

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB JUNE 15, 1999

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Marine Air Systems, Inc.

Serial No. 74/737,115

Robert A. Vanderhye of Nixon & Vanderhye, for applicant.

Katherine Stoides, Trademark Examining Attorney, Law Office
109 (Chris A.F. Pedersen, Managing Attorney).

Before Simms, Hairston and Walters, Administrative
Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

Marine Air Systems, Inc. has filed a trademark application to register on the Supplemental Register the mark shown below for "electrically powered refrigerated water generators."¹ The application includes a disclaimer of CHILLER apart from the mark as a whole.

¹ Serial No. 74/737,115, in International Class 11, initially filed on the Principal Register on August 28, 1995, based on a bona fide intention to use the mark in commerce. On November 5, 1996, applicant

This application was originally filed on the Principal Register. The Examining Attorney refused registration under Section 2(e)(1) of the Trademark Act, 15 U.S.C. 1052(e)(1), on the ground that applicant's mark is merely descriptive of the goods identified in the application, contending that CHILLER identifies a particular type of generator. Applicant responded by amending its drawing to the mark shown above and entering the noted disclaimer. The Examining Attorney then refused registration on the ground that the mark is merely descriptive and/or generic of the goods identified in the application, indicating that the design element is insufficient to render the mark registrable. Subsequently, applicant amended its application to seek registration on the Supplemental Register.²

filed an amendment to allege use, and specimens, alleging dates of first use and first use in commerce as of August 1995.

² There was some confusion as to applicant's amendment to the Supplemental Register. In its response of April 25, 1997, applicant's only reference to the Supplemental Register is its statement that its mark "is capable on the Supplemental Register" and applicant requests "publication" of its mark. Applicant indicated in its reply brief of January 9, 1998, that it intended by that unclear statement to amend its application to the Supplemental Register. Thus, the application

The Examining Attorney has finally refused registration, under Section 23 of the Trademark Act, 15 U.S.C. 1091, on the ground that the subject matter of this application, as used in connection with the identified goods, is generic and, thus, incapable of identifying applicant's goods and distinguishing them from those of others.

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

With respect to genericness, the Office has the burden of proving genericness by "clear evidence" thereof. *In re Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987). The critical issue in genericness cases is whether members of the relevant public primarily use or understand the term sought to be registered to refer to the genus (category or class) of goods in question. *In re Women's Publishing Co. Inc.*, 23 USPQ2d 1876, 1877 (TTAB 1992). Our primary reviewing court has set forth a two-step inquiry to determine whether a mark is generic: First, what is the genus (category or

was remanded to the Examining Attorney to consider the issue of genericness on the Supplemental Register. The Examining Attorney ultimately issued a final refusal on that ground and supplemental briefs were filed.

class) of goods at issue? Second, is the term sought to be registered understood by the relevant public primarily to refer to that genus (category or class) of goods? *H.*

Marvin Ginn Corporation v. International Association of Fire Chiefs, Inc., 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986).

The Examining Attorney contends that the evidence of record establishes that electrically powered refrigerated generators, *i.e.*, the goods identified in the application, represent the class of goods at issue in this case; that the public understands the designation "chiller" as primarily referring to this class of goods; and that the stylized element of applicant's mark is minimal and insufficiently distinctive to render the mark capable of identifying applicant's goods and distinguishing them from those of others. The Examining Attorney submitted a dictionary definition of "chiller" as "*n.* one that chills," and of "chill" as "*vt.* to lower in temperature." She argues that from these definitions alone, "it is clear that 'chiller' is recognized as something that serves the function of lowering the temperature, or cooling by refrigeration." The Examining Attorney also submitted excerpts of articles from the LEXIS/NEXIS database in support of her position that the term "chiller" is

frequently used "to identify a particular type of generator." Following are several examples:³

"... Carrier's packaged and central station air handlers, 12.5 to 100+ ton rooftop heating and cooling units, air-cooled **chillers**, and indoor water-cooled and condenserless **chillers**." [Contracting Business, December 1996]

"The total market for water **chillers** for central air-conditioning systems grew to 12,000 units in 1995, of which 2,200 units were large absorption machines." [Energy Conservation News, November 1996]

"Medical City's energy plant - slated to include backup electrical generators, heaters, **chillers** and ventilating equipment - drew criticism after Fallon proposed placing it on a highly visible section of Worcester." [Telegram & Gazette (Worcester, MA), September 12, 1996]

"New equipment (**chillers** and generators) could only be introduced if the noise it generated was completely attenuated." [Building Design and Construction, May 1996]

Major components of the cogeneration plant include two electric generators, three absorption **chillers**, a dual-fuel duct burner, CO catalyst selective catalytic reduction (SCR) emissions-control systems ..." [Power, April 1995]

Applicant has disclaimed the word "chiller" in its mark and does not appear to contest the Examining

³ The Examining Attorney appears to have submitted the entire results of her search, including irrelevant excerpts, such as excerpts that do not contain the term "chiller," or that contain various forms of the word "chill" unrelated to the goods before us, or that are foreign publications and, thus, not particularly useful in determining the American public's exposure to the term. We have not considered these excerpts and the better practice would have been to place in the record only those excerpts relevant to the issue in the application. However, the submission does include numerous excerpts that are quite relevant to the issue before us and we have considered these.

Attorney's conclusion that "chiller" is a generic term in connection with the identified goods. In particular, we note the statement of Mr. Beard, applicant's declarant, that water cooling systems are sometimes described as "chillers." Applicant maintains, however, that the style of lettering used in its mark is "clearly distinctive and can easily serve as a trademark"; and that any doubt should be resolved in applicant's favor. In support of its position, applicant submits declarations from two of its distributors.⁴ Ms. Stork declares that she and her customers recognize "the distinctive stylized letters of the word 'Chiller' ... as [applicant's] trademark." Mr. Beard declares that "[w]hile there are other companies that sell water cooling systems that are sometimes described as 'chillers,' [applicant's] distinctive stylized form of the word 'Chiller' is easily recognizable by me as a trademark of [applicant], ..."

The record before us, including applicant's disclaimer of the word "chiller," supports the conclusion, which

⁴ In her final refusal of June 30, 1997, the Examining Attorney incorrectly characterizes the lettering in applicant's mark as "Times New Roman" font, although she retracts this statement in a subsequent action and reiterates her position that the stylization in the mark is minimal and incapable of acquiring trademark significance. Thus, we disagree with applicant that one issue before us pertains to whether a known type font can legally be registered, and we have not considered this question.

applicant does not appear to contest, that the word "chiller" is a generic term for a category of cooling equipment. The evidence supports the further conclusion that the relevant purchasers understand the word "chiller" as referring to this category of equipment. Thus, the only question remaining before us is whether the stylized form of the word "chiller," as it appears in the applied-for mark, is capable of distinguishing applicant's goods.

It is well established that "for a term otherwise unregistrable to be capable of distinguishing an applicant's goods, the presentation of the term must be sufficiently striking, unique or distinctive so as to overcome its inherent incapacity and render the mark capable of serving as a source indicator." *In re Cosmetic Factory, Inc.*, 220 USPQ 1103 (TTAB 1983). *See also, In re Carolyn's Candies, Inc.*, 206 USPQ 356 (TTAB 1980). The decision of capability is dependent on the nature of the presentation of the unregistrable matter in each case.

Cases wherein the Court or the Board has found a sufficiently unique display of otherwise unregistrable matter to warrant registration on the Supplemental Register include the case cited by applicant, *In re Wella Corporation*, 635 F.2d 845, 196 USPQ 7 (CCPA 1977) (court found unregistrable term BALSAM displayed in "unique style

of lettering"); and the cases of *In re Jackson Hole Ski Corporation*, 190 USPQ 175 (TTAB 1976) (Board stated that the initial "J" and "H" of disclaimed term JACKSON HOLE were displayed in a distinctive manner due to the monogram effect of the partly joined letters which were twice as large and set down from the remaining portion of each word); and *In re Carolyn's Candies, Inc., supra*, (Board found "style of display" of words YOGURT BAR more distinctive than that of BALSAM in the *Wella* case).

On the other hand, cases wherein the Board has found the display of matter unregistrable on the Supplemental Register to be "completely ordinary and nondistinctive" and, thus, the matter is incapable of functioning as a trademark for the applicant's goods, include *In re Anchor Hocking Corp.*, 223 USPQ 85 (TTAB 1984) (Board found MICROWAVE TURNTABLE to be generic name of applicant's goods and "displayed in plain block style of lettering which obviously is not unique"); *In re Cosmetic Factory, Inc., supra*, (Board found style of lettering of BODY SOAP to be ordinary and nondistinctive). *See also, In re Sambado & Son Inc.*, 45 USPQ2d 1312, 1316 (TTAB 1997) (FRUTTA FRESCA, equivalent to "fresh fruit," found to be generic term for goods and presentation found "not so unique or unusual as

to create a distinctive commercial impression apart from the words).

In the present case, the word "chiller" is displayed in lower case in an ordinary style of lettering that is not unique or unusual. The stylization of the word "chiller" in the applied-for mark does not present any unique characteristic, such as the monogram design in *Jackson Hole, supra*, the uniquely stylized lettering in *Wella, supra*, or the unusual lettering style and placement of the words in *Carolyn's Candies, supra*. Neither applicant nor its declarants point to any specific unique features in the presentation of the word "chiller" in the applied-for mark to be persuasive of a different conclusion. Thus, we find the applied-for mark in its entirety to be incapable of functioning as a mark for applicant's goods.

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Decision: The refusal to register on the Supplemental Register on the ground that the applied-for mark is generic in connection with the identified goods is affirmed.

R. L. Simms

P. T. Hairston

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