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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Jesse James

Serial No. 76561134

Anthony M. Keats of Keats McFarland & Wilson LLP for Jesse James.

Jennifer Chicoski, Trademark Examining Attorney, Law Office 101 (Ronald R. Sussman, Managing Attorney).

Before Grendel, Drost, and Kuhlke, Administrative Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

On November 20, 2003, applicant Jesse James filed an intent-to-use application to register the mark THIRTYS (in standard character form) on the Principal Register for "automobile parts, namely, car wheel rims" in Class 12.¹

The examining attorney refused registration under Section 2(e)(1) on the ground that applicant's mark is merely descriptive of the identified goods. 15 U.S.C.

¹ Serial No. 76561134.

§ 1052(e)(1). When the examining attorney made the refusal to register final, applicant filed a notice of appeal.²

The examining attorney argues (Brief at unnumbered pp. 3-4) that:

When the significance of the term "THIRTYS" is considered within the context in which it will be used, namely on "car wheel rims," the average purchaser of such goods in the market place would immediately understand the mark's reference to a specific characteristic of the goods - their diameter size in inches. Therefore, the mark is merely descriptive of the goods.

Applicant argues that there is only a single reference to the exact term "thirtys" and "the use of 'twentys' and 'twenty fours' is likewise irrelevant and inapplicable to the applied-for mark because such references do not involve Applicant's mark." Brief at 5.

Therefore, the question is whether the term "THIRTYS" is merely descriptive of car wheel rims.

A mark is merely descriptive if it immediately conveys information concerning a quality or characteristic of the product or service. The perception of the relevant purchasing public sets the standard for determining descriptiveness. Thus, a mark is merely descriptive if the ultimate consumers immediately associate it with a quality or characteristic of the product or service. On the other hand, if a mark requires imagination, thought, and perception to arrive at the qualities or

² Applicant also has another application (No. 76562049) on appeal for the mark TREINTAS for the same goods. The word is alleged to be the Spanish word for "Thirties" and it has been refused on a similar ground. However, because of the differences in the record and issues, we have chosen to issue separate opinions in these cases.

characteristics of the goods or services, then the mark is suggestive.

In re MBNA America Bank N.A., 340 F.3d 1328, 67 USPQ2d 1778, 1780 (Fed. Cir. 2003) (citations and internal quotation marks omitted). See also In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215, 217 (CCPA 1978) and In re Nett Designs, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001). It is clear that when we are analyzing a mark to determine if it is merely descriptive, we must consider the mark in the context of the identified goods or services and not in the abstract. Abcor, 200 USPQ at 218.

The first question we address is the spelling of the term "Thirtys." The term "thirty" is "a cardinal number, 10 times 3." *The Random House Dictionary of the English Language (unabridged)* (2d ed. 1987).³ The same dictionary identifies the plural of this word as "thirties." Applicant's term THIRTYS would be pronounced the same as the normal plural "thirties." This slight misspelling would not change the meaning of the term if the underlying term is itself descriptive. The Supreme Court has held that:

The word, therefore is descriptive, not indicative of the origin or ownership of the goods; and being of

³ We take judicial notice of this definition. University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., 213 USPQ 594, 596 (TTAB 1982), aff'd, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

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...

Standard Paint Co. v. Trinidad Asphalt Mfg. Co., 220 U.S. 446, 455 (1911). See also 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 here between 'quik' and 'quick'"); Fleetwood Co. v. Mende, 298 F.2d 797, 132 USPQ 458, 460 (CCPA 1962) ("TINTZ [is] a phonetic spelling of 'tints'"); King-Kup Candies, Inc. v. King Candy Co., 288 F.2d 944, 129 USPQ 272, 273 (CCPA 1961) ("It is clear, therefore, that the syllable 'Kup,' which is the full equivalent of the word 'cup,' is descriptive); Andrew J. McFarland, Inc. v. Montgomery Ward & Co., 164 F.2d 603, 76 USPQ 97, 99 (CCPA 1947) (KWIXTART merely descriptive for electric storage batteries); 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, 1694 (TTAB 1997) (ORGANIK "is the phonetic equivalent of the term 'organic'"). Even if there was no evidence that such terms as NU, QUIK, KWIK, KUP, or ORGANIK

were used, it would not mean that they were not descriptive.

We now look at the evidence in support of the examining attorney's argument that "THIRTYS" is merely descriptive. An article in the *Detroit Free Press* (August 3, 2003) provides some basic information. It explains that "Rims" are: "[a]nother name for wheels. Rims are not to be confused with wheel covers or hub caps. Tires are mounted around the rim." The article defines "20s" as follows: "If someone says they are riding on 20s, they are driving a vehicle with 20-inch wheels. Many vehicles operate on a standard of 15-inch wheels, but 20s are a very popular size nationally." Similarly, "24s" are defined as "24-inch wheels. This is the size that's popular everywhere this summer." The article quotes an interviewee as saying that: "Rappers talk about their cars and rims on the radio and you can see them in the videos. I think that is why they have taken off."

An article at www.sema.org describes the aftermarket for rims as follows:

Wheels are getting absurdly large. There was a time when 20s were huge; now 20s are almost commonplace. The Dodge Ram pickup comes from the factory with 20s on it, and now you're seeing 26s at the SEMA Show. We understand that GM is now voiding warranties in vehicles that have 22s on them.

Another article on the Advanced Auto Parts website has a paragraph entitled "Got 20s?" The article reports that: "The big trend for SUVs is much larger wheels, 22-, 24- and even 26-inch wheels are now in vogue. Keep in mind, however, that as wheels go up in size, usually the weight does as well, which increases rotational mass and the leverage on the brakes and suspension."

The examining attorney also includes evidence of use of the term "30" and similar terms in relation to auto rims or wheels. At www.cheap-wheels-n-rims.com, there is an article entitled "Give your auto the right look with custom car rims and aftermarket wheels." The article reports that the "hottest of today's custom rims are getting bigger and bigger. Aftermarket wheels range in sizes from 14 inches right up to 30 inches! ... The trend of aftermarket wheels is getting bigger every single summer." Another article on the same website refers to "the sizes of these rims has gotten later [sic] and larger sizes for custom mags range from 12, 13, 14, 15, 16, 17, 19, 20, 24, 26 and 30 inches for SUV trucks like the Cadillac Escalade." At www.unverferth.com, rims are available in 24-, 26-, 28-, and 30-inch diameters."

The examining attorney even retrieved a vignette from an electronic bulletin board conversation concerning Acura

vehicles in December 2003. The conversation opened with the subject "30" rim!!" The writer displayed a photo of a car with large wheels and reported: "Yesterday while ridin with a friend I saw two cars roll by ridin on HUGE rims. We waved at the drivers and they told us, yep, 30's. I had my phone on me so I took a few pics, remember it's a phone before it is a camera, but this will give u an idea of what they look like." The first response to this message was: "I didn't know they had 30s out, are those custom?"

The examining attorney also submitted some additional evidence to show that rims are often referred to by the number that describes their diameter in plural form. <http://restored-classics.com> ("custom chrome twentys"); www.fordf150.net ("The Harley wheels are twentys though, you wouldn't be able to use them with your tires"); and www.dodgedakotas.com ("chrome twentys").⁴ Furthermore, the lyrics of several songs show the use of a plural number to refer to the size of the wheels on the vehicle. See, e.g., www.anysonglyrics.com (50 Cent, *True Loyalty*, "Look at them twenty-fours diamonds spin") and www.sing365.com (Insane Clown Posse, *24' on a '84*, "24's on my 84 Regal. I'm riding down your block with 2 Desert Eagles").

⁴ We note the use of the nontraditional spelling of "twenties."

From this evidence, we draw the following conclusions. Rims or wheels are often simply referred to by the plural number that describes their size. The number can be spelled in an understandable, but non-traditional, way, e.g., twentys. Rim sizes have been getting larger and larger with even production vehicles such as the Dodge Ram pickup coming with 20s or 20-inch rims. Aftermarket rims have similarly been increasing in size with various articles indicating that 26-inch rims are not uncommon. Other information now indicates that wheel sizes of 28 and 30 inches are beginning to appear. Indeed, there is one report on an electronic bulletin board of an early encounter with a car that had been modified to include 30-inch rims and the writers referred to them as "30's" or "30s."⁵ Similarly, applicant's term "Thirtys" would merely describe 30-inch wheels for automobiles.

Applicant argues that his term is "an abbreviation, contraction, foreshortening or whimsical alternative spelling for tire rims equal or greater than thirty inches in diameter." Brief at 3. If a misspelling "involves more than simply a misspelling of a descriptive or generic

⁵ We emphasize that our decision does not rest on the use of the term "30's" or "30s" on this bulletin board. We do point to it as an example of the natural progression of language that would be used to refer to the size of rims as they become larger.

word," it may not be merely descriptive. In re Grand Metropolitan Foodservices Inc., 30 USPQ2d 1974, 1975 (TTAB 1994) (Applicant's "MufFuns" (stylized) mark has a different commercial impression than the generic term "muffin"). However, we see nothing whimsical about the term "thirtys." It is no more whimsical than the earlier large size rims that were referred to simply as "twentys," "20s," "twenty-fours," or "24s." It is not so much an abbreviation as it is what Judge Rich referred to as follows:

[T]he users of language have a universal habit of shortening full names -- from haste or laziness or just economy of words. Examples are: automobile to auto, telephone to phone, necktie to tie, gasoline service station to gas station. I regard it as inevitable that a gas monitoring badge will be called a gas badge...

Abcor, 200 USPQ at 219 (Rich, J. concurring).

Regarding applicant's allegations (Brief at 5) that the "evidence of record is clearly insufficient," we simply disagree. The term "30" obviously is exactly descriptive of wheels having a thirty-inch diameter. There is no difference between using the Arabic numeral "30" or the word "thirty." Both mean exactly the same thing, the number 30. Applicant's identification of goods includes

wheels of thirty-inch diameter.⁶ The evidence demonstrates that wheels are frequently referred to by the plural number of their size. People even use similar misspellings when using these terms. We have no doubt that if prospective purchasers of car rims were to encounter the term THIRTYS on thirty-inch car rims, they would immediately understand that the term was merely descriptive of these goods.

Decision: The examining attorney's refusal to register applicant's mark on the ground that it is merely descriptive of the identified goods is affirmed.

⁶ There is no argument by applicant in this case that the term "thirty" would not describe his wheels. If that were the case, there would then be a question of whether the mark was deceptively misdescriptive of the goods.