

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB SEPT. 30,99

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **Chewing Brush, Inc.**

Serial No. 75/240,225

Gary J. Nelson of Christie, Parker & Hale, LLP for **Chewing Brush, Inc.**

Robert Clark, Trademark Examining Attorney, Law Office 108
(**David Shallant**, Managing Attorney)

Before **Seeherman, Quinn and Bottorff**, Administrative
Trademark Judges.

Opinion by **Bottorff**, Administrative Trademark Judge:

Applicant has filed an intent-to-use application seeking registration on the Principal Register of the mark CHEWING BRUSH for goods identified in the application as "toothbrushes."¹ The Trademark Examining Attorney has

¹ Serial No. 75/240,225, filed February 11, 1997. The original identification of goods in the application was "dental care devices; namely, brushes for cleaning teeth." Applicant amended the identification to "toothbrushes" in compliance with the Trademark Examining Attorney's requirement made in the first Office Action.

refused registration on the ground that the mark is merely descriptive of the identified goods, and thus unregistrable under Trademark Act Section 2(e)(1), 15 U.S.C. §1052(e)(1).²

When the refusal was made final, applicant filed this appeal. Applicant and the Trademark Examining Attorney have filed main briefs, and applicant has filed a reply brief. No oral hearing was requested.

The evidence of record on this appeal consists of an article and an article excerpt obtained from the NEXIS® database, which were attached to the Trademark Examining Attorney's initial and final Office Actions, respectively, and a dictionary definition of the word "brush," submitted by applicant as an exhibit to its main brief and of which we take judicial notice.

² We note that, in his brief, the Trademark Examining Attorney suggests that registration also should be refused because applicant has failed to provide information as to the nature of its goods. (Brief, p. 3.) A review of the file shows that, in the first Office Action, the Trademark Examining Attorney, citing Trademark Rule 2.61(b), required applicant to "submit any informational literature it has that describes its product to permit proper consideration of the application." Applicant responded to this requirement by stating that because the application is based on intent-to-use, "no informational literature of the type requested is readily available in this case." (January 23, 1998 response paper, p. 2.) In his final Office Action, the Trademark Examining Attorney did not comment on applicant's response, nor did he make any further requirement for submission of information regarding the nature of applicant's product. Accordingly, such a requirement is not at issue in this appeal.

The first NEXIS® article, attached to the initial Office Action, is from the March 22, 1997 edition of The Orange County Register. In relevant part, it reads as follows:

Here's a new twist on brushing your teeth. Chewing Brush from Noah Co. is a new, bite-size dental product that the manufacturer claims cleans teeth, reduces plaque, stimulates gums and refreshes the mouth without water, toothpaste or the use of your hands. Used exactly like chewing gum, Chewing Brush positions itself against teeth and gums at a 45-degree angle allowing tiny, soft, rounded bristles to reach between teeth, along and under the gumline. Each Chewing Brush is flavored with mint oil and plaque-reducing Xylitol. Especially handy for travelers, campers, or people with physical disabilities. Cost: \$19.97 (post paid) for 36 Chewing Brushes.

Attached to the Trademark Examining Attorney's final Office action was a NEXIS® excerpt from an article in the December 14, 1997 edition of The Sunday Gazette Mail (Charleston Newspapers), under the headline "Microbrewed beer shampoo loses big in consumer polls," which reads in its entirety as follows: ". . . upon itself to measure response to often offbeat business ideas, including edible chocolate-lined straws and a brushless toothbrush you chew like bubble gum." ³

³ Also attached to the final Office Action was a NEXIS® excerpt consisting of a headline of an article (but not the article

The dictionary excerpt made of record and relied on by applicant is from Webster's Third International Dictionary (1993) at 286, wherein "brush" is defined as, inter alia, "a hand-operated or power-driven tool or device composed of bristles set into a back or handle or attached to a roller and designed or adapted for such uses as sweeping, scrubbing, painting, and smoothing <a floor>."

A term is merely descriptive of goods or services, within the meaning of Trademark Act Section 2(e)(1), if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services. See, e.g., *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987), and *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). A mark need not immediately convey an idea of each and every specific feature of the applicant's goods or services in order to be considered merely descriptive; it is enough that the term describes one significant attribute, function or property of the goods or services. *In re H.U.D.D.L.E.*, 216 USPQ 358 (TTAB 1982); *In re*

itself or any excerpt therefrom) from the November 18, 1997 edition of the Daily Mail (London). This excerpt, from a publication which has not been shown to have wide circulation in the United States, is not competent evidence that the purchasing public in this country would perceive applicant's mark to be merely descriptive. See *In re Professional Tennis Council*, 1 USPQ2d 1917 (TTAB 1986).

MBAssociates, 180 USPQ 338 (TTAB 1973). Whether a term is merely descriptive is determined not in the abstract, but in relation to the goods or services for which registration is sought, the context in which it is being used on or in connection with those goods or services, and the possible significance that the term would have to the average purchaser of the goods or services because of the manner of its use. *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979).

In support of his Section 2(e)(1) mere descriptiveness refusal, the Trademark Examining Attorney argues essentially that "toothbrushes," the goods identified in the application, are encompassed within the word BRUSH appearing in applicant's mark; that the NEXIS® evidence of record establishes that there is a new type of toothbrush that is designed to be chewed;⁴ that CHEWING is merely descriptive of this feature of this new type of toothbrush;

⁴ The Trademark Examining Attorney does not contend that the use of the term "Chewing Brush" in the above-quoted article from the March 22, 1997 edition of The Orange County Register is, itself, evidence that CHEWING BRUSH is merely descriptive of applicant's goods. As pointed out by applicant in response to the first Office Action, the usage of the term in this article appears to be trademark usage, rather than merely descriptive usage. Accordingly, the Trademark Examining Attorney appears to be relying on this article only in support of his contention that a new type of "chewable" toothbrush exists.

and that CHEWING BRUSH accordingly is merely descriptive of such toothbrushes.

We find that the Trademark Examining Attorney has not made out a prima facie case that CHEWING BRUSH is merely descriptive of the goods identified in the application, i.e., "toothbrushes." Brushes, such as toothbrushes, are normally not chewed upon or designed to be chewed upon. The word CHEWING accordingly is incongruous as applied to toothbrushes, and thus is at most suggestive, rather than merely descriptive of those goods.

Contrary to the Trademark Examining Attorney's contention, the record in this case does not establish that there is a new type of toothbrush which is designed to be chewed upon, or that the dental device referred to in the above-quoted article from The Orange County Register is or would be referred to as a "toothbrush," within the common commercial meaning of that term.⁵ Therefore, the fact that such a device may exist is not probative evidence on the question of whether CHEWING BRUSH is merely descriptive of the goods identified in this application, i.e.,

⁵ If applicant submits specimens of use in which it appears that it is using its mark on a new type of dental device such as the one described in the article, which cannot properly be called a toothbrush, the Trademark Examining Attorney may wish to consider whether the identification of goods accurately reflects applicant's product.

"toothbrushes."⁶ As for the second NEXIS® excerpt relied on by the Trademark Examining Attorney, from the December 14, 1997 edition of The Sunday Gazette Mail which refers only to "a brushless toothbrush you chew like bubble gum," the excerpt is so devoid of context as to be of little or no probative value in this case.

In short, the Trademark Examining Attorney has failed to meet his burden of establishing a prima facie case of mere descriptiveness. The incongruity of the juxtaposition of the terms CHEWING and BRUSH suffices to render the mark suggestive, rather than merely descriptive, as applied to "toothbrushes." To the extent that any doubt as to this conclusion exists, we must resolve it in favor of applicant. See *In re Conductive Systems, Inc.*, 220 USPQ 84 (TTAB 1983).

Although we have found that the mark as a whole has not been shown to be merely descriptive, we also find that BRUSH is merely descriptive of the identified goods, i.e., "toothbrushes." Webster's Ninth New Collegiate Dictionary (1990) at p. 1243 defines "toothbrush" as "a brush for cleaning the teeth." (Emphasis added.) Accordingly, the refusal of registration is affirmed to the extent that

⁶ We need not decide in this case whether CHEWING BRUSH is merely descriptive of the dental device discussed in the article.

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applicant's mark may not be registered without a disclaimer of BRUSH apart from the mark as shown. Applicant is allowed until **thirty days** from the date of this order to submit an appropriate disclaimer statement to the Board for entry into the application record, upon which the refusal of registration will be set aside.⁷ See Trademark Rule 2.142(g); *In re S.D. Fabrics, Inc.*, 223 USPQ 56 (TTAB 1984); TBMP §1218.

E. J. Seeherman

T. J. Quinn

C. M. Bottorff

Administrative Trademark Judges
Trademark Trial and Appeal Board

⁷ The proper format for the disclaimer statement is as follows:

No claim is made to the exclusive right to use the word BRUSH apart from the mark as shown.