

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF  
THE TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Garfield & Marks Designs, Ltd.

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Serial No. 76/247,488

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Mark D. Godler of Kaye Scholer LLP for Garfield & Marks  
Designs, Ltd.

Gene V. J. Maciol, Trademark Examining Attorney, Law Office  
109 (Ronald Sussman, Managing Attorney).

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Before Cissel, Hairston and Bucher, Administrative  
Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

Garfield & Marks Designs, Ltd. has applied to register  
WOMYN as a trademark for "women's clothing, namely,  
hosiery, socks, stockings, jackets, blazers, coats,  
rainwear, sweaters, pants, jeans, vests, dresses, skirts,  
blouses, t-shirts, sleepwear, shoes, sandals, boots,

footwear, hats, belts, headbands and scarves" in International class 25.<sup>1</sup>

The Trademark Examining Attorney has refused registration under Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1), on the ground that the mark is merely descriptive of applicant's goods. When the refusal was made final, applicant appealed. Both applicant and the Examining Attorney have filed briefs. No oral hearing was requested.

It is the Examining Attorney's position that applicant's mark WOMYN is the phonetic equivalent of the word "women," and as such, merely identifies the end user or class of purchasers of applicant's goods. Thus, the Examining Attorney maintains that "women" is merely descriptive of applicant's goods. The Examining Attorney submitted excerpts from The American Heritage Dictionary of the English Language (1992) to show that when the letter "y" is located within a word, it is not uncommon for it be pronounced as the phonetic sound "î" which is the same sound as the letter "e" in the word "women."<sup>2</sup>

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<sup>1</sup> Serial No. 76/347,488, filed April 27, 2001, and asserting first use and first use in commerce on August 1, 2000.

<sup>2</sup> Specifically, the Examining Attorney submitted dictionary entries for the words "rhythm," "acronym," "lynx," "symbol," "lytic," "byssus," and "phlyctena." In addition, the Examining attorney submitted an entry from the same dictionary of the word "woman" and the plural "women."

Applicant argues primarily that its mark creates a commercial impression that is different from the word "women" and that it is not merely descriptive. According to applicant, WOMYN is an "alternate" term intended to raise awareness of culturally ingrained gender bias and inequality. Further, applicant's counsel states that applicant has spent approximately \$75,000 advertising and promoting its goods and that the WOMYN mark has attained a "unique position in the public sphere as evidenced by the "51,600 'hits' of WOMYN" when a search was performed on the Internet. In its response to the Examining Attorney's first office action, applicant listed several third-party registrations for marks that include the words "woman" or "women" or a foreign equivalent thereof.<sup>3</sup>

We agree with the Examining Attorney that the mark WOMYN is merely descriptive of applicant's goods, and accordingly affirm the refusal to register the mark under Section 2(e)(1) of the Trademark Act.

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<sup>3</sup> Although applicant stated that copies of the third-party registrations accompanied its response, they are not in the file of this case. We note that the Examining Attorney did not inform applicant that the registrations were missing until his brief on the case. Thus, while a mere listing of third-party registrations generally does not make the registrations of record, in this case, applicant did not have an opportunity to submit substitute copies of the third-party registrations. Thus, we will consider the list of registrations.

It is well settled that a term is merely descriptive if it serves merely to identify a class of users to which the goods or services are directed. *International Ass'n. of Fire Chiefs, Inc. v. H. Marvin Ginn Corp.*, 225 USPQ 940 (TTAB 1985) [FIRE CHIEF held generic for magazine targeted to fire chiefs and other senior fire fighting officials]; *In re Camel Manufacturing Co.*, 222 USPQ 1031 (TTAB 1984)[MOUNTAIN CAMPER held merely descriptive of retail and mail order services in the field of outdoor equipment and apparel]; see also *Yankee, Inc. v. Geiger*, 216 USPQ 996 (TTAB 1982) [FARMER'S ALMANAC held generic for an almanac published primarily for the benefit of farmers]; *In re Gentex Corp.*, 151 USPQ 435 (TTAB 1966)[PARADER held merely descriptive of helmet liners sold for use by persons who parade, e.g., members of a band or drill team].

We have no hesitation in finding that the word "women" is merely descriptive of applicant's goods since the goods are for use by women. Indeed, applicant has identified its goods as "women's clothing." The only question then is whether the mark WOMYN is likewise merely descriptive of women's clothing items. We find that prospective purchasers would recognize "womyn" as a slight misspelling of the word "women." The Supreme Court, in *Standard Paint*

Co. v. Trinidad Asphalt Mfg. Co., 220 U.S. 446, 455 (1911),

held that:

The word, therefore is descriptive, not indicative of the origin or ownership of the goods; and being of that quality, we cannot admit that it loses such quality and becomes arbitrary by being misspelled. Bad orthography has not yet become so rare or so easily detected as to make a word the arbitrary sign of something else than its conventional meaning . . .

Other cases have recognized that a slight misspelling does not change a merely descriptive term into a suggestive term. See *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315 (1938) [NU-ENAMEL; NU held equivalent of "new"]; *In re Quik-Print Copy Shops*, 616 F.2d 523, 205 USPQ 505, 507 n.9 (CCPA 1980) [QUIK-PRINT held descriptive; "There is no legally significant difference between 'quik' and 'quick'"]; *Hi-Shear Corp. v. National Automotive Parts Association*, 152 USPQ 341, 343 (TTAB 1966)[HI-TORQUE "is the phonetic equivalent of the words 'HIGH TORQUE'"]; and *In re Organik Technologies Inc.*, 41 USPQ2d 1690 (TTAB 1997)[ORGANIK is the phonetic equivalent of "organic"].

In this case, applicant's mark merely substitutes the letter "y" for the letter "e." As shown by the Examining Attorney's evidence, the letter "y" could easily be pronounced the same as the letter "e" in women.

We are not persuaded by applicant's argument that its mark will be perceived by purchasers as an "alternate" term, and thus it is not merely descriptive of applicant's goods. Applicant's mark is not so inventive that purchasers would understand it to mean something other than "women." Compare *In re Grand Metropolitan Foodservice Inc.*, 30 USPQ2d 1974 (TTAB 1994) ["MufFuns" in stylized script "does project a dual meaning of suggestiveness--- that of muffins and of the 'fun' aspect of applicant's food product."]. The fact that a search of the Internet reveals many hits for WOMYN is not evidence of consumer perception. In addition, although applicant argues that its mark has attained a unique position among purchasers, applicant did not amend its application to seek registration under the provisions of Section 2(f).

Finally, the third-party registrations are of limited value. As often noted by the Board, each case must be decided on its own merits. We are not privy to the records in the files of the cited registrations and, moreover, the determination of registrability of particular marks by the Trademark Examining Groups cannot control the result in another case involving a different mark for different goods. *In re Nett Designs, Inc.*, 263 F.3d 1379, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001). ["Even if some prior

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registrations had some characteristics similar to [applicant's] application, the PTO's allowance of such prior registrations does not bind the Board or this court."].

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