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Mailed: July 13, 2005

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Microcell Corporation

Serial No. 75931410

Steven J. Hultquist and Yongzhi Yang of Intellectual Property/Technology Law for Microcell Corporation.

Heather D. Thompson, Trademark Examining Attorney, Law Office 103 (Michael Hamilton, Managing Attorney).

Before Hairston, Chapman and Drost, Administrative Trademark Judges.

Opinion by Chapman, Administrative Trademark Judge:

An application has been filed by Microcell Corporation (a North Carolina corporation) to register on the Principal Register the mark MICROCELL for "power source and energy supply devices, namely, fibrous fuel cells, fibrous batteries, and energy storage fuel cells" in International Class 9.¹

¹ Application Serial No. 75931410, filed February 29, 2000, based on applicant's assertion of an intention to use the mark in commerce.

Citing Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1), the Examining Attorney has finally refused registration on the ground that if applicant's mark were used on or in connection with the goods identified in the application, it would be merely descriptive thereof.

Applicant has appealed, and both applicant and the Examining Attorney have filed briefs.² Applicant did not request an oral hearing.

Applicant contends that the mark MICROCELL is not merely descriptive of fibrous fuel cells, fibrous batteries, and energy storage fuel cells because its goods are not necessarily "micro" in size; that the words "micro" and "cell" each have a multiplicity of meanings (specifically, "micro" may mean "small, little, trivial and slight," and "cell" may mean "a small compartment, a basic structural unit of all organisms, a device that delivers an electric current, a small room, and/or a room where a prisoner is kept" (applicant's November 30, 2000 response, pp. 6-7); that the mark requires mature thought in order to determine the involved goods; that applicant's goods are

² Applicant submitted material (Exhibits A-D) for the first time with its brief on the case. The Examining Attorney objected to the evidence as untimely under Trademark Rule 2.142(d). The Examining Attorney's objection is well taken and is sustained. See TBMP §1207.01 (2d ed. rev. 2004). Applicant's untimely evidence submitted with its brief on the case has not been considered.

"not small in size" (reply brief, p. 5); and that there is no evidence that others in the relevant field need to use "MICROCELL" to describe their goods.

Regarding applicant's argument that competitors do not need to use the term, applicant specifically contends that (i) the Examining Attorney's first set of excerpted stories obtained from the Nexis database do not describe the type of goods involved herein but instead all "describe a new wireless cellular system" (microcell pagers and walkie-talkies) which are "energy consuming sources" (applicant's November 30, 2000 response, p. 8); and (ii) applicant's submission of printouts of pages from a few different websites "show the multiple uses of the term microcell on many different products," none of which are "energy producing sources" (i.e., "MC 100 Microcell" for a device for measurement of blood or other fluids, "MicroCell" for meltblown fibers for filtration, and "Large Volume Microcell Insert" used in a nuclear magnetic resonance (NMR) device) (applicant's November 30, 2000 response, p. 9).

Based on this evidence, applicant concludes that "it is clear that competitors do not need to use applicant's mark for advertising or otherwise commercially exploiting

their own goods or services relating to energy producing sources." (Applicant's November 30, 2000 response, p. 9.)

Applicant further argues as follows (brief, p.

3)(emphasis in original):

The designated goods of the present application are 'power source and energy supply devices, namely, fibrous fuel cells, fibrous batteries, and energy storage fuel cells.' Such fuel cells and batteries have a fibrous form. It is important to note that the term 'fibrous' describes the form of an article, while the term 'micro' describes the size of an article, and that a 'fibrous' article is not necessarily 'micro.'

After citing a few cases involving marks which include the word "mini,"³ applicant argues as follows (brief, p.5):

Such holdings by the Board regarding the descriptiveness of the term 'MINI' equally applies to the term 'micro' that is currently in issue, because both terms would be recognized by the purchasing public in a similar manner.

Therefore, the proposed mark 'MICROCELL', which consists of the name of the goods (i.e., 'cell' for 'fuel cell') modified by the word 'micro' is suggestive rather than merely descriptive for the designated goods of the present application (i.e., fibrous fuel cells and batteries), which are not produced or sold in miniature form or size, consistent with

³ In re Brundage, 180 USPQ 274 (TTAB 1973); In re Champion International Corp., 178 USPQ 639 (TTAB 1973); and In re Union Carbide Corp., 171 USPQ 510 (TTAB 1971).

the Board's reasoning in the above-cited cases.

The Examining Attorney argues that The American Heritage Dictionary (Third Edition 1996) defines the term "micro" as "adj. basic or small-scale" and the term "cell" as "n. ...5. Electricity a. A single unit for electrolysis or conversion of chemical into electric energy, usually consisting of a container with electrodes and an electrolyte. Also called electrochemical cell."; that the term "MICROCELL" describes a primary feature and characteristic of applicant's goods, namely, basic or small-scale energy fuel cells; that even if applicant's goods are not always produced in small scale, applicant goods can be and often are small scale and basic; that the multiple meanings of the separate words are not relevant in the context of applicant's identified goods because the question of descriptiveness must be determined not in the abstract, but in the context of purchaser perception in relation to the involved goods; and that the evidence clearly shows that MICROCELL is merely descriptive of applicant's "power source and energy supply devices, namely, fibrous fuel cells, fibrous batteries, and energy storage fuel cells."

As evidence in support of her refusal to register, the Examining Attorney refers to: (i) dictionary definitions of the involved terms; (ii) printouts of several excerpted stories obtained from the Nexis database regarding "microcell" fuel cell technology; (iii) printouts of pages from applicant's website which refer therein to "The cell's fibrous geometry provides for the highest achievable MEA surface area to volume ratio, resulting in compact fuel cells" and capability to "achieve power output in a variety of shapes and sizes"; and (iv) applicant's statement in its November 30, 2000 response (p., 2) to the Examining Attorney's requirement for information about applicant's goods pursuant to Trademark Rule 2.61(b), wherein applicant stated "Essentially more energy can be produced from a smaller compartment."

The following are examples of the several excerpted stories obtained from the Nexis database, showing use of the term "microcell(s)" in relation to fuel cells (emphasis added):

Headline: For Far Smaller Fuel Cells, A Far Shorter Wait
...The fact that consumers already pay high prices for battery power is a central reason why many start-up fuel cell companies regard **microcells** as a quicker path to profits.
For all that, however, completing the last few steps to commercialization of

microcells is still a big challenge. Some analysts wonder whether fuel cells might not turn out to be useful for only a few specialty applications. ... "The New York Times," March 26, 2003;

Headline: Corrosion Management Components Added
...has added corrosion management components to its fibrous electrochemical systems for generating and converting energy. The fibrous structures, according to Microcell scientist, Ray Eshraghi, enhance resistance to oxidative degradation in **microcell**-based high voltage, high power density fuel cell and battery systems. "Battery & EV Technology," February 2003;

Headline: Microcell Structure Boosts Separator
...scientist Ray R. Eshraghi, series-connected **microcell** structures and assemblies can be "readily" constructed from discrete fibrous **microcells** and can be used to form batteries or fuel cells of varying chemistries. **Microcells** can be "easily fabricated in sheet form and assembled into layered, sub-bundled and bundled conformations that produce high-voltage, high-power density outputs in applications such as fuel cell and battery systems." Each **microcell** is made with an inner electrode, a microporous membrane separator in contact with the inner electrode, with an electrolyte in the pores of the microporous membrane separator, and an outer electrode as detailed in ...
The hollow center or lumen of the **microcell** structure in fuel cell applications must be sufficiently "open" to allow passage of the gaseous feed

Fuel cells formed from **microcells** are monopolar and do not require bipolar flow field plates. Because the cells and current collectors are in fiber form, a high level of electrode surface area can be compacted in small volumes. ... "Fuel Cell Technology News," July 2002; and

Headline: Unit May Lower kW to \$100
...The fibers [or **microcells**] are connected and packed together to make a fuel cell module. In a **microcell**, gaseous or liquid fuel passes through a channel within a fiber. ... Microcell will evaluate fabrication methods for low-cost, corrosion-resistant conducting fibers; fabricate and test fuel-cell prototypes made from modular assemblies of **microcell** fibers; test and evaluate the fuel cells; integrate them into a system with a fuel cell processor and power conditioning unit; and optimize the system. ... "Fuel Cell Technology News," January 2002.⁴

The test for determining whether a term or phrase is merely descriptive is whether the term or phrase immediately conveys information concerning a significant quality, characteristic, function, ingredient, attribute or feature of the product or service in connection with which it is used or is intended to be used. See *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564 (Fed. Cir. 2001); *In re Abcor Development Corp.*, 588 F.2d 811, 200

⁴ We recognize that some of these excerpted stories may refer to or be about applicant. Nonetheless, the uses in those stories of the term "microcell" remain descriptive uses, with no reference that "microcell" is a trademark owned by applicant.

USPQ 215 (CCPA 1978); In re Eden Foods Inc. 24 USPQ2d 1757 (TTAB 1992); and In re Bright-Crest, Ltd., 204 USPQ 591 (TTAB 1979).

Further, it is well-established that the determination of mere descriptiveness must be made not in the abstract or on the basis of guesswork, but in relation to the goods or services for which registration is sought, the context in which the term or phrase is being used or is intended to be used on or in connection with those goods or services, and the impact that it is likely to make on the average purchaser of such goods or services. See In re Consolidated Cigar Co., 35 USPQ2d 1290 (TTAB 1995); and In re Pennzoil Products Co., 20 USPQ2d 1753 (TTAB 1991).

Consequently, "[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). Rather, the question is whether someone who knows what the goods or services are will understand the term or phrase to convey information about them. See In re Home Builders Association of Greenville, 18 USPQ2d 1313 (TTAB 1990).

Finally, it should be noted that a term or phrase may be "descriptive though it merely describes one of the

qualities or properties of the goods." In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009, 1010 (Fed. Cir. 1987).

We find that the Examining Attorney has established a prima facie case that the term MICROCELL immediately and directly conveys information about a significant feature of "power source and energy supply devices, namely, fibrous fuel cells, fibrous batteries, and energy storage fuel cells," specifically, that applicant's fuel cells are compact offering more energy from a smaller compartment, and/or can literally be small in size.

Applicant acknowledges that the term "cell" stands for "fuel cell" and is the name of the identified goods.⁵ Applicant also states that its goods can create more energy from a smaller compartment, which information is reflected in some of the Nexis stories in the record and set forth above in this decision; and that applicant's website refers to "compact fuel cells" which can be bundled in "a variety of shapes and sizes." Applicant's identification of goods is broad such that it encompasses small fuel cells or fuel cells with small, compact compartments.

⁵ More precisely, "cell" or "fuel cell" is the name of at least some of applicant's identified goods, but the identified goods also include "fibrous batteries."

The combination of the terms "micro" and "cell" does not create an incongruous or unique mark. Rather, applicant's applied-for mark MICROCELL, if applied to applicant's identified goods, would immediately describe, without conjecture or speculation, a significant feature of applicant's goods, as discussed herein. Nothing requires the exercise of imagination or mental processing or gathering of further information in order for purchasers of and prospective customers for applicant's goods to readily perceive the merely descriptive significance of the term MICROCELL as it pertains to applicant's goods. See *In re Tekdyne Inc.*, 33 USPQ2d 1949 (TTAB 1994) (MICRO-RETRACTOR held merely descriptive of "surgical clamps"). See generally, *In re Gyulay*, supra; *In re Omaha National Corporation*, 819 F.2d 1117, 2 USPQ2d 1859 (Fed. Cir. 1987); *In re Polo International Inc.*, 51 USPQ2d 1061 (TTAB 1999); *In re Intelligent Instrumentation Inc.*, 40 USPQ2d 1792 (TTAB 1996); and *In re Time Solutions, Inc.*, 33 USPQ2d 1156 (TTAB 1994).

We disagree with applicant's unsupported statement that the purchasing public would view the words "mini" and "micro" in a similar manner. Importantly, our primary reviewing court, the Court of Appeals for the Federal

Circuit, has made clear that descriptiveness issues generally cannot be determined on the basis of analogies drawn from terms other than the mark that is sought to be registered. See *In re Seats, Inc.*, 757 F.2d 274, 225 USPQ 364 (Fed. Cir. 1985). See also, *Levi Strauss & Co. v. R. Josephs Sportswear, Inc.*, 28 USPQ2d 1464 (TTAB 1993); and *Fuji Jyukogyo Kabushiki Kaisha v. Toyota Jidosha Kabushiki Kaisha*, 228 USPQ 672 (TTAB 1985). That is, the issue before us is whether the term "MICROCELL," not "minicell," is merely descriptive of the involved goods. We cannot focus on the related term, rather, we must focus on the applied-for mark itself. In addition, each case must be decided on its own merits. See *In re Nett Designs Inc.*, supra.

Based on the record before us, applicant's arguments to the contrary do not persuade us of a different result herein.

Finally, even if applicant became the first (and/or only) entity to use the term "MICROCELL" in relation to fibrous fuel cells, energy storage fuel cells and fibrous batteries, such is not dispositive where, as here, the term unquestionably projects a merely descriptive connotation. Applicant's evidence of use of the term "microcell" in connection with completely unrelated goods (i.e., a device

for measurement of blood or other fluids, meltblown fibers for filtration, and a nuclear magnetic resonance (NMR) device) does not establish that applicant's competitors do not have a need to use the term. See *In re Tekdyne Inc.*, supra at 1953, and cases cited therein. We find that applicant's competitors would have a competitive need to use this term. See 2 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, §11:18 (4th ed. 2005).

Decision: The refusal to register under Section 2(e)(1) of the Trademark Act is affirmed.