

This Opinion is Not a
Precedent of the TTAB

Mailed: May 10, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Delta Faucet Co.
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Serial No. 87001991
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Edgar A. Zarins of Masco Corporation,¹
for Delta Faucet Company.

Nelson B. Snyder III, Trademark Examining Attorney, Law Office 107,
J. Leslie Bishop, Managing Attorney.

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Before Bergsman, Lykos and Lynch,
Administrative Trademark Judges.

Opinion by Lykos, Administrative Trademark Judge:

Delta Faucet Company (“Applicant”) seeks to register the mark FOUNDRY in standard characters on the Principal Register for “plumbing products, namely, faucets” in International Class 11.²

¹ The attorney of record is in-house counsel at Masco Corporation, the parent company of both Delta Faucet Company and Masco Corporation of Indiana. *See Ex Parte Appeal Serial No. 86519140, In re Delta Faucet Co.* (Aug. 17, 2017 TTAB) at n.2.

² Application Serial No. 87001991, filed April 15, 2016 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), claiming a bona fide intent to use the mark in commerce.

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 the mark is deceptively misdescriptive of Applicant's identified goods, or alternatively, that the mark is merely descriptive. The appeal is fully briefed.

Section 2(e)(1) of the Trademark Act prohibits registration on the Principal Register of designations that are deceptively misdescriptive of the goods or services to which they are applied in the absence of a showing of acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f). A mark is considered deceptively misdescriptive if (i) the mark misdescribes a quality, feature, function, or characteristic of the goods or services with which it is used; and (ii) consumers would be likely to believe the misrepresentation. *In re White Jasmine LLC*, 106 USPQ2d 1385, 1394 (TTAB 2013) (citing *In re Quady Winery, Inc.*, 221 USPQ 1213, 1214 (TTAB 1984)).

As the starting point for our analysis, for a term to misdescribe goods, the term must be merely descriptive of a significant aspect of the goods which the identified goods could plausibly possess, but in fact do not. *In re Hinton*, 116 USPQ2d 1051, 1052 (TTAB 2015); *In re Schniberg*, 79 USPQ2d 1309, 1312 (TTAB 2006); *In re Phillips-Van Heusen Corp.*, 63 USPQ2d 1047, 1051 (TTAB 2002). "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)). *See also In re TriVita, Inc.*, 783 F.3d 872, 114 USPQ2d 1574, 1575 (Fed. Cir. 2015). This determination must be made in relation to the goods for which registration is sought, not in the abstract. *In re Chamber of Commerce*, 102 USPQ2d at 1219; *In re Bayer*, 82 USPQ2d at 1831. This requires consideration of the context in which the mark is used or intended to be used in connection with those goods, and the possible significance that the mark would have to the average purchaser of the goods in the marketplace. *In re Chamber of Commerce*, 102 USPQ2d at 1219; *In re Bayer*, 82 USPQ2d at 1831; *In re Omaha Nat'l Corp.*, 819 F.2d 1117, 2 USPQ2d 1859 (Fed. Cir. 1987).

To show that “foundry” merely describes a significant aspect of Applicant’s goods which they could plausibly possess, the Examining Attorney has submitted U.S. English dictionary entries from multiple online sources, including THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (www.ahdictionary.com), MERRIAM-WEBSTER DICTIONARY (www.merriam-webster.com), MACMILLAN DICTIONARY (www.macmillandictionary.com), COLLINS (www.collinsdictionary.com), and OXFORD DICTIONARIES (<http://en.oxforddictionaries.com>).³ By way of illustration, we highlight the entries from COLLINS defining “foundry” as “1. the act, process or work of melting and molding metals; casting 2. metal castings 3. a place where metal is cast,”⁴ and THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE as “1. An establishment where metal objects are made by melting metal and pouring into

³ See February 18, 2018 Office Action, pp. 2-16 and July 6, 2018 Office Action, pp. 2-4.

⁴ February 28, 2018 Office Action, p. 12.

molds. 2.a. The skill or operation of founding 2.b. The castings made by founding.”⁵ In addition, the Examining Attorney made of record a third-party registration showing the term FOUNDRY disclaimed for a mark registered on the Principal Register for faucets.⁶ Numerous other third-party registrations also show FOUNDRY disclaimed for other metal goods such as pipes, catch basin grates, and manhole covers.⁷ Also, as discussed below, evidence of third-party use of FOUNDRY in connection with plumbing goods further corroborates its descriptive nature in this context. Based on this evidence, “foundry” merely describes a significant characteristic or feature of the identified goods, namely that they are manufactured from metal castings and/or are produced in a manufacturing facility of this type.

To ascertain whether FOUNDRY misdescribes Applicant’s goods, during prosecution, the Examining Attorney issued the following information request under Trademark Rule 2.61(b), 37 C.F.R. § 2.61(b):

- 1) Are any of the identified goods produced in a foundry?
- 2) Will any of the identified goods be produced in a foundry?
- 3) Are any parts of the identified goods produced in a foundry?
- 4) Will any parts of the identified goods be produced in a foundry?⁸

Applicant responded:

⁵ *Id.* at 6.

⁶ *See* Registration No. 3441504 for the mark REGIONS FOUNDRY for goods including “faucets” in International Class 11 submitted with July 6, 2018 Office Action, pp. 9-10.

⁷ *Id.* at 5-22; January 26, 2017 Office Action, pp. 7-11, 16-18, 25-30.

⁸ January 26, 2017 Office Action.

The most common definition of a foundry is a factory that produces metal castings. Metals such as aluminum and cast iron are cast into shapes by melting them into a liquid, pouring the liquid metal in a mold, and removing the mold material after the metal has solidified. Applicant's goods are not manufactured in a foundry nor are they cast metal. Applicant's goods are manufactured with stamped components. Therefore, the answer to all of the questions posed by the Examining Attorney is "no".⁹

The aforementioned evidence unequivocally establishes that Applicant's proposed mark misdescribes the identified goods.

Having met the first prong of the test, we turn to the question of whether consumers would be likely to believe the misrepresentation. To establish the plausibility element, the Examining Attorney points to evidence showing that competitors in the field promote to consumers that they do in fact manufacture plumbing products such as faucets from metal castings and in production facilities known as foundries. Note the following examples:

Chicago Faucets has been America's leading manufacturer of commercial faucets for over 110 years ... Our foundry, manufacturing, assembly, and distribution facilities are located within a 350 mile radius of our corporate office.¹⁰

This 145-year-old manufacturer of, among other things, toilets, bathtubs and faucets, is bringing your entire bathroom online. Underneath the foundry where the family-owned Kohler pours iron for its sinks and tubs ... is Kohler's brand new Smart Home Experience Lab.¹¹

Charlotte Pipe and Foundry Company ... has been a preferred supplier to wholesalers for over a century. Plus,

⁹ July 18, 2017 Response to Office Action.

¹⁰ Excerpt from www.chicagofaucets.com submitted with July 6, 2016 Office Action, pp. 23-24.

¹¹ Excerpt from www.cnet.com submitted with February 28, 2018 Office Action, p. 20.

as the only manufacturer of cast iron and plastic plumbing systems, we are in a unique position to assist our customers when deciding whether cast iron or plastic products should be used for an application.¹²

This evidence shows that consumers are accustomed to encountering in the marketplace plumbing products such as faucets manufactured from metal products and produced at a foundry. It is therefore likely that consumers will be deceived by Applicant's misrepresentation.

Applicant counters that consumers would perceive its proposed mark FOUNDRY as "simply another fanciful descriptor of a faucet collection" and that "[a]t most, they may associate an industrial style to the collection."¹³ Given the nature of the goods, and the evidence that competitors in the industry use FOUNDRY to describe to consumers their production facility and process, we are skeptical that prospective consumers would attribute any of these "fanciful" meanings to Applicant's mark.

In sum, upon consideration of the entirety of the record and arguments, including those not specifically discussed in our opinion, we find Applicant's proposed standard character mark FOUNDRY deceptively misdescriptive of "plumbing products, namely, faucets" in International Class 11 under Section 2(e)(1) and therefore ineligible for registration on the Principal Register in the absence of a showing of acquired distinctiveness. In view thereof, we need not reach the Examining Attorney's refusal in the alternative that Applicant's mark is merely descriptive.

¹² Excerpt from www.charlottepipe.com submitted with February 28, 2018 Office Action July 6, 2016 Office Action, pp. 17-18.

¹³ Applicant's Brief at 4 TTABVUE 2.

Decision: The refusal to register is affirmed.