

6/27/02

**THIS DISPOSITION
IS NOT CITABLE AS PRECEDENT
OF THE T.T.A.B.**

Paper No. 11
EWH

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re George R. Melby

Serial No. 75/932,890

Jonathon Grad for George R. Melby.

David H. Stine, Trademark Examining Attorney, Law Office
114 (Margaret Le, Managing Attorney).

Before Hanak, Quinn and Hohein, Administrative Trademark
Judges.

Opinion by Hanak, Administrative Trademark Judge:

George R. Melby (applicant) seeks to register THE 4TH
SHELL in typed drawing form for "accessories for shotguns,
namely externally-mounted auxiliary shell holders." The
application was filed on December 4, 2000 with a claimed
first use date of August 6, 1999.

Citing Section 2(e)(1) of the Trademark Act, the
Examining Attorney has refused registration on the basis
that applicant's mark is merely descriptive of applicant's
goods.

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When the refusal to register was made final, applicant appealed to this Board. Applicant and the Examining Attorney filed briefs. Applicant did not request an oral hearing.

As has been stated repeatedly, "a term is merely descriptive if it forthwith conveys an immediate idea of the ingredients, qualities or characteristics of the goods." In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978) (emphasis added). Moreover, the immediate idea must be conveyed forthwith with a "degree of particularity." In re TMS Corp. of the Americas, 200 USPQ 57, 59 (TTAB 1978); In re Entenmann's Inc., 15 USPQ 57, 751 (TTAB 1990), aff'd 90-1495 (Fed. Cir. February 13, 1991).

At the outset, we note that the Examining Attorney has the burden of establishing that applicant's mark is merely descriptive of its goods. In this case, the Examining Attorney has made of record absolutely no evidence showing that applicant's mark is merely descriptive of applicant's goods. In the first Office Action, the Examining Attorney tentatively argued that "it appears that [applicant's] goods are, literally, holders for a 4th shell." In his brief at page 2, the Examining Attorney took on a more

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adamant tone stating that applicant's "goods are, without dispute, an external holder for a 4th shell for use in connection with shotguns otherwise having a three-shell magazine." However, in his brief the Examining Attorney never addressed the following argument set forth by applicant at pages 4 and 5 of his brief:

"In the instant case, thought, perception and imagination would be required to reach a conclusion, based on the mark, as to the nature of the goods. Upon hearing the mark, one would first question what exactly a fourth shell is ... Next, one would have to pause to consider why the term '4th' is present in the mark. The shot that is held by the shell holder [applicant's goods] may be a first shell, a second shell, a third shell, a fourth shell or even a fifth shell, depending on how many shells have been loaded into the shotgun, how many shells have already been fired, and how many shells are being held by the shell holder."

We find that based on this particular record where the Examining Attorney has introduced absolutely no evidence, that applicant's mark is simply suggestive of applicant's goods. Put quite simply, there is nothing in the record (including applicant's brochure describing his goods) which limits applicant's externally-mounted auxiliary shell holder to shotguns having a three-shell magazine. As previously noted, the Examining Attorney has never taken issue with applicant's contention that its goods could be

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used in connection with shotguns having various shell capacities. Quite telling is the failure of the Examining Attorney to make of record newspaper or magazine articles showing that users of shotguns have expressed the desire that they have a fourth shell or fourth shot. In short, based on this record, there is nothing to indicate that among users of shotguns, the terms "fourth shell" or "fourth shot" are ever used.

Decision: The refusal to register is reversed.