

7/30/02

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Paper No. 13
RFC

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Medical Solutions, Inc.

Serial No. 75/859,581

Ira C. Edell of Epstein, Edell, Shapiro, Finnan & Lytle,
LLC for Medical Solutions, Inc.

Tina L. Snapp, Trademark Examining Attorney, Law Office 116
(Meryl Hershkowitz, Managing Attorney).

Before Cissel, Hairston and Chapman, Administrative
Trademark Judges.

Opinion by Cissel, Administrative Trademark Judge:

On November 30, 1999, applicant filed the above-
identified application to register the mark "WARMOR" on the
Principal Register for "cabinets for heating medical
instruments and liquids," in Class 10. The basis for
filing the application is applicant's assertion that it
possesses a bona fide intention to use the mark in commerce
in connection with these products.

Citing *In re Bright-Crest, Ltd.*, 204 USPQ 591 (TTAB 1979) for the proposition that a mark is unregistrable under Section 2(e)(1) of the Lanham Act if it describes an ingredient, quality, characteristic, function, feature or purpose of the goods, the Examining Attorney refused to register applicant's mark because it is merely descriptive of the goods set forth in the application. She reasoned that the proposed mark is the phonetic equivalent of the term "warmer," which is what the goods are.

Submitted in support of this contention was a dictionary definition of a "warmer" as "a device for keeping something warm." Also submitted were a number of copies of excerpts from printed publications wherein the word "warmer" is used in this sense, e.g., "blood warmer," "food warmers," "bed warmers," "bottle warmer," "seat warmer" and "foot warmer." One such excerpt makes reference to something described as a "warmer cabinet."

The Examining Attorney held that the misspelling of "warmer" as "WARMOR" in the proposed mark does not alter the pronunciation of the word or alter its descriptive significance.

Applicant responded with the argument that "WARMOR" is not merely descriptive in connection with the goods specified in the application. The Examining Attorney was

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not persuaded to withdraw the refusal to register, however, and she made it final in the second Office Action.

Applicant filed a Notice of Appeal, along with a request for reconsideration. The Board instituted the appeal, but suspended action on it and remanded the application to the Examining Attorney for consideration of the request for reconsideration. She declined to withdraw the refusal, however, so the Board resumed action on the appeal. Applicant filed its brief on appeal and the Examining Attorney filed her appeal brief, but applicant did not file a reply brief and did not request an oral hearing before the Board.

Based on careful consideration of the record in this application in light of the relevant legal authorities, we hold that the refusal to register based on Section 2(e)(1) the Lanham Act is well taken.

We note at the outset that if a term is merely descriptive of the goods with which it is used, or is intended to be used, a novel spelling of that term is also merely descriptive of the goods as long as purchasers would perceive the different spelling as the equivalent of the merely descriptive term. In re State Chemical Manufacturing Co., 225 USPQ 687 (TTAB 1985); In re H.U.D.D.L.E., 216 USPQ 358 (TTAB 1982). The mark applicant

seeks to register is clearly a misspelling of the term "warmer." Only one letter has been changed. Prospective purchasers of cabinets for heating medical instruments and liquids would perceive the different spelling as the equivalent of the term "warmer" because the two terms are very similar in appearance and virtually identical when pronounced.

The evidence submitted by the Examining Attorney shows that warmers are devices which are used to heat things, which is just what the goods specified in the application do. The proposed mark is therefore merely descriptive within the meaning of the Act because it immediately and forthwith conveys the function or purpose of the goods.

Applicant argues that "WARMOR" is not merely descriptive of the goods set forth in the application "in view of the fact that there are multiple meanings of WARMOR that are not descriptive of applicant's goods." (brief, p. 2). Applicant apparently concedes that its proposed mark is perceived as "a phonetic variation" of the word "warmer," (brief, p. 2), but argues that the mark has four additional meanings: "(1) A coined combination of the words 'warm' and 'or,' implying some sort of alternative function; (2) A coined combination of the words 'warm' and 'more' implying some additional function; (3) A coined

combination of 'warm' and 'O.R.,' the latter being the recognized abbreviated for 'Operating Room'; and (4) A coined combination of 'warm' and 'O.R.,' the latter being recognized in health care industry as a part of the name of Appellant's sister company, O.R. Solutions, Inc., which sells high quality products to hospitals and other health care facilities."

It is well settled that whether a mark has different meanings in other contexts is not controlling on the question of descriptiveness. This issue must be resolved by considering the mark in relation to the goods specified in the application. In re Bright-Crest, Ltd., supra. In connection with cabinets for heating medical instruments and liquids, the phonetic equivalent of "warmer" would be readily understood as an indication that applicant's cabinets are warmers, i.e., that they serve the purpose of warming medical instruments and liquids. We agree with the Examining Attorney that the four alternative meanings suggested by applicant in its brief are far-fetched in comparison to the obvious meaning the proposed mark would have in connection with the goods set forth this application.

Applicant contends that in order for a refusal to register under Section 2(e)(1) to be upheld, "a consumer of

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the goods/services, if confronted with the mark in question out-of-context, must have at least some recognition of the nature of the goods without substantial imagination, thought or perception." (brief, p. 5). This is simply not the test. On the contrary, the determination of the descriptiveness of a mark must always be made by considering the mark in connection with the goods on which it is, or is intended to be, used. In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215 (CCPA 1978). When the mark in the instant case is considered in this context, its descriptiveness is apparent.

DECISION: The refusal to register is affirmed.