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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re David/Randall Associates, Inc.

Serial No. 76/258,134

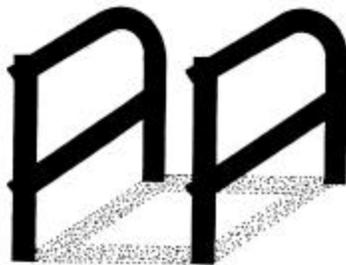
Norman E. Lehrer, Esq. for David/Randall Associates, Inc.

Michael Engel, Trademark Examining Attorney, Law Office 108  
(David Shallant, Managing Attorney).

Before Hanak, Hohein and Bottorff, Administrative Trademark  
Judges.

Opinion by Hohein, Administrative Trademark Judge:

David/Randall Associates, Inc. has filed an  
application to register the mark reproduced below for "hand



railings for a roof hatch".<sup>1</sup>

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

Applicant has appealed. Briefs have been filed and an oral hearing was held. We reverse the refusal to register.

Preliminarily, we note that it is well settled that a mark which is an illustration or representation of an applicant's goods or services is considered to be merely descriptive thereof, within the meaning of Section 2(e)(1) of the Trademark Act, if it forthwith depicts information concerning any significant quality, ingredient, characteristic, feature, function, purpose or use of the goods or services. See, e.g., In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978) and Planters Nut & Chocolate Co. v. Crown Nut Co., Inc., 305 F.2d 916, 134 USPQ 504, 507 (CCPA 1962). To be considered merely descriptive of goods or services, the illustration or representation need not be completely accurate, realistic or true-to-life, nor is it necessary for such to depict all of the properties, functions or

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<sup>1</sup> Ser. No. 76/258,134, filed on May 7, 2001, which is based on an allegation of a bona fide intention to use the design shown above as a trademark. The stippling is a feature of the mark and is not intended to represent color.

manners of use of the goods or services. See, e.g., In re LRC Products Ltd., 223 USPQ 1250, 1252 (TTAB 1984). It is instead sufficient if the illustration or representation depicts a significant attribute, subject or idea about the goods or services. Moreover, whether an illustration or representation 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 matter 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). Thus, "[w]hether consumers could guess what the product [or service] is from consideration of the mark alone is not the test." In re American Greetings Corp., 226 USPQ 365, 366 (TTAB 1985).

However, an illustration or representation which is a fanciful characterization, or which is more abstract or highly schematic in nature, is considered to be a suggestive mark because, when the goods or services are encountered under the mark, a multi-stage reasoning process, or the utilization of imagination, thought or perception, is required in order to determine what attributes of the goods or services the mark indicates. See, e.g., In re Abcor Development Corp., supra at 218; Planters Nut & Chocolate Co. v. Crown Nut Co., Inc., supra;

In re Mayer-Beaton Corp., 223 USPQ 1347, 1349 (TTAB 1984); In re LRC Products Ltd., supra; In re General Electric Co., 209 USPQ 425, 427 (TTAB 1980); and In re Laitram Corp., 194 USPQ 206, 209 (TTAB 1977). As has often been stated, there is a thin line of demarcation between a suggestive mark and a merely descriptive one, with the determination of which category a mark falls into frequently being a difficult matter involving a good measure of subjective judgment. See, e.g., In re Atavio, 25 USPQ2d 1361 (TTAB 1992) and In re TMS Corp. of the Americas, 200 USPQ 57, 58 (TTAB 1978). The distinction, furthermore, is often made on an intuitive basis rather than as a result of precisely logical analysis susceptible of articulation. See In re George Weston Ltd., 228 USPQ 57, 58 (TTAB 1985).

Applicant, in its initial brief, "acknowledges that an accurate representation of its goods would be considered to be merely descriptive thereof," but contends that the mark which it seeks to register "is a fanciful characterization rather than a representation of the goods." In particular, applicant argues that "the present case is much more akin to and should be controlled by *In re LRC Products Ltd.*," supra, which as applicant points out:

In *LRC Products*, the mark was the design of two hands or two gloves and the goods ... were gloves. There is no question that the representation in the ... design is a pair of gloves or a pair of hands. While the

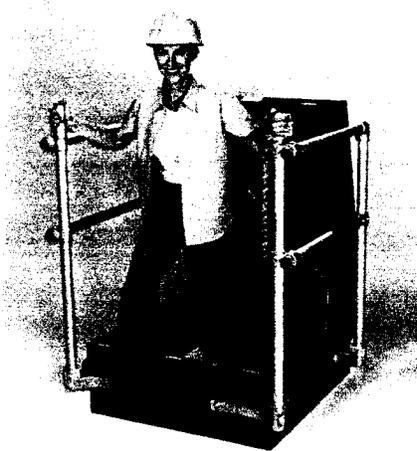
Board agreed that the mark may suggest or resemble the goods, it found that it did not merely describe them. ....

Likewise, in this case, applicant maintains that "its mark is sufficiently arbitrary and fanciful as to remove it from the category of merely descriptive marks." According to applicant:

The "railing" shown in the drawing is highly fanciful and does not resemble the actual product being sold. Furthermore, the "railing" in the drawing is not the only feature thereof. Rather, it is a unitary mark showing the fanciful "railings" in combination with a shaded base at the bottom thereof. Thus, Appellant's mark is not simply the representation of a "railing." Even further, there is no evidence that Appellant's mark is a common symbol or design used by the trade to represent hand railings. *In re LRC Products Ltd.* at 1252. Even further, and as pointed out by the Board in *LRC [Products]*, registration of this mark to Appellant will not deprive competitors of the free use of representations or illustrations of their products in advertising or sale of their goods.

Lastly, applicant asserts that, as in *LRC Products*, supra, "if there be any doubt on the question of mere descriptiveness, it should be resolved in favor of publication."

The Examining Attorney, on the other hand, argues that the "illustration [constituting applicant's mark] is more realistic of ... 'hand railings for a roof hatch' than stylized" and that this case should therefore be controlled by the decision in *In re Underwater Connections, Inc.*, 221 USPQ 95, 96 (TTAB 1983), in which the Board held that an "admitted[ly] stylized drawing of a compressed gas tank used in diving" was merely descriptive of travel tour services involving underwater diving. In resolving the issue presented in this case, we note that the advertising literature submitted by applicant provides the sole illustrations of its goods. Such literature shows that applicant offers several different styles of roof hatch hand



railings, of which the model shown in the picture below most closely resembles applicant's mark:

In view thereof, the Examining Attorney asserts in his brief that:

Although applicant's illustration is not an exact representation of its goods, it looks very much like an exact representation of some other party's hand railings for a roof hatch. In other words, even though applicant's hand railings for a roof hatch are squared off and not rounded, issuing a registration in this case would effectively deprive competitors whose hand railings are rounded of the free use of illustrations of their products.

Applicant's illustration has none of the features which made the illustration in *LRC Products* fanciful. Applicant is not claiming color .... There is nothing "abnormal," "unnatural" or "awkward" about the depiction of the goods found in applicant's mark. Since these adjectives were central to the Board's holdings in both *LRC Products* and *General Electric* [that the marks therein were suggestive], this must be what the Board meant when they described these marks as "stylized" rather than "realistic", since the illustration at issue in *Underwater Connections* was admittedly "a stylized drawing of a compressed gas tank used in diving." 221 USPQ at 96. Although stylized, there is nothing fanciful about applicant's mark.

The Examining Attorney accordingly concludes that "[a]pplicant's mark is a visual representation of the goods ... [identified in the application], and thus [is] merely descriptive of those goods."

We concede that this is a very close case. However, of the cases of which we are aware, the most analogous governing authority would seem to be that of *In re Curtiss-Wright Corp.*, 183 USPQ 621, 622 (TTAB 1974), in which the Board found that the

design sought to be registered, which the applicant therein argued was a "highly schematic or fanciful representation of a transverse cross-sectional view of a Wankel-type rotary engine," was on the whole "an arbitrary design which suggests the goods themselves to one familiar with Wankel-type rotary engines." As likewise is the case herein, while the illustration which applicant seeks to register as its mark, when compared with a picture of its actual goods, is clearly modeled on the goods themselves, such illustration nonetheless is basically an abstract design or silhouette which schematically suggests certain features of applicant's roof hatch hand railings but which lacks sufficient overall accuracy or detail to be considered merely descriptive of the goods.<sup>2</sup> Stated a bit differently, the level of stylization utilized in the perspective view of the goods in applicant's mark, ranging from the starkly bold manner in which the "hand railings," with their exaggerated curvature, are depicted, to the fanciful rhomboidal shape of the stippling representing the "roof hatch" over which applicant's goods would be installed, is just enough to preclude

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<sup>2</sup> To be sure, applicant's mark approaches the level of detail to be found in the marks at issue in such cases as *In re Underwater Connections, Inc.*, supra, [depiction of scuba tank] and *In re Ratcliff Hoist Co., Inc.*, 157 USPQ 118, 119 (TTAB 1968) [representation of hoist held merely descriptive of load sustaining devices and components thereof], but the profile-like view of what, upon reflection, would be taken to be hand railings instead of, for instance, two stylized letter "A"s, creates just enough of a pause as to require the use of some imagination, thought or perception.

immediate recognition of applicant's mark as a design showing its goods and their use. Furthermore, as in *LRC Products, supra*, there is no evidence of record that the illustration which constitutes applicant's mark is a common symbol or design used by the trade to represent roof hatch hand railings and/or depict their manner of use, and registration of such illustration will not deprive competitors of applicant of the free use of pictures or other graphic representations of their products in the advertising and sale of such goods.

In essence, the illustration which constitutes applicant's mark is sufficiently abstract, in the sense that at first glance it is unnatural, exaggerated, or otherwise unusual in appearance, that the overall commercial impression thereof would be that of a schematic or fanciful depiction which suggests the nature, function or use of its goods. At the very least, we have doubt that such mark is so accurate, realistic or true-to-life in its representation of roof hatch hand railings as to be merely descriptive thereof by immediately conveying a purpose, function or use of the goods. In view thereof, we resolve such doubt, in accordance with the Board's practice, in favor of the publication of applicant's mark for opposition. See, e.g., *In re Conductive Systems, Inc.*, 220 USPQ 84, 86 (TTAB 1983); *In re Morton-Norwich Products, Inc.*, 209 USPQ 791 (TTAB 1981); and *In re Gourmet Bakers, Inc.*, 173 USPQ 565 (TTAB 1972).

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