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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Baseball Express, Inc.

Serial No. 75/795,970

Pamela B. Huff of Cox & Smith, Incorporated for Baseball Express, Inc.

Lourdes D. Ayala, Trademark Examining Attorney, Law Office 106 (Mary Sparrow, Managing Attorney).

Before Cissel, Hanak and Drost, Administrative Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

Baseball Express, Inc. (applicant) filed an application to register the mark SOFTBALL SALES in typed form for services ultimately identified as "retail services featuring softball equipment, namely, balls, bases, bats, belts, chest protectors, equipment bags, face protectors, gloves, hats, helmets, jerseys, leg protectors, pants, shoes, and socks, available through catalogs and a global

computer network" in International Class 35. The application (Serial No. 75/795,970) was filed on September 9, 1999, and it claimed a date of first use and a date of first use in commerce of February 1, 1987.

The examining attorney refused registration on the ground that the mark SOFTBALL SALES is merely descriptive of the services. 15 U.S.C. § 1052(e)(1). The examining attorney also advised applicant that she could not recommend amending the application to the Supplemental Register because the mark "appears to be generic." Office Action dated February 11, 2000 at 1.

In response, applicant argued that its mark was not merely descriptive, but it also amended its application to seek registration under Section 2(f) of the Trademark Act. 15 U.S.C. § 1052(f). See also Applicant's Brief at 7: "Applicant's position is that SOFTBALL SALES is not merely descriptive."¹

When the refusals on the basis of genericness, descriptiveness, and lack of acquired distinctiveness were made final, applicant filed a notice of appeal.

¹ The examining attorney's only argument regarding the issue of acquired distinctiveness is that "since this mark appears to be generic and fails to function as a mark, the matter is thus unregistrable. The claims of acquired distinctiveness by the applicant are insufficient to overcome the generic refusal." Brief at 6. Thus, the examining attorney has conceded that if

GENERICNESS

The primary issue in this case is whether the term SOFTBALL SALES is generic for applicant's catalog and Internet services featuring softball equipment. The Court of Appeals for the Federal Circuit has held that: "The critical issue in genericness cases is whether members of the relevant public primarily use or understand the term sought to be protected to refer to the genus of goods or services in question." H. Marvin Ginn Corp. v. Int'l Association of Fire Chiefs, Inc., 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986). Ginn goes on to explain that:

Determining whether a mark is generic therefore involves a two-step inquiry: First, what is the genus of goods or services at issue? Second, is the term sought to be registered or retained on the register understood by the relevant public primarily to refer to that genus of goods or services?

Id.

First, we discuss the evidence that the examining attorney has made of record (emphasis added) that the term "softball sales" is used to refer to the sale of softball products.

"From a product standpoint, there is more selection and variety," explains Mark Talarico, Easton's director of U.S. baseball and **softball sales**. *Sporting Goods Business*, June 10, 1998.

the mark is not generic, it is registrable under the provisions of Section 2(f) of the Trademark Act.

A number of outfitters who had strong baseball and **softball sales** this past season will also be attending the show, shopping primarily for high-end goods. *Sporting Goods Business*, July 1991.

Support for the SCMAF by softball manufacturers Dudley, John deBeer and Worth led to a contract which pays the organization 50 cents per dozen after the first \$2,000 of yearly **softball sales**. *Los Angeles Times*, July 11, 1985.

Baseball/**softball sales** remained soft, totaling some \$161 million for the year. *Chain Store Age - General Merchandise Edition*, July 1984.

Today, merchants say they'd have a tough time if they had to rely solely on baseball or **softball sales**. *Detroit News*, March 24, 1998.

U.S. Justice Dept. moves to settle antitrust suit against Amer Softball Assn, Dudley Sports and H Harwood & Sons for monopolizing **softball sales**. *Wall Street Journal*, December 31, 1973.

Applicant has also submitted an affidavit from the Executive Director of the American Softball Association identifying applicant's services as the "retail sales of *softball* equipment"). Radigonda affidavit, p. 2 (emphasis added).

In addition, we look at the individual words in the term SOFTBALL SALES. "Softball" is defined as a "variation of baseball played on a smaller diamond with a larger, softer ball pitched underhand" and the "ball used in softball." *Webster's II New Riverside University Dictionary*

(1984).² A review of the record leaves no doubt that applicant's services involve softball equipment. Indeed, applicant's identification of services is identified as retail services featuring softball equipment, namely, balls, bases, bats, and other softball equipment. Applicant's specimens and catalog feature softballs, softball bats, softball gloves, and other softball equipment. The term "softball" is obviously a generic term for softballs and other softball equipment.

The other word in applicant's mark is "sales." That term is defined as the "exchange of goods or services for an amount of money or its equivalent; the act of selling." See Office Action dated September 15, 2000 at 2. A review of the record supports a finding that applicant's services involve the sale of softball equipment. The application originally identified its services as "retail sales of softball equipment..." Applicant itself refers people to its website to: "Check out all the features on this site - Q&A 'Ask The Umpire' Tournament Directory, Softball Links and Equipment sales." *Balls and Strikes Softball*, insert after page 34 (emphasis added, capitalization in original).

² 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).

Applicant's catalog shows that applicant is involved in the sale of softball equipment. The examining attorney has also included Internet printouts that show that the term "sales" is commonly used in association with such items as shoes, clothing, cars, and furniture.

Clearly, applicant's services involve the retail "sale of softball equipment" or "softball sales." Just as the sales of other products are referred to as "furniture sales" or "shoe sales," applicant's term defines the genus of retail sales in the field of softball equipment.

Next, we look at whether the term is understood by the relevant public to refer to that genus. Ginn, 228 USPQ at 530. "Evidence of the public's understanding of the term may be obtained from any competent source, such as purchaser testimony, consumer surveys, listings in dictionaries, trade journals, newspapers, and other publications." In re Merrill Lynch, Fenner and Smith Inc., 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987). The critical issue in genericness cases is whether members of the relevant public primarily use or understand the term sought to be protected to refer to the genus of goods or services in question." Ginn, 228 USPQ at 530. Here, the relevant public would understand that the combined term "softball sales" refers to the genus of the services.

Combining generic words can result in the combined term also being generic. See In re Gould Paper Corp., 834 F.2d 1017, 5 USPQ2d 1110 (Fed. Cir. 1987) (SCREENWIPE generic for a wipe for cleaning television and computer screens); In re Abcor Dev. Corp., 588 F.2d 811, 200 USPQ 215 (CCPA 1978) (GASBADGE at least descriptive for gas monitoring badges; three judges concurred in finding that term was the name of the goods); In re American Institute of Certified Public Accountants, 65 USPQ2d 1972 (TTAB 2003) (CPA EXAMINATION found generic). However, a failure to provide evidence that the public uses the term to refer to the genus of the goods can result the Office failing to satisfy its burden. In re American Fertility Society, 188 F.3d 1341, 51 USPQ2d 1832 (Fed. Cir. 1999) (SOCIETY FOR REPRODUCTIVE MEDICINE held not generic for association services because there was no evidence of generic use of the term); In re Dial-A-Mattress Operating Corp., 240 F.3d 1341, 57 USPQ2d 1807, 1811 (Fed. Cir. 2001) ("There is no record evidence that the relevant public refers to the class of shop-at-home telephone mattress retailers as '1-888-M-A-T-R-E-S-S'"). Here, the evidence discussed above demonstrates that the public would understand that applicant's term refers to the genus of the services. We

have evidence that the relevant public refers to, or understand, that applicant's services are "softball sales."

Our decision in this case is reinforced by the Eighth Circuit's decision in the case of Cellular Sales Inc. v. MacKay, 942 F.2d 483, 19 USPQ2d 1712 (8th Cir. 1991). In that case, the court held that the "terms 'cellular' and 'sales' individually are generic in nature. Moreover, even when combined, 'cellular sales' does not describe a particular product, but instead describes the sale of cellular telephone equipment, which is a genus or class of products." Id. at 1713-14. The court concluded that the "term 'cellular sales' defines this category of companies selling cellular telephone equipment." Id. at 1714. Similarly, "softball sales" defines companies selling softball equipment.

Applicant argues that its mark is not generic and it refers to two affidavits and a court decree as evidence to support its position. We start by noting that the court decree is a consent judgment. "The agreement to terminate the civil action must be considered for what it is - an agreement or a consent decree whereby the parties were able to settle their differences and avoid the cost of going to trial and possible imposition of money damages. This does not carry the probative effect or persuasiveness that a

judgment after a trial on the merits would have." In re Illinois Bronze Powder & Paint Co., 188 USPQ 4459, 462-63 (TTAB 1975). While we have consider the consent degree, we do not find it persuasive.

Applicant also refers to two affidavits as evidence that its mark is not generic. The first affidavit is from Ron Radigonda, Executive Director of the Amateur Softball Association (ASA). Mr. Radigonda declares that "the mark SOFTBALL SALES does not represent ordinary descriptive words. Instead, ASA recognizes SOFTBALL SALES as identifying the source of Softball Sales, Inc.'s services (retail sales of softball equipment through catalogs and the Internet)." Affidavit, p. 2. It is significant that Mr. Radigonda and the ASA are not ordinary consumers. The ASA and applicant are in a business relationship. In its *Balls and Strikes Softball* magazine of record, the "Letter from the Editor" (page 4) reports that "[i]n 2000 and 2001, the Amateur Softball Association and Softball Sales will join forces to create the first softball mag-a-log.. The relationship with Softball Sales is something that we hope will be positive for everyone. No where else can you get the latest news on ASA/USA Softball and order all of your equipment for the upcoming season. And no other softball catalog brings you the selection that Softball Sales

offers." Indeed, a review of affiant's magazine reveals that approximately half the pages of the magazine consist of applicant's advertisements and catalog and the front cover announces "SOFTBALL SALES See page 35 for our full catalog." Inasmuch as applicant and affiant's organization are in a business relationship, it is not surprising that affiant recognizes the term SOFTBALL SALES as identifying affiant's business partner's services. Therefore, we do not give the affidavit much weight. In re David Crystal, Inc., 296 F.2d 771, 132 USPQ 1, 2 (CCPA 1961) ("None of [the affidavits] are from the purchasing public except in the case of two affiants who wear the socks and who are buyers for stores in which socks are sold. At best, these affidavits merely assert that affiants believe that what amounts to a very small portion of the purchasing public identify these socks as those of applicant"); In re Soccer Supply Company, Inc., 507 F.2d 1400, 184 USPQ 345, 348 (CCPA 1975) (Four affidavits from soccer coaches and a retailer "do not establish an association of applicant's mark with a single source by other than a small number of purchasers").

Applicant's other affidavit is from a person identified as Jean Stout who, besides stating that she is

over 18 and executing the affidavit voluntarily, submits that:

I frequently purchase high-end softball equipment. In that regard, I have purchased several items from Softball Sales, Inc. through its SOFTBALL SALES catalog. To me, the mark SOFTBALL SALES is not an ordinary, descriptive, or generic term. Instead, it identifies the source of Softball Sales, Inc.'s equipment. When I see the SOFTBALL SALES mark, it indicates to me the origin of the services I'm receiving (Softball Sales, Inc.'s services) and distinguishes those retail sales services from the services of others.

While we give the affidavit some weight, the affiant has provided little basis for her belief that the mark is "not an ordinary, descriptive or generic term," especially since the affiant refers to the services as "retail sales services" of softball equipment. Even if affiant is a typical purchaser, the affidavit simply indicates that a single purchaser recognizes applicant's term as a trademark. While this is entitled to some weight, it is hardly significant evidence of non-genericness or even non-descriptiveness.

The only other affidavit of record is that of applicant's president. To the extent that the affidavit addresses the genericness issue, we note that the "affidavit of the president of the applicant-company comes from an interested party and we give it little weight." David Crystal, 132 USPQ at 2. Applicant's president also

addresses the volume of sales, Internet website hits, and the number of catalogs applicant has distributed.

Regarding the Internet hits, the record shows that applicant's website is advertised as www.softball.com not www.softballsales.com so applicant's domain name does not include the applied-for term. See specimens; and *Balls and Strikes Softball*, first insert after page 34. SOFTBALL SALES would simply be a term that appears on the site. Applicant's sales and advertising information is not evidence that its term is not generic. This evidence does not show that purchasers recognize applicant's term as a trademark. In re Leatherman Tool Group Inc., 32 USPQ2d 1443, 1450 (TTAB 1994) ("Absent, therefore, anything to link applicant's gross sales of over \$20 million and advertising expenditures of \$200,000, which were generated and spent in connection with its marketing of in excess of one million tools during a nearly ten-year period, with use in contexts which would condition customers to react to or recognize the designation 'POCKET SURVIVAL TOOL' as an indication of source rather than as a description of a category of product, there is no convincing basis for finding that such designation functions other than as a generic name").

If applicant is arguing that no other competitor is using the same term, we note that at least one softball equipment supplier's spokesman is identified as the "director of U.S. baseball and softball sales." *Sporting Goods Business*, June 10, 1998. Even if no other competitor were using the term, that would not establish that applicant's term, was not generic. A product or a service may have more than one generic name. Roselux Chemical Co. v. Parsons Ammonia Co., 299 F.2d 855, 132 USPQ 627, 632 (CCPA 1962). Even novel ways of describing products have been held to be generic. Clairol, Inc. v. Roux Distributing Co., 280 F.2d 863, 126 USPQ 397, 398 (CCPA 1960) (HAIR COLOR BATH, novel way of describing liquid for hair coloring, held generic).

We find that the examining attorney has provided clear evidence that SOFTBALL SALES is generic and applicant's evidence does not rebut the examining attorney's case of genericness. In re Central Sprinkler Co., 49 USPQ2d 1194, 1196 (TTAB 1998).

Lastly, we address the issue of whether applicant's term is merely descriptive. For a mark to be merely descriptive, it must immediately convey knowledge of the ingredients, qualities, or characteristics of the services. In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir.

1987); In re Quik-Print Copy Shops, Inc., 616 F.2d 523, 205 USPQ 505, 507 (CCPA 1980). To be "merely descriptive," a term need only describe a single quality or property of the services. International Nickel Co., 262 F.2d 806, 120 USPQ 293, 294 (CCPA 1959). Descriptiveness of a mark is not considered in the abstract, but in relation to the particular goods or services for which registration is sought. Abcor Dev., 200 USPQ at 218. "As often stated, genericness is the ultimate in descriptiveness." Central Sprinkler, 49 USPQ2d at 1199. Here, the record supports a finding that the term SOFTBALL SALES, when viewed in relationship to applicant's services, would immediately inform prospective purchasers that applicant's services involve the sale of softball equipment. Therefore, we find that SOFTBALL SALES is also merely descriptive.

CONCLUSION

The term SOFTBALL SALES is merely descriptive and generic for the services recited in the application. Inasmuch as the examining attorney has not objected to applicant's claim of acquired distinctiveness on the merits, if the genericness refusal is eventually overturned, applicant's term would be registrable under the provision of Section 2(f) of the Trademark Act.

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Decision: The refusal to register is affirmed.