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SEPT 9, 97

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Bose Corporation
v.
Kaman Music Corporation

Opposition No. 93,383
to application Serial No. 74/328,177
filed on November 2, 1992

Charles Hieken and Donna Weinstein of Fish & Richardson P.C.
for Bose Corporation.

Donald Huber, Mark Giarratana and Dean Alderucci of
McCormick, Paulding & Huber for Kaman Corporation.

Before Sams, Cissel and Hohein, Administrative Trademark
Judges.

Opinion by Cissel, Administrative Trademark Judge:

On November 2, 1992, applicant applied to register the
mark "DYNAMIC CORRECTION" on the Principal Register for what
were subsequently identified by amendment as "electronic
sound correction devices for use with sound generating,
recording, reproducing, amplifying and transmitting
equipment including microphones, musical instrument pick up
devices, speaker cabinets, radios, television receivers,
tuners, headphones, compact disc players, tape players,

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wireless transmission devices, equalizers, and telephones," in Class 9. The application was based on applicant's assertion that it possessed a bona fide intention to use the mark on the specified goods in commerce. Along with the amendment to the identification of the goods, applicant disclaimed the exclusive right to use the word "CORRECTION" apart from the mark as shown.

Following publication under Section 12 of the Act, a timely notice of opposition was filed on November 12, 1993 by Bose Corporation. As grounds for opposition, opposer alleged that it is a manufacturer of audio equipment, including the types of such products specified by applicant in its application; that the term "DYNAMIC CORRECTION," as applied to these goods, is so highly descriptive of them that it is incapable of functioning as a trademark for them; that it is at a minimum merely descriptive of them, because the term is an apt and common term used to describe a fundamental characteristic of applicant's dynamic equalization or correction circuits; and that registration to applicant is not appropriate under these circumstances because opposer and others in this field are entitled to use the term sought to be registered and its equivalent, "DYNAMIC EQUALIZATION," without fear of potential legal prosecution by applicant.

Applicant's answer denied opposer's allegations.

On September 2, 1994, opposer moved for summary judgment. In support of the motion, opposer submitted the

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declarations, with exhibits, of Joseph Veranth, opposer's vice president for engineering, and of Donna Weinstein, opposer's attorney. Applicant submitted the declaration of Katherine Tingley, its marketing coordinator, in opposition to the motion.

On October 27, 1994, applicant moved to amend the identification of goods in its application to read as follows: "electronic sound correction devices forming a part of guitar amplifiers."

On July 24, 1995, the Board granted the motion to amend and denied the motion for summary judgment. The Board acknowledged that opposer had presented evidence showing the descriptive usage of "DYNAMIC CORRECTION" in the technical literature relating to audio products other than guitar amplifiers, but the Board found that opposer had not established that prospective purchasers of applicant's goods, i.e., guitar players, would be aware of the descriptive usage of the term in connection with those other products and would thus understand the term to be merely descriptive of a feature or characteristic of applicant's goods. Because a genuine issue of material fact existed as to the meaning the relevant prospective purchasers would ascribe to the term sought to be registered in connection with applicant's goods, summary judgment was denied, and the case proceeded to trial.

The record for opposer includes the testimony, with exhibits, of Robin Sibucão, a professional guitarist and

field sales manager for opposer; and the testimony, with exhibits, of the aforementioned Joseph Veranth and Donna Weinstein. Applicant took no testimony.

On November 17, 1995, applicant filed a notice of reliance on a number of documents, including dictionary definitions of the words "dynamic" and "correction;" opposer's responses to applicant's interrogatories and requests for admissions; opposer's registrations for other marks; an advertisement and a brochure for applicant's goods; and the same declaration of Katherine Tingley which applicant had previously submitted in connection with the motion for summary judgment. All of these materials have been considered except for the declaration of Ms. Tingley, either because they were proper for introduction by means of a notice of reliance or because opposer has not objected and has in fact treated them as being of record by making arguments based upon them.

Opposer objected, however, to our consideration of the Tingley declaration. We sustain the objection because the declaration was not properly made of record. A declaration ordinarily may not be introduced by means of a notice of reliance under Trademark Rule 2.122(e) because it is not a printed publication or an official record. Moreover, although the declaration was part of the group of materials we considered in resolving the summary judgment motion,

materials submitted in connection with such a motion are of record only for purposes of that motion. Once the case proceeds to trial, the summary judgment evidence does not become part of the record unless it has been introduced properly during the testimony period of the party seeking to have it considered. See *Levi Strauss & Co. v. R. Josephs Sportswear Inc.*, 28 USPQ2d 1464 (TTAB 1993); and *Pet Inc., v. Bassetti*, 219 USPQ 911 (TTAB 1983). In the instant case, applicant did not introduce the declaration in question in connection with any of its testimony or otherwise make it of record in any proper manner. We therefore have not considered it.

Both parties filed briefs following the testimony periods, but an oral hearing before the Board was not requested.

Based on the record before us in this case, we find that the term "DYNAMIC CORRECTION" is merely descriptive as applied to the goods set forth in the application as amended, namely, "electronic sound correction devices forming a part of guitar amplifiers."

The test for whether a mark is merely descriptive under Section 2(e)(1) of the Act is whether the term sought to be registered immediately conveys information about the nature of the goods, their functions, characteristics or features. In *re Pennzoil Products Co.*, 20 USPQ2d 1753 (TTAB 1991); In

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re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215 (CCPA 1978). As we noted in connection with the summary judgment motion, we must look to the perceptions of the average prospective purchasers of the goods in order to make this determination. Magic Wand, Inc. v. RDB Inc., 940 F.2d 638, 19 USPQ 1674 (Fed. Cir. 1991).

In the instant case, as the Board pointed out in its opinion on the motion for summary judgment, prospective purchasers of applicant's guitars are guitar players, but although opposer had supported its motion for summary judgment with "voluminous evidence relating to the apparently descriptive usage of DYNAMIC CORRECTION in the technical literature relating to various other types of products, as well as the opinion of its engineering expert to the effect that DYNAMIC CORRECTION has the same merely descriptive meaning in relation to applicant's goods," at the time of our ruling on the motion, the materials then of record did not allow us to conclude that "the relevant purchasers of applicant's goods, i.e., guitar players, would be familiar with that technical literature, or that they would be aware of the descriptive usage of the term in connection with those other products and readily ascribe a similar descriptive meaning to the term when they encounter it on applicant's goods."

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The trial testimony of Ms. Weinstein is a confirmation that the statements in her earlier declaration remain true. That declaration included the results of a search of journal and news articles and patents containing the term "dynamic correction." As noted above, the excerpts from the search show the term used in a descriptive sense in connection with electronic sound devices, although amplifiers for guitars are not specifically identified therein. One article describes Dolby Pro-Logic circuitry used in home theater systems by claiming that the circuitry "provides dynamic correction of left-right input-signal-level imbalances, eliminating manual user adjustments while improving center-channel dialogue separation from the sound channels." A patent for an amplifier states that "[g]enerally, the loop parameters do not remain constant over the full operating range of the amplifier and some dynamic correction is required..." Another patent, this one for a stereo receiver "with improved correction signals," states that the receiver "for receiving a compatible stereo signal and requiring a dynamic correction factor prevents the introduction of a false phase reference signal by limiting and filtering the signal going into the oscillator or the PLL which provides the correction reference signal."

Also included with the exhibits to the testimony of Ms. Weinstein were dictionary definitions of "dynamic" and

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"correction." One listed meaning for the former is "Mus. Relating to the volume of sound." Another is "the varying degree of volume of sound in musical performance."

"Correction," the word applicant has disclaimed in its application for trademark registration, is listed as "the act or process of correcting." The verb "correct" is shown to mean to "set right, amend...substitute the right thing for the wrong one."

The trial testimony of Mr. Veranth is essentially a confirmation that what he stated in his earlier declaration remains true. The declaration established his technical qualifications and his conclusion that "[a]s applied more specifically to sound reproduction and amplification equipment, dynamic correction describes, among other things, correction of errors in output signals under dynamic conditions." (paragraph 6).

Attached as an exhibit to the declaration was a copy of an advertisement for applicant's amplifiers. Mr. Veranth viewed the advertisement as confirming the descriptive nature of the term sought to be registered. The text of the advertisement states that "[a]t the heart of each amplifier is a unique new technology called Dynamic Correction™. Developed by Trace Elliot in consultation with leading acoustic guitarists, the circuit actually monitors the way in which a loudspeaker reacts to the signal being presented

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to it, and compares this directly with the original input signal. Any differences detected are 'dynamically corrected', ensuring that the speaker reproduces the original signal with an exceptionally high degree of accuracy. The result is a totally clean sound, right up to the maximum output power of the amplifier--ideal for amplifying acoustic guitar."

The testimony of Mr. Sibucan was not before the Board in connection with the motion for summary judgment, however. As noted above, Mr. Sibucan is the field sales manager for opposer. More significant is the fact that he has been a guitar player since the age of six. At age twelve, he began playing in musical groups. He studied music in college, and then was a full time professional musician, a guitarist with touring bands, for years. In addition, he managed music stores which sold and repaired guitars. His work with opposer involved the sale of amplifiers and speakers used in conjunction with guitars. He is still active as a professional guitarist, although on a part-time basis these days.

Mr. Sibucan's unrebutted testimony is that guitar players are extremely sophisticated in their understanding of the technical details of the equipment they use, and that they have sufficient technical knowledge to understand the descriptive meaning of "DYNAMIC CORRECTION" in connection

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with applicant's goods. Copies of editions of Musician, Acoustic Guitar, Guitar Player, Guitar Shop, and Guitar Classics magazines were exhibits to his testimony. In each exhibit he pointed out advertisements and articles which demonstrate that guitar players have a high level of sophistication and knowledge as to the electronics incorporated into the equipment they use with their guitars. What appears to the Board to be highly technical language and specifications are routinely used in these magazines in reference to guitar amplifiers and other electronic gear used by guitarists. While the term sought to be registered is not used in these exhibits with reference to guitar amplifiers, this evidence does support his testimony that guitar players are technically sophisticated and understand electronic terms and jargon.

The testimony of Mr. Sibucan and the exhibits to it, in conjunction with the declarations of record and the attachments to them, particularly applicant's own advertisement which was an exhibit to the Varanth declaration, are unrebutted support for opposer's contention that guitar players would readily understand the term sought to be registered to refer to the key characteristic of applicant's guitar amplifier electronic sound correction devices. That characteristic is that under dynamic, or changing, conditions, when the volume or sound pressure

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level is changing, the devices correct the output signal to conform it more accurately to the input signal from the guitar to which the amplifier is connected. As applicant's advertisement states, the signal is "dynamically corrected," from the low levels of audibility "right up to the maximum output power of the amplifier." Applicant's advertisement must be presumed to be directed at people who can understand it. A guitar player who is a prospective purchaser of applicant's goods who understands this text will certainly be able to comprehend the descriptive meaning of the term "DYNAMIC CORRECTION" when it is used in connection with these products. For this reason, the term is merely descriptive of such goods within the meaning of Section 2(e)(1) of the Act.

Applicant argues that the term is suggestive because it requires imagination, thought, and perception to determine the nature of the goods. It is well settled, however, that the issue under Section 2(e)(1) is not whether one can tell from the mark what the goods are, but rather when the mark is considered in connection with the goods as they are set forth in the application, whether the mark provides information about their features, functions or characteristics. See *Abcor Development Corp.*, *supra*.

Applicant also argues that neither opposer nor any other competitor has used or needs to use the designation

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"DYNAMIC CORRECTION" in connection with competing products. A showing that others use or even need to use a descriptive term is not necessary in order to support a holding that a term is merely descriptive under the Act, however. That applicant is the first one, or even the only one, in a particular field to adopt the descriptive term does not alter the fact that it is merely descriptive of the goods in question. In re Mark A. Gould, M.D., et al., 173 USPQ 318 (TTAB 1974).

In summary, although there is no evidence in support of opposer's claim that the term is so highly descriptive of applicant's goods that it is not capable of functioning as a trademark for them, opposer's unrebutted testimony and evidence do establish that prospective purchasers of applicant's guitar amplifier sound correction devices would understand the term "DYNAMIC CORRECTION" to indicate that the devices dynamically correct the sound produced by

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applicant's product. Accordingly, the opposition is sustained and registration to applicant is refused.

J. D. Sams

R. F. Cissel

G. D. Hohein
Administrative Trademark Judges
Trademark Trial & Appeal Board