

This Opinion is not a
Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re GCool-Tech USA LLC
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Serial No. 87433779
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David L. Principe of Phillips Lytle LLP,
for GCool-Tech USA LLC.

Patrick Shanahan, Trademark Examining Attorney, Law Office 116,
Christine Cooper, Managing Attorney.

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Before Shaw, Goodman and Larkin,
Administrative Trademark Judges.

Opinion by Goodman, Administrative Trademark Judge:

GCool-Tech USA LLC (“Applicant”) seeks registration on the Principal Register of the mark COPPER 88 (in standard characters) for “clothing made of fabric containing copper, namely, athletic sleeves, sweatshirts, pants, scarves, scrubs not for medical purposes, shorts, socks, T-shirts and underwear, shoes, gloves, hats” in International Class 25.¹

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¹ Application Serial No. 87433779 was filed on May 2, 2017, based upon Applicant’s allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act.

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).

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed. We affirm the refusal to register.

I. Mere Descriptiveness

Section 2(e) of the Trademark Act prohibits registration on the Principal Register of "a mark which, (1) when used on or in connection with the goods of the applicant is merely descriptive ... of them," 15 U.S.C. § 1052(e)(1), unless the mark has acquired distinctiveness under Section 2(f) of the Act, 15 U.S.C. § 1052(f). A term is "merely descriptive" within the meaning of Section 2(e)(1) 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 AG*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)). Whether a mark is merely descriptive is determined in relation to the goods or services for which registration is sought, not in the abstract or on the basis of guesswork. *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978). We must consider "the context in which [the mark] is being used, and the possible significance that the term would have to the average purchaser of the goods because of the manner of its use or intended use." *In re*

Page references herein to the application record refer to the online database of the USPTO's Trademark Status & Document Retrieval (TSDR) system. References to the briefs on appeal refer to the Board's TTABVue docket system.

Chamber of Commerce of the U.S., 102 USPQ2d at 1219 (quoting *In re Bayer AG*, 82 USPQ2d at 1831). In other words, we evaluate whether someone who knows what the goods or services are will understand the mark to convey information about them. *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012); *In re Tower Tech Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002).

When two or more merely descriptive terms are combined, the determination of whether the composite mark also has a merely descriptive significance turns on whether the combination of terms evokes a new and unique commercial impression. If each component retains its merely descriptive significance in relation to the goods or services, the combination results in a composite that is itself merely descriptive. See, e.g., *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370 (Fed. Cir. 2004) (PATENTS.COM merely descriptive of computer software for managing a database of records that could include patents and for tracking the status of the records by means of the Internet).

The following evidence is of record. The Examining Attorney has provided evidence from Applicant's website (copper88.com) describing the goods. Cf. *In re Empire Tech. Dev. LLC*, 123 USPQ2d 1544 (TTAB 2017) (Board considered applicant's own website and promotional video in finding COFFEE FLOUR generic).

Applicant described its goods as follows:

Consisting of 88% embedded copper-nylon and 12% spandex, Copper 88 uses a unique fabric structure and composition that maximizes its embedded copper content... and delivers excellent wicking performance.

August 4, 2017 Office Action at 5-6 (copper88.com).

The Examining Attorney also provided evidence about Applicant's goods from websites that offer the goods for purchase in Canada. Although both of these websites are foreign websites, we find they have probative value as they provide additional information about the composition of Applicant's goods. *See In re Florists' Transworld Delivery Inc.*, 106 USPQ2d 1784, 1786 (TTAB 2013). The websites state as follows:

Copper 88 offers 88% embedded copper in the composition of the [sic] used in its products. The brand's special copper fibres remain in the garment after countless wears and washes. ... Copper 88 compression garments harness all the natural properties found in copper to aid in the relief of pain due to muscle stiffness and soreness by transporting oxygen through the bloodstream to affected areas.

August 4, 2017 Office Action, at 2-4 (theshoppingchannel.com).

Copper 88 Ankle Compression Sleeve with 88% Copper Fiber Embedded Nylon to Aid in Recovery & Pain Relief ... COMPOSITION: 88% Copper Nylon/12% Spandex ... Product Description. Copper 88™ is the only garment in the marketplace that offers 88% EMBEDDED copper in its composition. ... our durable garments contain 88% EMBEDDED copper fiber. This allows our copper products to remain in the garment after countless washes, ...

September 29, 2017 Office Action at 5-6 (Amazon.com.ca).

Applicant argues that there is no evidence that any competitors use the term "copper" combined with any numbers to describe any technical features of their products and that competitors do not need to use "copper 88" to describe their goods.²

² Applicant has argued the three-part test described in *No Nonsense Fashions, Inc. v. Consol. Foods Corp.*, 226 USPQ 502 (TTAB 1985). The test set forth in *No Nonsense Fashions* has been superseded in the Federal Circuit by the test for descriptiveness enunciated in *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987) (whether a term "immediately

However, there is no requirement that the Office prove actual competitor use or need; it is well established that even if an applicant is the only user of a merely descriptive term, this does not justify registration of that term. *In re Carlson*, 91 USPQ2d 1198, 1203 (TTAB 2009) (citations omitted). Applicant also contends that it is “highly unlikely” that consumers will immediately perceive COPPER 88 as describing a feature of the goods “as no reasonable consumer would expect that clothing would be 88% metal” and that COPPER 88 could refer to a variety of products. 8 TTABVUE 7, 11. These arguments assume that a consumer would encounter the term COPPER 88 out of context. As previously stated, the term COPPER 88 must be considered in the context in which it is used and not in the abstract.

Applicant argues that COPPER 88 is suggestive of a feature of the product and requires “mental steps” to determine “the actual technical feature” that removes it from descriptiveness.³ 8 TTABVUE at 8. In particular, Applicant asserts that the mark is based on a patent where electrolyte copper in powder form is mixed with a polymer which is processed into nylon fibers containing copper. The amount of copper-nylon fibers used in the fabric is in the range of 70 to 90 percent. *Id.* According to Applicant, the “number 88 is derived from one specific example from one subset of the nylon fibers, namely a nylon fiber containing copper in that range.” *Id.* Applicant

conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used”). *In re Bayer Aktiengesellschaft*, 82 USPQ2d at 1831, citing *In re Gyulay*, 3 USPQ2d at 1009. See also *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1514 (TTAB 2016).

³ Applicant argues that COPPER 88 is a coined term, but a coined term is one without any recognized meaning. *In re Joint-Stock Co. Baik*, 84 USPQ2d 1921, 1923 (TTAB 2007).

contends that COPPER 88 “only indirectly suggests information regarding the copper content of its clothing articles,” is “too remote from any specific technical features of the product” to provide meaning to the consumer, that there is no “variety of copper or copper composition referred to as COPPER 88,” and that the term has no meaning in the industry. *Id.* at 7-8, 10-11. Applicant further urges that any doubt on the matter of mere descriptiveness be resolved in Applicant’s favor.

The evidence of record establishes that the composite term COPPER 88 is merely descriptive of Applicant’s goods. The term “copper” in this case refers to the copper fiber in Applicant’s clothing. Applicant has conceded the descriptiveness of the term “copper” by its use in the identification of goods. *Cf. In re Johanna Farms, Inc.*, 222 USPQ 607, 609 (TTAB 1984) (the “term ‘yogurt’ is concededly the name of the goods. That fact is uncontrovertible where, as here, the same term has been used in the identification of goods for which registration is sought.”). Further, Applicant’s websites and the third party-websites refer to the composition of the goods as containing embedded copper content and copper fiber. The term “88” is merely descriptive of the percentage of embedded copper-nylon fiber. As the evidence shows, the term “88” refers to the percentage of copper fiber in the clothing. Applicant’s website and the Amazon.com.ca website identify the composition of the goods as 88% copper-nylon and 12% spandex, and both third-party websites describe the goods as having 88% copper fiber in its composition.

COPPER 88 conveys an immediate idea of the qualities of the clothing products offered by Applicant. When considering the term COPPER 88 as a whole, the

combined term merely describes the goods as having a composition of 88% embedded copper-nylon fiber. In describing the process in which the copper-nylon fibers are made, counsel has stated that the number 88 refers to a subset of nylon fiber containing copper in that range.⁴ As the website pages and product descriptions show, the combined term COPPER 88 is used to describe the composition of Applicant's clothing and conveys to the consumer information about the makeup of Applicant's products, in that they are embedded with 88% copper-nylon fiber.

II. Conclusion

Consumers encountering COPPER 88 in connection with Applicant's clothing will immediately understand the term to merely describe a feature or characteristic of the goods, namely, that Applicant's clothing contains 88% copper-nylon fibers.

Decision: The refusal to register Applicant's mark COPPER 88 is affirmed.

⁴ In its reply brief Applicant acknowledges that "one species of the product contains polymeric fibers with eighty-eight percent of the polymeric fibers containing copper." 11 TTABVUE 6.