawler Shocks” which states “Rock Crawlers utilize coilovers in order to maximize the suspension travel and articulation.” March 31, 2016 p. 2.

With respect to radio-controlled scale rock crawlers used in competitions:

(www.axialracing.com)

“Articulation Pro’s and Con’s for Shaft Driven Crawlers” March 31, 2016 Office Action p. 6. “I personally build my comp crawlers to flex the height of the tire I’m running and I always set the front suspension a little softer in the rear. ... And there is no magic formula for building a comp crawler that has the potential to win competitions on your first try.” *Id.* at. 13.

(www.rctruckstop.com)

“Scale crawler must know setup and tricks” October 25, 2016 Office Action p. 2. “For example I frequently see people show up to what is their first scale comp with crawlers they’ve had for a long time and have put many miles on. ... *Id.* at 2. ... Another running change improvement we’ve see made by Axial to its crawlers is a gear cover. *Id.* at 6. ... It is common to see 2.2 comp crawlers use a stiffer rear spring ony as a replacement for the rear spring opposite the front tire.” *Id.* at 9.

A non-U.S. patent abstract for an automobile anti-skid chain:

(www.technology-x-net.com)

“Automobile Crawler Type Anti-Skid Chain Manufacturing Method” for an automobile crawler anti-skid chain entirely sleeved on an automobile tire for muddy roads and snowy road conditions. October 25, 2016 Office Action p. 20.

A definition of “crawler” and “crawler gear” (October 25, 2016 Office Action p. 32) from www.motorera.com:

Crawler:

1. An off-road vehicle using track propulsion instead of wheels.

2. A British term for a slow-moving vehicle.

Crawler gear:

A British term for a very low gear used especially in an off-road application.

The Examining Attorney contends that “[p]otential purchasers who are seeking automotive parts for rock crawling will certainly immediately understand the relationship between the term CRAWLER and off-road crawling of all types, including rock crawling.” 6 TTABVUE 6. Pointing to Applicant’s specimens, the Examining Attorney argues that the specimen immediately conveys information regarding the goods, namely that the purpose of Applicant’s identified goods is to raise the center of gravity of the vehicle, alter the suspension height, and increase axle articulation so as to turn the vehicle into a “crawler” for the “unique purpose” of driving on rocky and rough terrain.⁴ 6 TTABVUE 6. The Examining Attorney further asserts that the term “crawler” is a “consistently used” term that identifies a vehicle that is deliberately designed to move slowly in order to perform a certain task, such as scale rocks or drive over steep, rugged, or flat terrain, pointing to the definitions in the record for “crawler” and “crawler gear.” 6 TTABVUE 7. Lastly, the Examining Attorney contends that [t]he marketplace evidence shows that the term CRAWLER is specifically used to describe vehicles, including trucks and sports utility vehicles, which feature an axle link suspension configuration that allows for recreational crawling.” 6 TTABVUE 8.

⁴ The specimen is installation instructions for Applicant’s goods. The Examining Attorney has not identified what pages of the specimen support these assertions. We further note that the only use of “crawler” in connection with this specimen is on the cover page.

The Examining Attorney's position is that the evidence shows that "crawler" refers to full-size automotive light trucks and sport utility vehicles with altered suspensions used in "recreational crawling"; however, the Examining Attorney has not identified any specific evidence in the record that supports this assertion. The Examining Attorney references the website excerpt from www.offroadshocks.com as using the term "crawler" to identify vehicle suspension components that maximize suspension travel and articulation when crawling over rocky terrain, but that website uses the term "rock crawler," not crawler per se, and that use is in connection with vehicle shocks, rather than link arms and coil springs. The definitions that the Examining Attorney relies on in the record to come to the conclusion that "crawler" is a term for describing full-size vehicles fitted with suspension parts that enable them to be driven off-road over rugged terrain are "British English" and lack probative value as the issue is the meaning of the term in the United States, not in Britain.⁵ See *In re Murphy Door Bed Company, Inc.*, 223 USPQ 1030, 1032 (TTAB 1984) (British dictionary not relevant to usage in United States); see also *In re Future Ads LLC*, 103 USPQ2d 1571, 1572 n.2 (TTAB 2012) (declining to take judicial notice of a dictionary definition for British English as the meaning of the term in Britain is not necessarily the meaning of the term in the United States.). The other definition for "crawler" in the record, relating to vehicles that use a continuous band of treads or track plates, such as a bulldozer or tractor, is not relevant to light truck and sport utility vehicles that use aftermarket suspension parts in connection with wheels with

⁵ This definition for "crawler" also does not specifically mention off-road applications.

tires. Nor is the non-U.S. patent abstract for an automotive anti-skid chain relevant to use of the term “crawler” in connection with the identified goods.

The Examining Attorney has also asked us to consider, by analogy, the use of the term “crawler” in connection with scale radio-controlled vehicles that are identified as “comp crawlers,” “rock crawlers” or “R/C crawlers” which, according to the Examining Attorney, “perform precisely the same function as a standard automotive rock crawler.” 6 TTABVUE 7. However, as stated previously, in determining whether a mark is descriptive, the mark must be considered as “applied to the goods or services involved.” *In re Abcor Development*, 200 USPQ at 218. In addition, the fact that a term may be descriptive of certain types of goods does not establish that it is likewise descriptive of other types of goods, even if the goods are closely related. *In re the Stroh Brewery Co.*, 34 USPQ2d 1796, 1797 (TTAB 1994) (citing *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 189 USPQ 759, 766 (2d Cir.1976)). The evidence of record simply does not support a finding that the terms “comp crawlers,” “rock crawlers” or “R/C crawlers” as applied to scale radio-controlled vehicles establishes that CRAWLER merely describes the recited goods.

Based on the record before us, we find that the Examining Attorney has not shown that CRAWLER is merely descriptive in connection with the identified goods. The record contains no evidence of use of the term “crawler” with regard to full-size light trucks and sport utility vehicles that feature aftermarket link arms and coil springs, and we cannot conclude on this record that CRAWLER would be understood by relevant consumers to describe a significant aspect of Applicant’s goods. On another

record, such as may be adduced in an inter partes proceeding, we might come to a different conclusion.

Decision: The refusal to register Applicant's mark CRAWLER is reversed. The application will be forwarded for publication of the mark for opposition in due course.