Paper No. 13
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THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB JULY 20, 00

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Townsend Engineering Company

Serial No. 75/363,944

Donald H. Zarley of Zarley, McKee, Thomte, Voorhees & Sease for applicant.

Vivian Micznik First, Trademark Examining Attorney, Law Office 104 (Sidney Moskowitz, Managing Attorney).

Before Quinn, Chapman and Holtzman, Administrative Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

An application has been filed to register on the Supplemental Register[1] the term shown below

for "sausage encasing machines."[2]

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[1] The application originally was filed to seek registration on the Principal Register, but later was amended to the Supplemental Register.

[2] Application Serial No. 75/363,944, filed September 26, 1997, alleging dates of first use of September 15, 1997.

The Trademark Examining Attorney has refused registration under Section 23 of the Trademark Act on the ground that the term sought to be registered is generic and, thus, is incapable of identifying applicant's goods and distinguishing them from those of others.

When the refusal was made final, applicant appealed. Applicant and the Examining Attorney have filed briefs. Although applicant originally requested an oral hearing, it later filed a withdrawal of the request.

Applicant argues, in urging that the refusal be reversed, that the Examining Attorney has not met the burden of proof to show that applicant's applied-for mark is generic. That is to say, applicant's position is that there is insufficient evidence that the purchasing public would understand the term SMARTLinker as naming the type or category of applicant's machines. Applicant specifically points to the absence of any dictionary listing of the term, as well as to the absence of any uses by others in the trade in connection with similar machines. In support of its position, applicant submitted the declarations of ten customers who essentially assert that they recognize the term sought to be registered as a source indicator. An informational brochure on applicant's goods also is of record.

The Examining Attorney maintains that “linker” is the commercial name of applicant’s machine, and that the term sought to be registered is generic for linkers which are controlled by a microprocessor. In connection with the refusal, the Examining Attorney submitted dictionary definitions of the terms “smart” and “smart machine.” Also or record are excerpts retrieved from the NEXIS database showing uses of the term “linker” in articles and in patents.

In order for a term to be registered on the Supplemental Register, it must be capable of serving as an indicator of source. Capability is determined by considering the meaning of the term as applied to the goods, the context in which the term is used on the specimens filed with the application, and the likely reaction thereto by average purchasers upon encountering the term in the marketplace. In re Sambado & Son Inc., 45 USPQ2d 1312 (TTAB 1997).

A mark is a generic name if it refers to the class or category of goods on which it is used. H. Marvin Ginn Corp. v. International Association of Fire Chiefs, Inc., 782 F.2d 987, 228 USPQ 528 (Fed. Cir. 1986). The test for determining whether a mark is generic is its primary significance to the relevant public. Section 14(3) of the

Act; Magic Wand Inc. v. RDB Inc., 940 F.2d 638, 19 USPQ2d 1551 (Fed. Cir. 1991); and H. Marvin Ginn Corp. v. International Association of Fire Chiefs, Inc., supra. The Patent and Trademark Office has the burden of establishing by clear evidence that a mark is generic and thus unregistrable. In re Merrill Lynch, Pierce, Fenner and Smith, Inc., 828 F.2d 1567, 4 USPQ2d 1141 (Fed. Cir. 1987). Evidence of the relevant public's understanding of a term may be obtained from any competent source, including testimony, surveys, dictionaries, trade journals, newspapers, and other publications. In re Northland Aluminum Products, Inc., 777 F.2d 1556, 227 USPQ 961 (Fed. Cir. 1985).

The term "smart" is defined as "having some computational ability of its own; smart devices usually contain their own microprocessors." The term "smart machines" is defined as "machines that use microprocessors as their control elements." *Webster's New World Dictionary of Computer Terms.* Applicant has stated that its "goods are controlled by a microprocessor."

The record is devoid of any dictionary definition of the term "linker." The Examining Attorney introduced, however, excerpts retrieved from the NEXIS database which show, according to the Examining Attorney, that "linker" is

the common commercial name for sausage encasing machines. Examples include the following: "automatic sausage linkers;" "conventional mechanical linkers;" "a linker apparatus;" "a linker for linking sausages;" "an automated linker;" and "an automatic stuffer/linker machine."

There is no question that the term SMARTLinker is merely descriptive of sausage encasing machines which are controlled by a microprocessor. See: In re Cryomedical Sciences Inc., 32 USPQ2d 1377 (TTAB 1994). However, while the term is merely descriptive, based on the record before us we find that it is not generic for such goods. In making this determination we are reminded of the Federal Circuit's observation that "whether a term is classified as 'generic' or as 'merely descriptive' is not easy to discern when the term sits at the fuzzy boundary between these classifications." In re Merrill Lynch, Pierce, Fenner, and Smith Inc., supra at 1141.

The only evidence submitted by the Examining Attorney comprises dictionary definitions bearing on "smart" and NEXIS excerpts bearing on "linker." On the other side of the ledger, applicant has submitted the declarations of ten customers. In each instance, the customer states that he/she recognizes the term SMARTLinker as a source indicator and not as the name of a sausage encasing

machine. Further, the Examining Attorney has been unable to discover any generic uses of the term “smart linker” either by applicant or any others in the field. This factor is particularly significant here. See: In re American Fertility Society, 188 F.3d 1341, 51 USPQ2d 1831 (Fed. Cir. 1999).

Although the term sought to be registered may describe applicant’s machines, the record falls short in showing that the term names the type of machines at issue, namely sausage encasing machines. See: In re Bush Brothers & Co., 884 F.2d 569, 12 USPQ2d 1058 (Fed. Cir. 1989).

Lastly, any doubts on this issue are resolved in favor of applicant. In re Volvo White Truck Corp., 16 USPQ2d 1417 (TTAB 1990).

Decision: The refusal to register is reversed.

T. J. Quinn

B. A. Chapman

T. E. Holtzman
Administrative Trademark
Judges, Trademark Trial
and Appeal Board