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Paper No. 23
Bottorff

11/2/00

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re William McCullam

Serial No. 75/152,342

Ainslee A. Schreiber of Furgang & Adwar, L.L.P. for William McCullam.

Patricia M. Evanko, Senior Attorney, Law Office 112 (Janice O'Lear, Managing Attorney).

Before Hanak, Hohein and Bottorff, Administrative Trademark Judges.

Opinion by Bottorff, Administrative Trademark Judge:

Applicant seeks registration on the Principal Register of the mark THE AMERICAN ARTIFACT, in typed form, for "retail store services, mail order catalog services, and electronic online ordering services, all featuring clothes, furniture, tools, jewelry, housewares, personal care items, appliances, transportation equipment, foodstuffs, nostrums,

husbandry and farming items, artwork, books, posters, ephemera, scientific devices, and weapons," in Class 35.¹

The Trademark Examining Attorney has issued a final refusal of registration on the ground that applicant's mark is merely descriptive of applicant's services and thus is unregistrable under Trademark Act Section 2(e)(1).

Applicant has appealed from that refusal. Applicant and the Trademark Examining Attorney have filed main briefs, and applicant filed a reply brief. No oral hearing was held.² We affirm the refusal.

A term is deemed to be merely descriptive of goods or services, within the meaning of 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 term need not immediately convey an idea of each and every specific feature of the applicant's goods or

¹ Serial No. 75/152,342, filed August 19, 1996 on the basis of intent-to-use under Trademark Act Section 1(b), 15 U.S.C. §1051(b).

² An oral hearing was scheduled at applicant's request. Subsequently, applicant's attorney notified the Board that applicant would not be represented at the scheduled oral hearing. Accordingly, no hearing was held.

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 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).

We find that THE AMERICAN ARTIFACT is merely descriptive of applicant's "retail store services, mail order catalog services, and electronic online ordering services" because among the items applicant intends to offer for sale via such services are items which readily could be described as "American artifacts." See *In re Bonni Keller Collections Ltd.*, 6 USPQ2d 1224 (TTAB 1987)(LA LINGERIE unregistrable for retail store services in the field of clothing); *In re Wickerware, Inc.*, 227 USPQ 970 (TTAB 1985) (WICKERWARE unregistrable for mail-order and distributorship services in the field of wicker furniture

and accessories); *In re Half Price Books, Records, Magazines, Inc.*, 225 USPQ 219 (TTAB 1984)(HALF PRICE BOOKS RECORDS MAGAZINES unregistrable for services including retail book and record stores offering books, records and magazines at half price).

Our finding is based on the following evidence. We take judicial notice³ that the adjective "American" is defined as:

1. Of, relating to, or typical of the United States of America, its people, culture, government, or history;
2. Of, in, or relating to North or South America or the Western Hemisphere;
3. Of or relating to the Indians inhabiting America; and
4. Indigenous to North or South America.

Webster's II New Riverside University Dictionary (1988) at 100. We further note that "artifact" is defined as "a usu. simple object (as a tool or ornament) showing human workmanship or modification as distinguished from a natural object,"⁴ and as "an object produced by human workmanship,

³ The Board may take judicial notice of dictionary definitions. See Fed. R. Evid. 201; *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co.*, 213 USPQ 594 (TTAB 1982), *aff'd* 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

⁴ Webster's Third New International Dictionary (1993) at 124.

esp. a tool, weapon, or ornament of archaeological or historical interest.”⁵

The Trademark Examining Attorney has made of record numerous excerpts of articles obtained from the NEXIS® automated database which demonstrate common use of the term “American artifact” and that, more generally, the term “artifact” is used to refer to many of the items to be offered for sale by applicant. Those excerpts include the following:

While most items you’ll see are American artifacts, some are more “souvenirs of war.”
- The Montgomery Advertiser, August 6, 1998, under headline: “U.S. Military History Comes Alive”;

Now the American artifact exhibition is in Boston, and Tulloch anticipates attendance figures at around 500,000 during its engagement through October.
- The Providence Journal-Bulletin, July 1, 1998;

Each of the buildings and nearly 200,000 early American artifacts are authentic.
- Vero Beach (FL) Press Journal, June 28, 1998;

...a room-sized repository of American artifacts to be opened in the year 8113 AD.
- CBS News Transcripts: 48 Hours, June 25, 1998;

This partnership will result in the unparalleled opportunity to assemble some of

⁵ Webster’s II New Riverside University Dictionary (1988) at 128.

the finest exhibitions of American artifacts outside of Washington, D.C. Exhibits - always emphasizing education - will focus on an amazing variety of subjects.

- The Dallas Morning News, February 5, 1998;

Thirteen-year-old Amanda Arnold's family roots are English, but she brought an American artifact: A quilt her great-grandmother made for her grandmother when she was a girl. The quilt, made during the Great Depression, is made from...

- St. Petersburg Times, December 21, 1997;

He was an avid collector of early American artifacts and tools, which he considered pure art, ...

- The Santa Fe New Mexican, November 14, 1997;

... officer and director of America's Smithsonian said that Maher and his staff have worked with the institution since the kick-off of its special 150th anniversary American artifact exhibit tour in Los Angeles last year.

- Ventura County Star, August 3, 1997;

The Museum of the Confederacy has purchased several African-American artifacts and two Confederate flags. One artifact is a Civil War period shoe worn by an African-American...

- The Richmond Times Dispatch, October 4, 1998;

The exhibit features African-American artifacts from Arlington, including diaries kept by slaves that have been recorded on audio tape; quilts made by slaves, as well as...

- The Dallas Morning News, June 19, 1998;

Her home should be an African American history museum. It is filled with all kinds of African American artifacts from some of the oldest Ebony and Jet magazines, rare African American books and journals, photographs, albums, posters and the like.

- The Tennessee Tribune, March 5, 1998;

A workshop, "What You Should Know About Collecting African-American Artifacts and Memorabilia," will begin at 5:30 p.m. Visitors are encouraged to bring three items, such as photographs, paintings and prints from their personal...

- The Hartford Courant, February 3, 1998; and

He's a collector of African-American artifacts. He says he has postcards, photos and memorabilia of every sort in his home.

- The Baltimore Sun, October 12, 1997.

These article excerpts and the dictionary definitions quoted above are sufficient to establish that the designation THE AMERICAN ARTIFACT would directly and immediately inform purchasers that applicant is engaged in the sale of American artifacts, i.e., objects of American historical or cultural interest. Applicant's arguments to the contrary are not persuasive.

Applicant argues that the word AMERICAN, as shown by the dictionary definition quoted above, has several meanings, not all of which would have descriptive significance as applied to applicant's services, i.e., the sale of reproductions of antiques "that are indigenous to the United States of America." However, because one of the definitions of AMERICAN (indeed, the primary definition)

merely describes applicant's services, it is not dispositive that other of the definitions might not.⁶

Applicant also relies on the alleged existence of various third-party registrations (and pending applications) involving marks which include the term AMERICAN, and argues that his mark likewise should be deemed registrable. However, applicant never properly made those registrations of record by submitting copies of PTO records. *See In re Duofold, Inc.*, 184 USPQ 638 (TTAB 1974). Moreover, the commercial search report printouts applicant submitted are so incomplete as to be of no probative value. In many instances, they fail to identify the goods and services covered by the registrations, which register (Principal or Supplemental) is involved, whether registration was issued pursuant to Trademark Act Section 2(f), and/or whether a disclaimer was required. In any event, it is settled that third-party registrations are not conclusive on the question of descriptiveness. Each case

⁶ In his reply brief, applicant backs away from his assertion in his main brief that the objects he will sell are limited to those which are indigenous to the United States; he now says that his goods may include reproductions of Canadian and/or South American antiques as well. Under any of these scenarios, the term AMERICAN merely describes the goods applicant intends to sell. Moreover, applicant's recitation of services is not limited in any way with respect to the types, or geographic origins, of the goods applicant intends to sell.

must stand on its own merits and a mark which is merely descriptive should not be registered on the Principal Register simply because other such marks appear on the register. See *In re Scholastic Testing Service, Inc.*, 1906 USPQ 517 (TTAB 1977).

Likewise, applicant is not persuasive in arguing that ARTIFACT is not merely descriptive of his services or that the items he intends to sell are not "artifacts." Many, if not all, of the items listed in the recitation of services fall within the dictionary definitions of "artifact" set forth above, and many of the items are of the type which are specifically identified in the NEXIS® excerpts as "artifacts." It is immaterial, even assuming it is true, that a few of the items listed in the recitation of services might not be thought of as "artifacts." Because several of the items in fact are "American artifacts," refusal of the application in its entirety is warranted. See *In re American Society of Clinical Pathologists, Inc.*, 442 F.2d 1404, 169 USPQ 800 (CCPA 1971); *In re Cannon, Inc.*, 219 USPQ 820 (TTAB 1983).

Also immaterial is applicant's assertion that the goods applicant intends to sell are factory reproductions of artifacts rather than authentic and/or handmade artifacts. Applicant's contention that only "hand-made"

objects qualify as "artifacts" is not supported by the dictionary definitions and NEXIS® evidence of record.⁷ Moreover, applicant's recitation of services contains no such restriction or limitation as to the nature of the artifacts applicant intends to sell, i.e., "reproduction" vs. "authentic." Even if applicant intends to sell only "reproductions" of artifacts, the term ARTIFACT still merely describes significant feature of the goods, i.e., their appearance or function, and thus merely describes applicant's services.

Finally, the availability to competitors of alternative, equally merely descriptive terms, i.e., "antiques," "reproductions" or "collectibles," does not eliminate the mere descriptiveness of THE AMERICAN ARTIFACT as applied to applicant's services.

In summary, the evidence of record suffices to establish that THE AMERICAN ARTIFACT is merely descriptive of applicant's services. We have carefully considered all of applicant's arguments to the contrary, but are not

⁷ Similarly, there is no basis in the record for applicant's contention that purchasers would view an "artifact" solely or even primarily as an item which was unearthed at an archaeological dig.

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persuaded.

Decision: The refusal to register is affirmed.

E. W. Hanak

G. D. Hohein

C. M. Bottorff

Administrative Trademark Judges
Trademark Trial and Appeal Board