

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 Jeffrey Butscher*  
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Serial No. 87572095  
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Luke Brean of Breanlaw, LLC,  
for Jeffrey Butscher.

Deborah E. Lobo, Trademark Examining Attorney, Law Office 109,  
Michael Kazazian, Managing Attorney.

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Before Cataldo, Bergsman and Lykos,  
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Jeffrey Butscher (“Applicant”) seeks registration on the Principal Register of the mark CANNABIS CANNIBALS (in standard characters) for “entertainment services, namely, an ongoing series featuring animated cannabis smoking cannibals provided through network or cable TV and the internet,” in Class 41.<sup>1</sup>

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<sup>1</sup> Application Serial No. 87572095 was filed on August 16, 2017, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant’s allegation of a bona fide intention to use the mark in commerce.

The Trademark Examining Attorney refused registration of Applicant's mark under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that Applicant's mark CANNABIS CANNIBALS for an entertainment series featuring animated cannabis smoking cannibals merely describes the subject matter of the series (i.e., cannabis smoking cannibals).<sup>2</sup>

While Applicant concedes that the series features animated cannabis smoking cannibals, Applicant argues that the mark is suggestive because viewers will have to use their imagination to discern the thematic content and genre of the show.<sup>3</sup> Applicant also has argued that the test of whether a mark is merely descriptive includes the competitors' use test and the competitors' need test set forth in *No Nonsense Fashions, Inc. v. Consol. Foods Corp.*, 226 USPQ 502 (TTAB 1985). The competitors' use and need tests described in *No Nonsense Fashions* have been rejected by the Board. *In re Carlson*, 91 USPQ2d 1198, 1203 (TTAB 2009) (rejecting the tests set out in *No Nonsense Fashions*). The test for descriptiveness is whether a mark "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)). *See also In re TriVita, Inc.*, 783 F.3d 872, 114 USPQ2d 1574, 1575 (Fed. Cir. 2015). "There is no requirement that the Office prove actual competitor use or need; it is well established that even if an

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<sup>2</sup> Trademark Examining Attorney's Brief, 6 TTABVUE 5.

<sup>3</sup> Applicant's Brief, pp. 4-5 (4 TTABVUE 5-6).

applicant is the only user of a merely descriptive term, this does not justify registration of that term.” *Carlson*, 91 USPQ2d at 1203; *see also In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1514 (TTAB 2016).

In the absence of acquired distinctiveness, Section 2(e)(1) 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). As noted above, 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.” *Chamber of Commerce of the U.S.*, 102 USPQ2d at 1219 (quoting *Bayer AG*, 82 USPQ2d at 1831). “On the other hand, if one must exercise mature thought or follow a multi-stage reasoning process in order to determine what product or service characteristics the term indicates, the term is suggestive rather than merely descriptive.” *In re Tennis in the Round, Inc.*, 199 USPQ 496, 498 (TTAB 1978); *see also In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987); *In re Shutts*, 217 USPQ 363, 364-65 (TTAB 1983); *In re Universal Water Sys., Inc.*, 209 USPQ 165, 166 (TTAB 1980).

Whether a mark is merely descriptive cannot be determined in the abstract or on the basis of guesswork. Descriptiveness must be evaluated “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 because of the manner of its use or intended use.” *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).

The term CANNABIS CANNIBALS is not merely descriptive because the primary significance of CANNABIS CANNIBALS to a prospective viewer indicates an ongoing entertainment series and the fanciful animated fictional, principal characters of the series. To hold to the contrary would lead to the inequitable result that this Applicant, as well as countless other applicants in the creative industries, could not register their marks because the marks identify their characters or the subject matter of the television shows. For example,

- MORK & MINDY for a television series would be merely descriptive because it describes two characters with the names Mork and Mindy;
- THE LITTLE ENGINE for a series of books would be merely descriptive because it describes the subject matter of the book series, a little engine that goes to school, the fair, the playground, etc.; and
- SUPERMAN for a graphic novel would be merely descriptive because it describes a character with superhuman powers.

*See, e.g., In re DC Comics, Inc.*, 689 F.2d 1042, 215 USPQ 394 (CCPA 1982) (drawings of the fictional characters Superman, Batman and Joker were held to function as trademarks for toy dolls of such characters); *In re Paramount Pictures Corp.*, 213 USPQ 1111 (TTAB 1982) (television character names MORK & MINDY serve as a

trademark although used and presented as ornamentation for the decalcomania goods involved); *In re Florida Cypress Gardens, Inc.*, 208 USPQ 288 (TTAB 1980) (designation consisting of name of clown is registrable for entertainment services despite fact that name also identifies a fictitious character played by performers in applicant's shows); *Warner Bros, Inc. v. Road Runner Car Wash, Inc.*, 189 USPQ 430 (TTAB 1975) (ROAD RUNNER held to be a protectable trademark).

Cases such as *In re Conus Commc'ns Co.*, 23 USPQ2d 1717 (TTAB 1992) (ALL NEWS CHANNEL found generic for a television channel broadcasting all news); *In re Weather Channel, Inc.*, 229 USPQ 854 (TTAB 1986) (THE WEATHER CHANNEL found generic for a television transmission whose subject matter exclusively concerns the weather) are inapplicable. In *Conus Commc'ns*, the Board held that the term ALL NEWS CHANNEL is generic for a television channel broadcasting all news because a viewer seeing that term would understand it as the apt descriptive language for a type of television channel. "The words chosen by applicants as their mark generically describe their broadcasting and production services of which the entire subject matter is the news." 23 USPQ2d at 1719. Likewise, THE WEATHER CHANNEL was held to be a generic term for a television transmission whose subject matter exclusively concerns the weather because viewers would understand that term as the apt descriptive name for television channel dedicated to the weather. 229 USPQ 854. In this case, however, the mark sought to be registered, CANNABIS CANNIBALS, is the fanciful animated, fictional subjects of Applicant's entertainment services created by Applicant rather than a factual subject matter.

As discussed in *In re United Trademark Holdings, Inc.* 122 USPQ2d 1796, 1799 (TTAB 2017) (LITTLE MERMAID for dolls), “[o]ur case law concerning whether character names serve as source identifiers or are merely descriptive draws a distinction between situations where the character is in the public domain and where the applicant owns intellectual property rights in the work(s) from which the character arose.”

As we explained in *In re Carlson Dolls Co.*, [31 USPQ2d 1319, 1320 (TTAB 1994)] a case where we held that MARTHA WASHINGTON for “historical dolls” is merely descriptive because the mark identifies an historical figure which consumers do not necessarily link to commercial entities as they do a fictional character:

While it can also be *argued* that a characteristic of the dolls bearing either the configuration of the Superman character or the name “SUPERMAN” is that they embody the appearance of the Superman character, an important difference exists which distinguishes that situation from the circumstances presented by the instant application. Superman was and is a proprietary creation, a character featured by a business entity which markets all manner of products, from comic books to dolls, by identifying the common source of those goods with the name and/or image of its proprietary fictional character. Consumers reasonably expect goods and services bearing the name or image of this character to emanate from, or be produced or marketed under license from, the entity which created the character and therefore owns the right to profit from commercialization of it.

This is not the case with historical figures, whose names and images are not necessarily linked to particular commercial entities. In short, while prospective purchasers of dolls may reasonably expect dolls labeled with the name “SUPERMAN” or the likeness of the Superman character to emanate from the same source which is responsible for the

comic books and other products which bear the name or image of the character, the likely reaction of ordinary consumers presented with “MARTHA WASHINGTON” on tags attached to “historical dolls” made to look like women in colonial clothing would be that the name indicates not the commercial source of the dolls, but rather is used as a description of the historical figure the dolls are supposed to represent.

31 USPQ2d at 1320.

Similarly, a fictional public domain character like the Little Mermaid of the Hans Christian Anderson fairy tale is not necessarily linked to a specific commercial entity and may be presented in various embodiments because prospective purchasers expect dolls labeled as LITTLE MERMAID to represent the fairy tale character and, thus, describes the purpose or function of the goods (*i.e.*, to represent the Little Mermaid of the fairy tale).

*United Trademark Holdings*, 122 USPQ2d at 1799.

Also, the double use of the letter “C” as the first consonant in both components of Applicant’s mark, CANNIBUS CANNIBALS, provides an element of alliteration, while not dispositive in and of itself, adds to the character of the mark. *See In re Star Metal Corp.*, 150 USPQ 133, 134 (TTAB 1966) (VITTLE VENDOR for food displaying and dispensing equipment is not merely descriptive, in part, because the alliteration adds character); *In re David Crystal, Inc.*, 145 USPQ 95 (TTAB 1965) (SPORTSWEAR FOR EVERYWEAR for dresses and suits is not merely descriptive, in part, because it has some alliteration); *cf. In re Joseph Bancroft & Sons Co.*, 129 USPQ 329, 331 (TTAB 1961) (THE TEST IS IN THE TOUCH for knitted underwear, outerwear and hosiery is an alliterative slogan that possesses a certain degree of originality that serves as a trademark).

We find that CANNABIS CANNIBALS when used in connection with “entertainment services, namely, an ongoing series featuring animated cannabis smoking cannibals provided through network or cable TV and the internet” is not merely descriptive.

**Decision:** The refusal to register Applicant’s mark CANNABIS CANNIBALS is reversed.