

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB

JAN 26, 98

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Wet Labs Inc.

Serial No. 74/585,258

Roger W. Blakely, Jr. and Sunny Tamakaoki of Blakely,
Sokoloff, Taylor & Zafman for applicant.

Conrad Wai-pac Wong, Trademark Examining Attorney, Law
Office 104 (Sidney I. Moskowitz, Managing Attorney).

Before Simms, Quinn and Walters, Administrative Trademark
Judges.

Opinion by Walters, Administrative Trademark Judge:

Wet Labs Inc. has filed a trademark application to
register the mark SHOOTER for "automatic nozzles and nozzle
controls, sold as a unit, for decorative water fountains"
and "water display equipment, namely, decorative water
fountains."¹

The Trademark Examining Attorney has finally refused
registration under Section 2(e)(1) of the Trademark Act, 15

¹ Serial No. 74/585,258, in, respectively, International Classes 9 and
11, filed October 13, 1994, based on use of the mark in commerce,

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U.S.C. 1052(e)(1), on the ground that applicant's mark is merely descriptive of its goods.

Applicant has appealed. Both applicant and the Examining Attorney have filed briefs, but an oral hearing was not requested. We reverse the refusal to register.

The Examining Attorney contends that SHOOTER merely describes the fact that the goods "eject water in their application as water display equipment"; and that SHOOTER is synonymous with "nozzle," which is one of applicant's goods. In support of his position, the Examining Attorney has submitted dictionary definitions of "shoot" and "shooter"; excerpts of articles from the LEXIS/NEXIS database, including an article about applicant and one of its water displays; and excerpts of patents, also from the LEXIS/NEXIS database.

Applicant contends, in view of the nature of the goods, that the mark is at most suggestive in connection therewith; that "in common parlance, the term SHOOTER refers to a person firing a gun, or in the case of the Dennis Hopper character in the motion picture 'Hoosiers' a person known for his basketball shooting skills"; and that the term SHOOTER appears in the excerpts submitted by the Examining Attorney in connection with other types of goods unrelated to applicant's goods. In support of its position, applicant

alleging first use and first use in commerce as of December, 1993, in

submitted a drawing of four of its water display designs and two copies of another article about its water displays written by the same person who authored the excerpt made of record by the Examining Attorney.²

The test for determining whether a mark is merely descriptive is whether the involved term immediately conveys information concerning a quality, characteristic, function, ingredient, attribute or feature of a product or service. *In re Bright-Crest, Ltd.*, 204 USPQ 591 (TTAB 1979); *In re Engineering Systems Corp.*, 2 USPQ2d 1075 (TTAB 1986). It is not necessary, in order to find a mark merely descriptive, that the mark describe each feature of the goods, only that it describe a single, significant quality, feature, etc. *In re Venture Lending Associates*, 226 USPQ 285 (TTAB 1985). Further, it is well-established that the determination of mere descriptiveness must be made not in the abstract or on the basis of guesswork, but in relation to the goods or services for which registration is sought, the context in which the mark is used, and the impact that it is likely to make on the average purchaser of such goods or services. *In re Recovery*, 196 USPQ 830 (TTAB 1977).

both classes.

² Applicant contends that the copies of the article submitted by applicant show proper trademark use of the term SHOOTER; whereas the article submitted by the Examining Attorney, albeit by the same author, shows "that the author misused the mark in a way that made it 'look' descriptive."

Webster's Ninth New Collegiate Dictionary, 1990, defines "shoot" in pertinent part as "to drive forth or to cause to be driven forth by a sudden release of gas or air" and "to emit (as light, flame or fumes) suddenly or rapidly"; and defines "shooter" in pertinent part as "something that is used in shooting." While SHOOTER suggests that applicant's goods may be capable of spraying water, these definitions of "shoot" and "shooter" do not persuade us that SHOOTER is merely descriptive in connection with applicant's goods.

Further, we do not find the use of the term SHOOTER in many of the articles and patents excerpted in the record to be probative of the significance of the term SHOOTER in connection with applicant's goods. The goods to which these articles and patents pertain are in fields and in relation to goods that are very different from applicant's goods. For example, in a significant number of the articles and patents of record the term SHOOTER refers either to a part in an automotive carburetor; or to a part in the steel refining process; or to a toy water gun. Except as noted below, the remaining article excerpts submitted by the Examining Attorney use the term SHOOTER to refer, primarily, to toy "guns" such as water shooters, pea shooters, spud shooters and bubble shooters.

Applicant's goods are described in an article in the *Los Angeles Times*, March 13, 1994, as follows:

At the Los Angeles Music Center, scene of a fountain that rises and falls according to a computer program, tuxedoed concert-goers dash through during quiet moments only to get soaked as the shooters blast again. On hot days at Universal CityWalk, youngsters caper amid jets that erupt without warning from the plaza floor. Equally tempting is the Watercourt in Downtown's California Plaza . . . There, giant shooters and undulating water curtains surround stages. When the stages are empty, the water is the show as plumes dance back and forth and a huge wave crashes below.

In a September 29, 1988,³ article about applicant by the same author, in the *Los Angeles Times*, the term SHOOTER appears in quotes, as follows:

Japan's Seito Ohashi Exhibition near Osaka features another WET fountain, a circular grouping of fireworks-style "shooters" that blast water hundreds of feet into the air.

While the term SHOOTER is used in a descriptive manner in the first-quoted article about applicant, its use in the second article is more ambiguous in nature. Absent significant other evidence in the record regarding the descriptive nature of SHOOTER in relation to applicant's goods, we do not find these two articles by a single author to be particularly probative of the issue before us as, with

³ The article is repeated in a different edition of the same paper on October 2, 1988.

respect to the first article in particular, the author could be simply misusing applicant's mark.

The Examining Attorney has presented a comprehensive record from numerous sources regarding the use of the term SHOOTER. However, from that substantial amount of evidence, there appear to be only two excerpts involving goods that may be similar in nature to those of applicant. One excerpt, from an article in *The Washington Times*, May 29, 1994, uses the term SHOOTER to refer to part of a water display, as follows:

. . . Fountain. A formally dressed Mickey Mouse takes center stage, opening the show in front of custom-designed shooters that spray water up to 150 feet high.

One patent uses the term SHOOTER to pertain to a part in an "explosion simulator,"⁴ which is described as "an underwater explosion effect simulator [that] includes a submerged shooter for shooting props and dye-colored water through the water surface."

However, while these two excerpts tend to indicate that SHOOTER may have more than a suggestive connotation in connection with goods that may be similar to applicant's goods, we find that this is insufficient evidence of the context in which the term may be used in applicant's field for us to conclude that the impact SHOOTER is likely to have on the average purchaser of applicant's goods is as a merely

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descriptive term. It is well-established that the determination of mere descriptiveness must be made not in

⁴ U. S. Patent No. 5,114,140.

the abstract or on the basis of guesswork, but in relation to the goods or services for which registration is sought, the context in which the mark is used, and the impact that it is likely to make on the average purchaser of such goods or services. *In re Recovery*, 196 USPQ 830 (TTAB 1977).

There is a fine line between what is a suggestive mark and what is unregistrable merely descriptive matter. It is our view that the record before us is not sufficient⁵ to establish that the term SHOOTER, when applied to applicant's goods, is merely descriptive thereof. We believe that this is a close case and we emphasize that our determination on this issue is not free from doubt. However, where there is doubt on the question of mere descriptiveness, that doubt is to be resolved in applicant's behalf and the mark should be published for opposition. *See, In re Rank Organization Ltd.*, 222 USPQ 324, 326 (TTAB 1984) and cases cited therein.

⁵ We do not intend by this statement to criticize the Examining Attorney's presentation of his case. Rather, we recognize that there are practical limitations to the nature of evidence accessible to an Examining Attorney in defending a refusal in an ex parte matter. That is to say, our conclusion in this ex parte appeal would not, of course, preclude the Board from reaching a different result in a subsequent inter partes proceeding brought against this same application by a competitor of applicant, if the competitor was able to present evidence of descriptive use in the trade. Such evidence is more readily available to a competitor than it is to a Trademark Examining Attorney.

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Decision: The refusal under Section 2(e)(1) of the Act
is reversed.

R. L. Simms

T. J. Quinn

C. E. Walters
Administrative Trademark Judges,
Trademark Trial and Appeal Board