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Bucher

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Gravel Conveyors, Inc.

Serial No. 78363393

Michael D. Beck of Maginot Moore & Beck, LLP for Gravel
Conveyors, Inc.

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Attorney).

Before Hohein, Bucher and Holtzman, Administrative
Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

Gravel Conveyors, Inc. seeks registration on the
Principal Register of the mark **GRAVEL SHOOTER** (*in standard
character format*) for goods identified in the application as
"mobile hydraulic conveyors for dispensing aggregate and
particulate materials at a job site" in International
Class 7.¹

¹ Application Serial No. 78363393 was filed on February 5,
2004 based upon applicant's allegation of a *bona fide* intention
to use the mark in commerce. The database shows this product as
classified in International Class 19. While that would seem to
be correct for "aggregate and particulate materials," the
"hydraulic conveyors" would seem to be classified correctly in
International Class 7.

This case is now before the Board on appeal from the final refusal of the Trademark Examining Attorney to register this designation under Section 2(e)(1) of the Trademark Act based upon the ground that the mark is merely descriptive when considered in relation to applicant's identified goods, i.e., that the term "gravel shooter" immediately informs potential purchasers about a feature or characteristic of applicant's goods.

Applicant and the Trademark Examining Attorney have each filed a brief on the issues involved in this appeal, but applicant did not request an oral hearing before the Board. We affirm the refusal to register.

A mark is merely descriptive, and therefore unregistrable pursuant to the provisions of Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), if it immediately conveys information of significant ingredients, qualities, characteristics, features, functions, purposes or uses of the goods or services with which it is used or is intended to be used. In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215, 217 (CCPA 1978) [GASBADGE merely descriptive of a "gas monitoring badge"]. See also In re MBNA America Bank N.A., 340 F.3d 1328, 67 USPQ2d 1778, 1780 (Fed. Cir. 2003) [MONTANA SERIES

and PHILADELPHIA CARD merely descriptive of "credit card services." The Court found that a "mark is merely descriptive if the ultimate consumers immediately associate it with a quality or characteristic of the product or service"]. Hence, the ultimate question before us is whether the term **GRAVEL SHOOTER** conveys information about a significant feature or characteristic of applicant's goods with the immediacy and particularity required by the Trademark Act.

A mark is suggestive, and therefore registrable on the Principal Register without a showing of acquired distinctiveness, if imagination, thought or perception is required to reach a conclusion on the nature of the goods or services. See *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987) [APPLE PIE merely descriptive of potpourri mixture]; and *In re Bed & Breakfast Registry*, 791 F.2d 157, 229 USPQ 818, 819 (Fed. Cir. 1986) [BED & BREAKFAST REGISTRY merely descriptive of "making lodging reservations for others in private homes"].

The question of whether a particular term is merely descriptive is not decided in the abstract. That is, when we analyze the evidence of record, we must keep in mind that the test is not whether prospective purchasers can

guess what applicant's goods are after seeing applicant's mark alone. In re Abcor, supra at 218 ["Appellant's abstract test is deficient - not only in denying consideration of evidence of the advertising materials directed to its goods, but in failing to require consideration of its mark 'when applied to the goods' as required by statute"]; In re Home Builders Association of Greenville, 18 USPQ2d 1313 (TTAB 1990) [NEW HOME BUYER'S GUIDE (in special form shown below)² for "real estate advertisement services"]; and In re American Greetings Corp., 226 USPQ 365, 366 (TTAB 1985) [APRICOT is merely descriptive of apricot-scented dolls]. Rather, the proper test in determining whether a term is merely descriptive is to consider the alleged mark in relation to the goods or services for which registration is sought, the context in which the mark is used, and the significance that the mark is likely to have on the average purchaser encountering the goods or services in the marketplace. See In re Omaha National Corp., 819 F.2d 1117, 2 USPQ2d 1859 (Fed. Cir. 1987) [the term "first tier" describes a

² Mark of In re Home Builders Association of Greenville:

NewHome
BUYER'S GUIDE

class of banks]³; In re Intelligent Instrumentation Inc., 40 USPQ2d 1792 (TTAB 1996) [the term VISUAL DESIGNER is merely descriptive of "computer programs for controlling the acquisition of data from measurement devices"]; In re Consolidated Cigar Co., 35 USPQ2d 1290 (TTAB 1995) [SUPER BUY is laudatory for "cigars, pipe tobacco, chewing tobacco and snuff"]; In re Pennzoil Products Co., 20 USPQ2d 1753 (TTAB 1991) [MULTI-VIS is merely descriptive of "multiple viscosity motor oil"]; In re Engineering Systems Corp., 2 USPQ2d 1075 (TTAB 1986) [DESIGN GRAPHIX merely descriptive of computer graphics programs]; and In re Bright-Crest, Ltd., 204 USPQ 591 (TTAB 1979) [COASTER-CARDS merely descriptive of a coaster suitable for direct mailing].

The Trademark Examining Attorney argues that the evidence of record shows that "gravel" is one of the materials thrown from the applicant's goods, and that several dictionary definitions support the conclusion that "shoot" can be used to describe how this aggregate is discharged using applicant's equipment.

³ Mark of In re Omaha National Corp.:



By contrast, applicant argues that the evidence of record does not support this refusal to register - that while one may shoot a gun, the concept of a conveyor "shooting" gravel is incongruous. Rather than being descriptive, applicant contends that its mark is, at worst, suggestive:

In the context of Applicant's products, the term "shooter" is suggestive of the accuracy and rapid rate at which Applicant's mobile hydraulic conveyor can dispense aggregate at a job site. The term "shooter" also carries a "Wild West" connotation that glamorizes an otherwise less glamorous process.

Applicant's appeal brief, p. 6.

In support of the refusal to register, the Trademark Examining Attorney has relied upon two different dictionary entries, the first with the initial Office action and the second with the Final Office action.

shoot to send forth suddenly, intensely, or swiftly.⁴

shoot ... 1 a (5): to throw or cast off or out often with force ... **1 d:** to discharge, dump or empty especially by overturning, upending, or directing into a slide ...⁵

From these dictionary entries, the Trademark Examining Attorney argues that whenever the average

⁴ AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (Third Edition 1992).

⁵ MERRIAM-WEBSTER ONLINE DICTIONARY.

purchaser encounters this mark in relation to applicant's goods, no imagination or thought is necessary to determine the nature of applicant's conveyors. She takes the position that the proposed mark informs prospective purchasers that "gravel" can be thrown, discharged or "shot" from applicant's conveyor in a concentrated stream.

However, applicant contends that these definitions fail to support the position taken by the Trademark Examining Attorney:

None of the cited dictionary definitions proposed by the Examining Attorney fits Applicant's goods. To the contrary, a certain amount of imagination was necessary to shoehorn these dictionary definitions into a description of a feature of Applicant's goods. [citation omitted] At a minimum, the attempt to apply these different definitions of the term "shoot" as a description of a feature or function of Applicant's goods raises a doubt that must be resolved in Applicant's favor.

Applicant's appeal brief, p. 7.

The Trademark Examining Attorney also included pages from *FocusOn Aggregates*, an email newsletter from May 26, 2001, describing applicant's involved product:

GRAVEL THROWER

Gravel Conveyors, Inc. has introduced the Gravel Shooter™, a high-speed belt conveyor which mounts on a dump truck tailgate. The patented system, which features side to side swing, is designed to throw sand, gravel, crushed stone and other materials in a concentrated stream up to 60 ft. The conveyor can be operated by one person who can place the material accurately and evenly. After use the conveyor is

folded to the travel position. The company also offers the Rock'n Rounder, a new round bed design with shooter conveyor.⁶

The article also contained a photograph demonstrating this mobile conveyor in action:



In referring to this photograph, the Trademark Examining Attorney observes that the gravel is "thrown in a long arc" ... "similar to how a basketball is 'shot' by a player into a basket." She refers back to the dictionary definition of "to throw or cast off or out often with force," as a prime example of this use of the word because clearly applicant's equipment herein throws gravel with force in a concentrated stream.

Applicant responds to this by arguing:

In particular, the [newsletter] excerpt states that Applicant's product "is designed to throw." The term "shoot" or "shooter"⁷ is not used in this trade

⁶ <http://www.focusonaggregates.com/newsletterV1N3.html>

⁷ Evidently neither applicant nor the Trademark Examining Attorney noticed the last line in this newsletter excerpt, referring to "the Rock'n Rounder, a new round bed design with **shooter** conveyor."

publication to describe the features or function of Applicant's product. This excerpt from the trade publication *FocusOn Aggregates* is the only evidence of record that demonstrates what term might be used by the relevant public to describe the features or functions of these products. That term is "throw," not "shoot."

Applicant's appeal brief, pp. 4 - 5.

We disagree. If applicant's conveyors for dispensing aggregate and particulate materials can throw gravel, given these dictionary entries, these conveyors can "shoot" it as well. Even if other terms or phrases exist by which applicant's competitors may equally describe mobile conveyors for throwing gravel at a job site, such would not prevent the term "Gravel Shooter" from being merely descriptive of applicant's product. See Roselux Chemical Co., Inc. v. Parsons Ammonia Co., Inc., 299 F.2d 855, 132 USPQ 627, 632 (CCPA 1962) [SUDSY is descriptive of household ammonia containing detergent].

Applicant argues that its use of the term "shooter" as part of its trademark will not inhibit its competitors in their ability to describe the features of their products. However, the fact that applicant intends to be, or presently is, the first and only user, among its competitors, of the term "Gravel Shooter" in connection with a mobile conveyors for throwing gravel, does not, as

correctly noted by the Trademark Examining Attorney, justify registration when, as here, such term projects a merely descriptive significance. See In re International Game Technology Inc., 1 USPQ2d 1587, 1589 (TTAB 1986) [ON-LINE, ON-DEMAND is merely descriptive of computer lottery terminals]; In re National Shooting Sports Foundation, Inc., 219 USPQ 1018, 1020 (TTAB 1983) [SHOOTING, HUNTING, OUTDOOR TRADE SHOW AND CONFERENCE is merely descriptive of conducting and arranging trade shows in hunting, shooting, and outdoor sports products field]; and In re Pharmaceutical Innovations, Inc., 217 USPQ 365, 367 (TTAB 1983) [ULTRA/PHONIC is merely descriptive of diagnostic ultra sound conductivity or scanning gel].

Accordingly, because the term GRAVEL SHOOTER conveys forthwith a significant feature of applicant's "mobile hydraulic conveyors for dispensing aggregate and particulate materials at a job site," namely, that such mobile conveyors throw or shoot gravel, it is merely descriptive thereof within the meaning of the statute.

Decision: The refusal under Section 2(e)(1) of the Lanham Act is hereby affirmed.