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Paper No. 9
GDH/gdh

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **The Black & Decker Corporation**

Serial No. 75/**617,396**

Bruce S. Shapiro of **The Black & Decker Corporation** for **The Black & Decker Corporation**.

William G. Breckenfield, Trademark Examining Attorney, Law Office 112 (**Janice O'Lear**, Managing Attorney).

Before **Quinn, Hohein** and **Hairston**, Administrative Trademark Judges.

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

The Black & Decker Corporation has filed an application to register the term "PIVOT DRIVER" for a "cordless power operated screwdriver."¹

Registration has been finally refused under Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1), on the basis that, when used in connection with applicant's goods, the term "PIVOT DRIVER" is merely descriptive of them.

¹ Ser. No. 75/617,396, filed on January 8, 1999, which is based on an allegation of a bona fide intention to use the term "PIVOT DRIVER" in commerce. The word "DRIVER" is disclaimed.

Applicant has appealed. Briefs have been filed,² but an oral hearing was not requested. We affirm the refusal to register.

It is well settled that a term is considered to be merely descriptive of goods or services, within the meaning of Section 2(e)(1) of the Trademark Act, if it immediately describes an ingredient, quality, characteristic or feature thereof or if it directly conveys information regarding the nature, function, purpose or use of the goods or services. See *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). It is not necessary that a term describe all of the properties or functions of the goods or services in order for it to be considered to be merely descriptive thereof; rather, it is sufficient if the term describes a significant attribute or idea about them. Moreover, 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. See *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979). Consequently, "[w]hether consumers could guess what the product [or service] is from consideration of the mark alone

² Applicant, for the first time with its brief, has submitted as additional evidence printouts of several pages from its website and those of some of its competitors. While such evidence is technically untimely under Trademark Rule 2.142(d), the Examining Attorney has not objected thereto on such ground and has instead treated the evidence as forming part of the record herein. Accordingly, the additional evidence furnished by applicant with its brief has been considered.

is not the test." In re American Greetings Corp., 226 USPQ 365, 366 (TTAB 1985).

Applicant, pointing to an ad for its cordless power operated screwdriver on its website as well as to advertising by its related company and that of several of its competitors for such goods on their websites, "submits that its mark is suggestive," arguing that:

The mark PIVOT DRIVER does not immediately impart the knowledge necessary to categorize it as descriptive. In fact, the term PIVOT DRIVER is an incongruous and odd way to "describe" the underlying screwdriver. The "oddity" of the phrase is confirmed by the fact that in an industry where tools are adjustable with multi-function features, the term PIVOT is not used to describe merchandise similar to the underlying product. Applicant submits that the mark PIVOT DRIVER carries with it a sufficient minimum of fancifulness to categorize it as suggestive. The mark is a "short, snappy" way to suggest the advantageous characteristics of an adjustable, two-positioned powered screwdriver.

In particular, applicant notes that its product "offers two potential modes of operations: in line grip for standard application; and pistol grip for hard to reach places." Applicant consequently maintains that while "[t]he term 'pivot' as used by Applicant in relation to the underlying tool suggests the adjustable nature of the tool," such term "does not immediately describe the underlying tool." Accordingly, because "[t]he consumer is required to exert a bit of imagination to determine the exact nature of the goods," applicant contends that the term "PIVOT DRIVER" does not merely describe the adjustable feature of its cordless power operated screwdriver.

The Examining Attorney, relying in part on definitions of record from The American Heritage Dictionary of the English Language (3rd ed. 1992), asserts on the other hand that the term "PIVOT DRIVER" is merely descriptive of a feature of applicant's goods. Contending, specifically, that "[t]he terms **PIVOT** and **DRIVER** are both highly descriptive of the [applicant's] goods," the Examining Attorney reasons that (footnotes omitted; bold type in original):

The applicant's goods are adjustable, two-position cordless power operated screwdrivers. The nature of the goods is such that the end of the screwdriver opposite the handle rotates between two positions. The screwdriver locks in a straight position and at an angle for "hard to reach places." **PIVOT** is defined as, ["a] short rod or shaft on which a related part rotates or swings.["] The applicant's screwdriver is shaped like a short rod, and the adjustable end rotates, or **PIVOTs** between two positions. A **DRIVER** is defined as, ["a] tool, such as a screwdriver or hammer, that is used for imparting a forceful pressure on another object.["] The applicant's goods are **DRIVERS** that **PIVOT**, or **PIVOT DRIVERS**.

As further support for his position, the Examining Attorney points out that he found and made of record 12 stories from a search of the "NEXIS" computerized database which utilize "the term **PIVOT** to describe screwdrivers." A representative sample of the pertinent excerpts from such stories is set forth below (emphasis added):

"Black & Decker launched a 14.4-volt cordless circular saw in its Firestorm line, plus a unique two-position **pivot driver** that permits drilling at an angle for hard-to-reach spots." -- Discount Store News, September 6, 1999;

"Cordless screwdrivers have pretty much been replaced on most tool shelves by drill/drivers--more powerful cordless tools that serve as a drill as well as a screwdriver.

But Black and Decker's new **pivot driver** is worth making some room for, especially if you mostly use your drill/driver to drive screws.

....
Making this tool unique is the **pivot**, of course. You can use it either for in-line jobs, or lock it into the pistol grip position for work in tight areas." -- Detroit News, August 21, 1999;

"Robot lawn mowers, tape measures that don't bend or twist, **screw drivers that pivot** and portable power sources that can run small appliances during blackouts will soon be in stores to entice homeowners.

....
Eric Endel, hardware buyer for the Army and Air Force Exchange Service in Dallas, was fascinated by Black and Decker's **pivoting cordless screw driver**, which has been on the market for six months." -- Washington Times, August 19, 1999;

"Tape measures that don't bend or twist, **screwdrivers that pivot**, giant turtles that mow the lawn and rechargeable generators to use during power outages.

....
Eric Endel, hardware buyer for the Army and Air Force Exchange Service in Dallas, was fascinated by Black and Decker's **pivoting cordless screw driver**, which has been on the market for six months." -- Chicago Tribune, August 18, 1999 (with caption to a photograph reading, in part: "Brenda Holland ... shows Arthur Carroll ... how the Black and Decker **pivot screwdriver** works at the National Hardware Show at McCormick Place.");

"There's a new **pivot** cordless **screwdriver** that rotates and locks in two positions for driving screws under counter tops, behind sinks and more." Virginian-Pilot (Norfolk, Va.), June 13, 1999;

"Black & Decker is coming out with a new cordless **screwdriver** that can **pivot** to work in hard-to-reach places.

Called the **Pivot Driver** Two Position Cordless Screwdriver, it is especially good at driving screws in tight areas next to walls, under countertops and in similar situations.

The **Pivot Driver** has a suggested retail price of \$35.99. It's available through home centers and hardware stores." -- Augusta (Ga.) Chronicle, June 6, 1999; and

"Through the years, Neff added to his stable of inventions. He invented a **screwdriver with pivoting handle** for greater torque" -- Cincinnati Enquirer (December 15, 1996);

In addition, the Examining Attorney has made of record an illustration from applicant's website of its "Pivot Driver™" product, as shown at left below, while applicant has submitted a reproduction of its "PivotDriver™" product, as depicted at right below, which appears in a different section of its website.

Both illustrations plainly demonstrate that a significant feature of the kind of cordless power operated screwdriver offered by applicant under the term "PIVOT DRIVER" is a pivot which is centrally located between the head and handle of such a driver.

Upon careful consideration of the arguments and evidence presented, we agree with the Examining Attorney that, in light of the dictionary definitions, "NEXIS" story excerpts, and

website ads and illustrations, the term "PIVOT DRIVER" immediately describes, without speculation or conjecture, a significant feature of applicant's cordless power operated screwdriver, namely, that the product is a driver with a pivot.³ It is precisely the versatility provided by the pivot feature of applicant's screwdriver which enables it to adjust, unlike a driver without a pivoting handle, so as to operate in two different modes: an in-line grip for standard applications and a hinged or pistol grip for confined or other hard to reach places. A screwdriver with such a feature is aptly described as a "PIVOT DRIVER" and there is nothing in the term which is incongruous or otherwise odd. No imagination, cogitation or mental gymnastics is required in order for consumers to readily understand that the term "PIVOT DRIVER" designates a driver with a pivot, a feature which is plainly integral to the utility and commercial appeal of applicant's pivoting screwdriver.

The fact, moreover, that applicant intends to be or presently is the first and only user, among its competitors, of the term "PIVOT DRIVER" in connection with a cordless power operated screwdriver does not, as correctly noted by the Examining Attorney, justify registration when, as here, such term projects a merely descriptive significance. See, e.g., In re International Game Technology Inc., 1 USPQ2d 1587, 1589 (TTAB

³ We observe, in this regard, that only one of the "NEXIS" story excerpts even arguably utilizes the term "PIVOT DRIVER," by capitalizing the initial letters of such term, in the manner of a reference thereto as applicant's mark. All the other references to the term "PIVOT DRIVER" clearly use such term, or minor variations thereof (e.g., "pivot screwdriver," "pivot cordless screwdriver," "pivoting cordless screw driver," etc.), in a descriptive context.

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1986); In re National Shooting Sports Foundation, Inc., 219 USPQ 1018, 1020 (TTAB 1983); and In re Pharmaceutical Innovations, Inc., 217 USPQ 365, 367 (TTAB 1983). In addition, as a final consideration, it is pointed out even if other terms or phrases exist by which applicant's competitors may equally describe pivoting screwdrivers, such would not prevent the term "PIVOT DRIVER" from being merely descriptive of applicant's product. See, e.g., Roselux Chemical Co., Inc. v. Parsons Ammonia Co., Inc., 299 F.2d 855, 132 USPQ 627, 632 (CCPA 1962).

Accordingly, because the term "PIVOT DRIVER" conveys forthwith a significant feature of applicant's cordless power operated screwdriver, it is merely descriptive thereof within the meaning of the statute.

Decision: The refusal under Section 2(e)(1) is affirmed.