

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF THE TTAB                      NOV. 17, 99

U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Raimund Moessmer

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Serial No. 75/017,177

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Gerald H. Kiel of McAulay Fisher Nissen Goldberg & Kiel,  
LLP for Raimund Moessmer.

Alice Benmaman, Trademark Examining Attorney, Law Office  
146 (Michael Szoke, Managing Attorney).

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Before Simms, Quinn and Bottorff, Administrative Trademark  
Judges.

Opinion by Simms, Administrative Trademark Judge:

Raimund Moessmer (applicant), a German citizen, has  
appealed from the final refusal of the Trademark Examining  
Attorney to register the mark LOTTOCARD for "plastic device  
for randomly selecting lottery numbers consisting of card

with a viewing window and numbered disks, which rotate within the device.”<sup>1</sup>

The Examining Attorney has refused registration under Section 2(e)(1) of the Act, 15 U.S.C. §1052(e)(1), arguing that applicant’s mark is merely descriptive of his goods. Applicant and the Examining Attorney have submitted briefs but no oral hearing was requested.<sup>2</sup>

Relying upon a dictionary definition of “lotto” from the Random House Unabridged Dictionary, Second Edition, “a lottery, as one operated by a state government, in which players choose numbers that are matched against those of the official drawing, the winning numbers typically paying large cash prizes,” the Examining Attorney maintains that applicant’s mark used in connection with applicant’s product (reproduced below) merely describes a type of card

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<sup>1</sup> Application Ser. No. 75/017,177, filed November 9, 1995, based upon applicant’s allegation of a bona fide intent to use the mark in commerce.

<sup>2</sup> In the first Office action, the Examining Attorney also refused registration under Section 2(d) of the Act, 15 U.S.C. §1052(d), on the basis of a now-cancelled registration (Reg. No. 1,581,707, issued February 6, 1990) for the mark LOTTO CARDS and design (“LOTTO CARDS” disclaimed) for a lottery numbers selector game. Because of the cancellation of that registration under Sec. 8 of the Act, 15 U.S.C. §1058, the Examining Attorney withdrew that refusal.

used in selecting lottery numbers. More particularly, the Examining Attorney contends that applicant's mark immediately describes the function and intended use of the cards produced by applicant used for selecting lottery numbers.

As additional support for her refusal, the Examining Attorney has also made of record excerpts from a computerized search system wherein the term "lotto card" appeared.<sup>3</sup> These references indicate that a "lotto card" is a card on which chosen numbers are indicated. It is the Examining Attorney's position that this term is one that is recognized in the lottery industry because it is commonly used in reference to playing the game of lotto. Because consumers are familiar with the term "lotto card," the Examining Attorney argues that they will understand applicant's asserted mark to describe a card used in playing the lottery.

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<sup>3</sup> It is noted that some of these excerpts are from articles carried in foreign newspapers and journals. Accordingly, we have given little weight to those excerpts. See *In re Men's International Professional Tennis Council*, 1 USPQ2d 1917, 1918-19 (TTAB 1986).

Applicant, on the other hand, argues that his mark is only suggestive of his goods and not merely descriptive of them. While conceding that "lotto" has been used generically to refer to a game of chance, it is applicant's position that the term "lotto card" is used in the trade to identify a card which one uses to either scratch out numbers or to insert numbers. This lotto card is then submitted to the lottery officials. However, applicant maintains that his goods are not "lotto cards" in this sense of the term but rather are devices used to select a series of numbers which can then be entered onto an appropriate card for submission to the lotto authorities. (By moving applicant's device numbered disks appear in the window.) In other words, it is applicant's position that the excerpts submitted by the Examining Attorney demonstrate that "lotto cards" are the cards in which numbers are chosen and that these cards are different from applicant's plastic device.

A lotto card, as it is used in playing the lotto, which is usually a governmental authorized lottery, is, in fact, a card on which the chosen number [sic] are indicated and then submitted. The present goods constitute a device that is used to select a series of numbers which can then be entered onto an appropriate card ("lotto card") for submission to the lottery authorities. The plastic device in question is not

submitted to the appropriate authorities and thus, is not, in fact, a "lotto card". Rather, it is a device to assist the lotto player in selecting a random series of numbers for the purpose of entering into a lottery by filling out the numbers onto the official lotto card which is to be submitted.

Applicant's brief, 3. Applicant also maintains that the mark is suggestive of the credit card-like shape of his goods.

Upon careful consideration of this record and the arguments of the attorneys, we agree with the Examining Attorney that applicant's asserted mark is merely descriptive of his goods. Of course, the question of whether or not a particular designation is merely descriptive is determined, not in the abstract, but in relation to the goods for which registration is sought and the context in which the designation is used. See *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215 (CCPA 1978). There is no question but that applicant's plastic devices are used to select numbers for playing the game of lotto, and that applicant's device is or resembles a plastic card. While it is true that applicant's device identified by the mark LOTTOCARD is not in fact a "lotto card" actually used in playing the game of lotto, applicant's device is in fact a card used for playing

**Ser. No. 75/017,177**

lotto. As such, we believe that no thought or imagination is or will be needed by the average purchaser to understand that applicant's mark describes his card-like device used to play lotto. See *In re Bright-Crest, Ltd.*, 204 USPQ 591 (TTAB 1979)(COASTER-CARDS held merely descriptive of coasters suitable for mailing).

Decision: The refusal of registration is affirmed.

R. L. Simms

T. J. Quinn

C. M. Bottorff  
Administrative  
Trademark Judges,  
Trademark Trial and  
Appeal Board