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Hearing: January 19, 2005

Mailed: March 28, 2005

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Quorum International, L.P.

Serial No. 76255593

Kenneth C. Hill of Hill & Hunn LLP for Quorum International, L.P.

Theodore McBride, Trademark Examining Attorney, Law Office 103
(Michael Hamilton, Managing Attorney).

Before Walters, Holtzman and Drost, Administrative Trademark
Judges.

Opinion by Holtzman, Administrative Trademark Judge:

An application has been filed by Quorum International, L.P.
to register CRISTAL for the following goods (as amended):
"lighting fixtures, namely chandeliers and wall sconces and the
ceiling mounts, wall mounts, and light kits, namely electric
lighting fixtures for attachment to ceiling fans, lamps and
lampshades and electrical torches" in Class 11.¹ The

¹ Serial No. 76255593, filed May 11, 2001, based on an allegation of
first use on January 12, 1996 and first use in commerce in March 1996.

application contains the following statement: "The English translation of the [word] 'cristal' is 'crystal'."

The Trademark Examining Attorney refused registration on the basis of Section 2(e)(1) of the Trademark Act.² When the refusal was made final, applicant appealed. Applicant and the examining attorney have filed briefs. An oral hearing was held.

Before proceeding further, we need to clarify the issue on appeal. The examining attorney initially refused registration under Section 2(e)(1) of the Trademark Act on the ground that applicant's mark is merely descriptive of its goods. In response, and without any argument that the mark is inherently distinctive, applicant amended the application to seek registration under Section 2(f) of the Act. The amendment was accompanied by a declaration of five-years use from William S. Davis, Sr., the president of Davoill, Inc., applicant's general partner.

The Examining Attorney rejected the 2(f) evidence and continued the refusal under Section 2(e)(1) contending that the mark is generic for the goods and that no amount of evidence would be sufficient to overcome the refusal based on

² Registration was also initially refused under Section 2(d) of the Act but that refusal was subsequently withdrawn in view of applicant's claim of ownership of the cited registration (Registration No. 2149301 for the mark "CRYSTAL" for "ceiling fans"). That registration has since been cancelled by the Office under Section 8 of the Trademark Act.

genericness.³ Applicant responded to the refusal with evidence and argument that the mark is not merely descriptive. The examining attorney subsequently issued a final refusal solely on the basis of the descriptiveness of the mark and the insufficiency of applicant's 2(f) evidence. The issue of genericness was not mentioned in the final refusal.

Applicant requested reconsideration of the final refusal, admitting that the mark is "arguably descriptive" (Recon., p. 2) and submitting additional evidence of acquired distinctiveness. The evidence consisted of the declarations of Dean Mathis and Denis Alison, two individuals in the lighting fixture industry. In addition, applicant stated that "[t]he mark CRISTAL is clearly not generic, nor was the refusal to register based on an argument that it is." (Recon., p. 3). In denying the request for reconsideration, the examining attorney maintained his position that the mark is highly descriptive of the goods and once again argued that the mark is generic.

In its brief on appeal, applicant states that as it has converted its application to 2(f), "for procedural purposes, applicant does not challenge the finding that CRISTAL is descriptive." (Brief, p. 7). In addition, finding the basis for

³ The examining attorney also refused registration on the Supplemental Register as well as the Principal Register, but since applicant never sought to amend its application to the Supplemental Register this refusal was premature.

the examining attorney's refusal "unclear," applicant included arguments on the genericness issue but at the same time noted that it would have presented evidence on genericness if that issue had been maintained. In its reply brief, applicant reiterated that "the only outstanding refusal was one based on descriptiveness" and that its evidence was accordingly directed solely to the acquired distinctiveness claim.

Under the circumstances, we find, with respect to issues before the Board, that the examining attorney has withdrawn the refusal based on genericness, and that applicant has conceded that the mark is merely descriptive of its goods.⁴ Thus, the only question on appeal is whether the evidence is sufficient to establish that the mark has acquired distinctiveness under Section 2(f) of the Trademark Act.

Applicant's goods are "lighting fixtures" including chandeliers and wall sconces. Applicant admits, (Brief, p. 4), and the dictionary evidence submitted by the examining attorney shows, that CRISTAL is the French word for "crystal."⁵ In

⁴ We also point out that unless the question of inherent distinctiveness is clearly reserved, which in this case it was not, a claim of acquired distinctiveness under Section 2(f) is tantamount to a concession that the mark is not inherently distinctive. See *Yamaha International Corp. v. Hoshino Gakki Co. Ltd.*, 840 F.2d 1572, 6 USPQ2d 1001, 1005 (Fed. Cir. 1988) and *General Foods Corporation v. MGD Partners*, 224 USPQ 479, 485 (TTAB 1984).

⁵ We note, in addition, that "cristal" is also the Spanish word for "crystal," (see *Cassell's Spanish-English English-Spanish Dictionary*

addition, "cristal" is the phonetic equivalent, that is, a mere misspelling, of "crystal." The evidence shows that the term "CRISTAL," as either the foreign or phonetic equivalent of "crystal," is highly descriptive of lighting fixtures.

The dictionary listing provided by the examining attorney defines "crystal" as, "**a.** A high-quality clear, colorless glass. **b.** an object, especially...an ornament, made of such glass."⁶ It is clear from the examining attorney's Internet search summaries and excerpts of third-party websites that elements or components made of "crystal" are common decorative feature of lighting fixtures, and that "crystal" is also commonly used to describe a type of chandelier, i.e., a crystal chandelier. Examples of such references are as follows (emphasis added):

Titanus Crystal Chandeliers & Frames[]The first **crystal chandelier** site on the web ever, ... www.algonet.se

...Welcome to Krebs Crystal Chandeliers! Crystal chandeliers of high quality has [sic] been our main ...
Description: Manufacturer of **crystal chandeliers** ...
www.worldclasslighting.com

...home address in the USA and Canada of 150 Bohemia hand cut lead **crystal chandeliers**, wall sconces, table and floor lamps... www.crystal-chandelier.cz

A collection of **crystal chandeliers** and **crystal sconces** from manufacturers such as Nulco Lighting, Wilshire, Crystal Clear and Pecasso ... www.lightingforum.com

(1959)), and as indicated on applicant's specimen labels, applicant's lighting fixtures are a product of Spain.

⁶ *The American Heritage Dictionary of the English Language* (3rd ed. 1992).

Crystal lighting fixtures from Newton Electrical Supply and AD Cola Lighting, ... www.newtonelectric.com

SENOV **crystal lighting fixtures** ...
...You can see and feel the difference. The assembled chandeliers and lighting fixtures are then decorated with various shapes and sizes of **crystal trimmings** ...
www.abcandg.com

Waterford Crystal Lighting Fixtures. Waterford Beaumont Lantern Gold plated accents and Waterford Crystal combination... www.crystalclassics.com

Manufacturer of **crystal lighting fixtures and crystal chandeliers**... www.arch-details.com

Congratulations on choosing fine **crystal light fixtures** for your home. We hope you will find the traditional, yet **timeless beauty of crystal** as enchanting as we do.
www.chandelier.com

Schonbek Crystal Lighting Fixtures
Click on the **crystal lighting fixtures** below to see a larger image along with the **crystal lighting fixture's** dimensions and price. ... If you have any questions about ordering a light fixture, table or floor lamp, or a **crystal chandelier**, give Union Lighting a call... www.unionlighting.net

The "Crown Jewel Collection" of **crystal lighting fixtures** features intricate swags of almond-shaped **crystal beads** with delicate candlelights. **The line includes crystal chandeliers** (shown), pendants, surface mounts, wall sconces and other fixtures. www.visualstore.com

Contrary to applicant's contention, the fact that "crystal" is used as an adjective in the context of a "crystal chandelier" does not prevent it from being a highly descriptive of a type of chandelier. See, e.g., *Roselux Chemical Co., Inc. v. Parsons Ammonia Company, Inc.*, 299 F.2d 855, 132 USPQ 627, 634 (CCPA 1962) ("SUDSY", as an adjective, is "half of a common descriptive

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name" [for "sudsy ammonia"] and "as such it is clearly, and in common parlance, a type designation"); Miller Brewing Co. v. G. Heileman Brewing Co., 561 F.2d 75, 195 USPQ 281, 285 (7th Cir. 1977) (the adjective "light" is a generic or common descriptive term for beer), cert. denied, 434 U.S. 1025, 196 USPQ 592 (1978); and In re Central Sprinkler Co., 49 USPQ2d 1194, 1198 (TTAB 1998) (wherein the Board stated with regard to the mark ATTIC for attic sprinklers, "[t]he fact that applicant has chosen to not include the term "sprinkler" in the mark sought to be registered should not lead to the registrability of ATTIC standing alone).

While admitting that "[s]ome lighting fixtures include crystal as one of the materials used to make the fixture," applicant contends that "most lighting fixtures do not include crystal" and, in particular, that "[a] majority of Applicant's products do not include crystal." Applicant argues that its identification of goods "is clearly not limited to fixtures containing crystal components" and that although crystal is a component of some goods that fall within its description, crystal components are not a central characteristic or ingredient of those goods. (Brief, pp. 4, 6). This argument misses the point. The relevant point is that CRISTAL is highly descriptive of at least some of applicant's lighting fixtures, that is, those of applicant's fixtures that do include crystal elements or those fixtures that are crystal chandeliers. See, e.g., Roselux

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Chemical Co., Inc., supra at 634 (immaterial that "some of the so-called 'sudsy' [ammonia] products marketed by opposers were not in fact sudsy because they contained no detergent").

Applicant also argues that the foreign term "cristal" and its English translation "crystal" are not "actually equivalent" terms.⁷ Applicant contends that the two terms do not look the same and are not pronounced the same. Applicant points to statements made by Mr. Mathis and Mr. Alison in their declarations that CRISTAL is pronounced "in the industry" with the emphasis on the second syllable which, according to the declarants, "mak[es] it easier to distinguish between the use of CRISTAL to designate a source for a line of products."

Whether or not CRISTAL is pronounced the same as "crystal" does not make this term any less descriptive. First, the declarations fail to establish that "CRISTAL" would be perceived by ultimate purchasers, as opposed to industry purchasers, as anything other than simply the phonetic equivalent of "crystal" rather than the foreign word for crystal. Further, CRISTAL sounds at least similar to "crystal" and moreover conveys precisely the same meaning and commercial impression as "crystal," regardless of how it is pronounced. In any event,

⁷ The list of third-party registrations submitted for the first time in applicant's reply brief is untimely and has not been considered. In any event, a listing of registrations is insufficient to make them of record. See *In re Duofold, Inc.*, 184 USPQ 638 (TTAB 1974).

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whatever applicant considers the correct pronunciation of its mark is beside the point. It has been consistently held that there is no "correct" pronunciation of a trademark. See *In re Belgrade Shoe*, 411 F.2d 1352, 162 USPQ 227 (CCPA 1969); and *Kabushiki Kaisha Hattori Seiko v. Satellite International Ltd.*, 29 USPQ2d 1317. These are clearly equivalent terms with equally descriptive meanings.

The burden is on applicant to show acquired distinctiveness, and the more descriptive the term, the heavier that burden. *Yamaha International Corp. v. Hoshino Gakki Co.*, supra. We find that CRISTAL is highly descriptive of applicant's goods. Thus, applicant's burden in this case is substantial.

As we noted earlier, applicant's evidence consists of the declaration of William S. Davis, Sr., president of Davoil, Inc., the general partner of applicant, attesting to substantially exclusive and continuous use of the mark for 5 years, and the declarations of Dean Mathis and Denis Alison.

Mr. Mathis is the owner and president of Porter Lighting, Inc., a "lighting showroom" and a "retail lighting distributor, with multiple outlet stores." Mr. Mathis has worked in the industry for over 33 years, and has been the president and owner of this company for over 19 years.

Mr. Mathis states that his company "provides a wide variety of decorative lighting products for sale to individual consumers,

interior designers, and homebuilders"; that CRISTAL products have been available for approximately 8 years; that he has had extensive first-hand experience with purchasing and sales of decorative lighting products "at both the retail and wholesale level"; that he has "sold and discussed" CRISTAL products in his stores and has seen them widely promoted at national lighting shows; that based on his experience, the name CRISTAL is widely recognized "in the industry" as designating a particular line of lighting products sold by a single source and has achieved prominence "in the industry;" that when people "in my industry" refer to CRISTAL, they are referring to this line of products and not to describe generally lighting fixtures having crystal in them; and that "customers" recognize use of the name CRISTAL as a brand name designating the supplier, not as a descriptive term.

Mr. Alison is an independent sales representative in the lighting industry. He represents several lines of lighting fixtures including the CRISTAL line, and sells lighting products to independent lighting store retailers in the North Texas, Oklahoma, and New Mexico territories. Mr. Alison has worked in the industry for over 29 years and has sold lighting products in his present capacity for over 22 years.

Mr. Alison states that CRISTAL products have been available for approximately 8 years; that he has extensive experience with lighting fixture products and is aware of most of the different

lighting product lines sold in his territory; that he has "sold and discussed" CRISTAL products "with many different retailers," and has "discussed them with commercial and retail customers on numerous occasions"; and that the name CRISTAL is not used "in the industry" to describe generally lighting fixtures having crystal in them but instead that the name CRISTAL is widely recognized "in the industry" as designating a particular line of lighting products sold by a single source.

Considering the highly descriptive nature of this term, applicant's evidence of eight years use, without evidence which would help determine the extent of consumer exposure to the mark, such as sales figures or advertising expenditures relating to the mark, is not particularly meaningful.

Moreover, the statements in the declarations of Mr. Mathis and Mr. Alison are, for the most part, directed to industry perception of the mark. The perceptions of those in the industry concerning acquired distinctiveness are of little value because they are not the ultimate purchasers for applicant's products. See *In re Edward Ski Products, Inc.*, 49 USPQ2d 2001, (TTAB 1999); *In re Pingel Enterprise Inc.*, 46 USPQ2d 1811 (TTAB 1988); and *In re Semel*, 189 USPQ 285 (TTAB 1975). The statements by Mr. Mathis and Mr. Alison regarding consumer, rather than industry, perception consist essentially of vague assertions that they have "discussed" crystal products with retail consumers, and

conclusory assertions that "customers" recognize CRISTAL as a mark. First, it is unclear which "customers" the declarants are referring to, industry or general consumers, and moreover without any information as to the extent of the exposure or sale of applicant's lighting fixtures to the public, such as number of customers or number of units sold, such conclusory statements about "customer" perception are of little value. In addition, Mr. Alison is a sales representative who sells to lighting store retailers. It is unclear how or to what extent he would even have any contact with retail consumers.⁸ We also find that Mr. Alison's relationship to applicant as a representative for applicant's products further limits the probative value of his opinions regarding the average customer's perception of the mark. See, e.g., *In re Paint Products Company*, 8 USPQ2d 1863 (TTAB 1988).

Under the circumstances, we find that the evidence as a whole fails to persuade us that CRISTAL would be perceived by the purchasing public as a mark for lighting fixtures rather than

⁸ Applicant also relies on *In re Bose Corporation*, 216 USPQ 1001 (TTAB 1983), *aff'd*, 772 F.2d 866, 227 USPQ 1 (Fed. Cir. 1985). While the Board in that case found the statement of a retailer as to the perception of ultimate purchasers to be competent evidence of acquired distinctiveness, the Board went on to point out that the weight of the evidence must "of course, be a matter of judgment on the trier of the facts." In view of the highly descriptive nature of this mark, and for the reasons stated above, the declarations in this case are not entitled to much weight.

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merely describing a type of lighting fixture or lighting fixtures in general that have crystal components.

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