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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Shindaiwa, Inc.

Serial No. 75552930

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Williamson & Wyatt, P.C. for Shindaiwa, Inc.

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Before Cissel, Hohein and Bucher, Administrative Trademark
Judges.

Opinion by Bucher, Administrative Trademark Judge:

Shindaiwa, Inc. seeks registration on the Principal
Register of the mark shown below:

PowerBroom

as used in connection with "hand held power-operated
sweeping devices consisting of a power-rotated cylinder
having a handle for manual manipulation and exterior fins
that engage and throw loose material to thereby clean
outdoor surfaces such as a sidewalk, driveway or the like,"

in International Class 7.¹ The application, as amended, seeks registration under Section 2(f) of the Trademark Act (15 U.S.C. §1052(f)) as a result of the mark acquiring distinctiveness due to substantially exclusive and continuous use of the mark in commerce since 1993.

The Trademark Examining Attorney has refused registration under Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1), on the ground that, when used in connection with applicant's goods, the term PowerBroom is at least merely descriptive of, if not generic for, such goods. In particular, while applicant, in its response to the refusal on the basis of mere descriptiveness, amended the application to set forth a claim that the term PowerBroom has acquired distinctiveness for its hand-held, power-operated sweeping device and is therefore registrable pursuant to the provisions of Section 2(f) of the Trademark Act, 15 U.S.C. §1052(f), such claim has also been refused as insufficient inasmuch as the term is either generic for applicant's goods or, alternatively, it is so highly descriptive thereof that the evidence offered by applicant does not suffice to demonstrate acquired distinctiveness.

¹ Application Serial No. 75552930 was filed on September 14, 1998, based upon applicant's allegation of use in commerce since at least as early as April 15, 1993.

Thus, the issues on this appeal are whether the term PowerBroom is generic for applicant's goods and, if not, whether applicant's showing is sufficient to establish that such term, although merely descriptive of hand-held, power-operated sweeping device, has acquired distinctiveness.

When the refusal was made final, applicant appealed. Applicant and the Examining Attorney submitted briefs. Applicant did not request an oral hearing.

It has been repeatedly stated that "determining whether a mark is generic ... 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?" H. Marvin Ginn v. International Association of Fire Chiefs, 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986). Of course, in a proceeding such as this, the genus of goods at issue are the goods set forth in the identification of goods in the application itself. Magic Wand Inc. v. RDB Inc., 940 F.2d 638, 19 USPQ2d 1551, 1552 (Fed. Cir. 1991) ["Thus, a proper genericness inquiry focuses on the description of [goods or] services set forth in [the application or] certificate of registration."].

Moreover, the burden rests with the Trademark Examining Attorney to establish that the mark sought to be registered is generic for the goods or services as described in the application. In re Merrill Lynch, 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1997). It is incumbent upon the Trademark Examining Attorney to make a "substantial showing ... that the matter is in fact generic." Indeed, this substantial showing "must be based on clear evidence of generic use." Merrill Lynch, 4 USPQ2d at 1143. Thus, it is beyond dispute that "a strong showing is required when the Office seeks to establish that a term is generic." In re K-T Zoe Furniture Inc., 16 F.3d 390, 29 USPQ2d 1787, 1788 (Fed. Cir. 1994). Furthermore, any doubt whatsoever on the issue of genericness must be resolved in favor of the applicant. In re Waverly Inc., 27 USPQ2d 1620, 1624 (TTAB 1993).

Addressing the first part of the Ginn genericness inquiry above, we find that the genus of goods at issue in this case is hand-held, power-operated sweeping devices.

We turn next to the second part of the Ginn genericness inquiry: whether the matter applicant seeks to register, PowerBroom, is understood by the relevant public primarily to refer to the genus of goods at issue, i.e., hand-held, power-operated sweeping devices.

The Trademark Examining Attorney initially assigned to this case provided separate dictionary definitions of the words "power"² and "broom"³, arguing that "[t]ogether the terms leave no doubt that the applicant's goods are merely power-operated brooms." (Office action of May 25, 1999).

In support of the refusal, the Trademark Examining Attorney submitted excerpts of articles retrieved from the LEXIS/NEXIS database showing "power broom" (and variations thereof) used in connection with various power-driven cleaning devices.

In response, applicant argues that the term PowerBroom is not generic, and that is it not "highly descriptive" as contended by the Trademark Examining Attorney, but rather that it should be found to be merely descriptive, and that the term has acquired distinctiveness when used in connection with its hand-held, power-operated sweeping devices. Applicant asserts that the excerpts the Trademark

² **power:** ... 9. a. The energy or motive force by which a physical system or machine is operated: *turbines turned by steam power; a sailing ship driven by wind power.* b. The capacity of a system or machine to operate: *a vehicle that runs under its own power.* c. Electrical or mechanical energy, especially as used to assist or replace human energy. d. Electricity supplied to a home, building or community: *a storm that cut off power to the whole region.* ... The American Heritage Dictionary of the English Language, (3rd Ed 1992).

³ **broom:** 1. A bunch of twigs, straw, or bristles bound together, attached to a stick or handle, and used for sweeping. The American Heritage Dictionary of the English Language, (3rd Ed 1992).

Examining Attorney has collected from the LEXIS/NEXIS database fail to support the Office's position on genericness, falling into three general categories.

According to applicant, the first category of articles involves unmistakable references to applicant's product:

GETTING THE MOUSETRAP TO MARKET

... Ronald Gergman and Paul Sund scoured trade magazines, joined a trade association and wrote out a list of potential customers and key decision makers who might handle their invention - a **power broom** to deal with snow, leaves and dirt. They filmed their own product video and sent out 75 copies. A marketing manager at the Portland, Ore. Division of Japan-based Shindaiwa Inc. saw the video and ...⁴

A COOL NEW TOOL THAT'S HARD TO GIVE THE BRUSH-OFF

...
The implement is called a **power broom**, and let's just say it swept this reviewer off his feet.
Developed by a company called Shindaiwa, the **power broom** first began showing up on dealers' floors about seven years ago...⁵

Applicant argues this category includes several examples that probably involve the theft of one of applicant's branded products along with other lawn and landscaping machinery:

POLICE BLOTTER:

A landscaping trailer was entered and two blowers, a **power broom** and a hedge clipper were stolen on August 6 ...⁶

⁴ Forbes, October 5, 1998.

⁵ The Hartford Courant, May 7, 2001.

⁶ Asbury Park Press (Neptune, NJ), August 19, 1998.

POLICE BEAT:

It was reported Hamel Sodding & Landscapes ... was burglarized and a **power broom** and chain saw were taken totaling \$1,089. The incident occurred between Aug. 25 and Sept. 1.⁷

According to applicant, the second category of LEXIS/NEXIS excerpts references heavy-duty machinery for sweeping municipal streets and highways or for removing snow from streets, airports and parking areas:

In other business, the board: 'Approved Highfield's request to purchase a new **power broom** for road cleaning. Highfield said he had bids of \$2,100 and \$2,800; Mitchel instructed him to get a third bid and buy from the lowest bidder...'⁸

Typically, 1,400 to 1,500 tons of sand and salt had to be removed each spring from the city's 39 miles of streets. **Power brooms** swept spillover from the sidewalks. Four or five laborers raked layers of muddy junk from the parkways. Others hand-shoveled some of the bulky dirt and debris from roadway gutters and swales. Loaders scraped and scooped the remaining ...⁹

... Silica (dirt), viscosity and total base number stayed well within acceptable ranges, too. Hubbard had established 350 hours as the company's official service interval. Only asphalt pavers (because of the heat) and **power brooms** (because of the dust) remain at the 250-hour interval.¹⁰

Target streets will be posted with temporary No Parking signs the day before city employees come with leaf blowers and rakes to go after litter, followed by **power brooms** sweeping the sidewalks and a checking and cleaning of street catch basins.¹¹

... or see the latest snow-fighting equipment and learn how to use that equipment more effectively.

⁷ Telegraph Herald (Dubuque, IA), September 14, 2000.

⁸ Intelligencer Journal (Lancaster, PA), September 22, 1999.

⁹ Public Works, December 1998.

¹⁰ Construction Equipment, September 1998.

¹¹ The Providence Journal-Bulletin, May 13, 1998.

Thus **power brooms** are now replacing plows at many airports.

"They sweep down to bare pavement. A plow leaves a thin film of slush or snow and that can freeze," said a representative from a major ...¹²

Jerry Naimoli, general superintendent of Anderson Construction, remembers an out-of-control driver who slammed into a **power broom** on his work site on I-95 ... at 3 a.m. in November 2000. The driver was killed upon impact. His workers just narrowly avoided injury.¹³

The final category of uses of the term "Power Broom," according to applicant, refers to a vacuum-like device not unlike the subject of an earlier, subsisting registration initially cited as a bar to the instant application under Section 2(d) of the Trademark Act.¹⁴

FULL-FEATURES BREATHE LIFE BACK INTO VACUUM MARKET:

While full-feature vacuum cleaners are relatively venerable compared to gadgets like mop vacs and **power brooms**, manufacturers have been beefing up canister features to prevent them from getting stale...¹⁵

THE BENEFITS OF SEAMLESS RUBBER ROOFING:

The application process first requires the preparation of the existing surface. As the seamless rubber roofing can be applied over the existing roofing material, the procedure involves the removal of any loose aggregate via a **power broom**, a vacuum or other means...¹⁶

¹² The Buffalo News, April 27, 1994.

¹³ The Philadelphia Inquirer, May 1, 2001.

¹⁴ Reg. No. 1114125 for the mark POWER BROOM issued to The Scott Fetzer Company on February 27, 1979 for "electric vacuum cleaners." Section 8 affidavit accepted and section 15 affidavit acknowledged; renewed. The word "Power" is disclaimed apart from the mark as shown.

¹⁵ Discount Store News, January 14, 2000.

¹⁶ Indiana Manufacturer, April 1998.

YOUR GINSU KNIFE LIKELY CUT ITS TEETH IN
ARKANSAS:

But company officials want to promote the two-year-old Readi Vac line, which includes small brush vacuums, **power brooms**, wet-dry vacs, portable canister vacuums and hand-held models, Anderson said.¹⁷

COOL TOOLS:

Sleek and sophisticated, the winner of an appliance design award, the Quicksilver vacuum is intended to offer the best features of uprights, canisters, portable units and **power brooms**, according to product manager Doug Barren.¹⁸

We also look to the evidence in the record showing how applicant uses its mark. The designation "the PowerBroom" is often used as a stand-alone noun (Exhibit K), or writers have used the term "PowerBrooms," the pluralized form of the mark, again as a noun (Exhibit L). Nonetheless, consistent with the discussion above, we do see the general categories into which this product falls. For example, applicant's patent documents (Patent Nos. 5,161,318 and 5,269,082, Exhibit A) refer to the invention as a "hand-held, readily portable power sweeping tool" relying upon "a plurality of pliant fins¹⁹ extending radially outwardly" from "a pair of drums." Clearly, this machine has none of the "twigs, straw, or bristles" associated with the traditional broom. Applicant's brochures list the

¹⁷ The Commercial Appeal (Memphis, TN), August 1, 1992.

¹⁸ The San Francisco Chronicle, September 22, 2001.

¹⁹ The record does show the option of replacing the fins with a nylon brush assembly for some applications.

specifications of this "gasoline-powered sweeper" (Exhibit D), they compare its "Whole New Concept in Power Sweeping" with "conventional sweeping tools" as well as with other "hand power tools." (Exhibit J). It is called a "cleanup tool" (Exhibit I) and a "power sweepers" (Exhibit F).

Based on this entire record, we agree with applicant that the evidence offered falls short of clearly establishing genericness. The absence of any third-party use of the term PowerBroom (or "power broom" or other similar variations) in connection with hand-held, power-operated sweeping devices supports a conclusion on this record that such term is not generic in relation to applicant's goods. See In re American Fertility Society, 188 F.3d 1341, 51 USPQ2d 1832 (Fed. Cir. 1999); and In re Ferrero S.p.A., 24 USPQ2d 1155, 1157 (TTAB 1992) ["if a term is generic for a type of a product that has been on the market for decades, evidence of its use by others in the marketplace should be available"].

By amending the application to set forth a claim of acquired distinctiveness, applicant has in effect conceded that the term PowerBroom is merely descriptive of its goods. Such a claim is tantamount to an admission that the term PowerBroom is not inherently distinctive and therefore is unregistrable on the Principal Register, in light of the prohibition in Section 2(e)(1) against merely descriptive

marks, absent a showing of acquired distinctiveness pursuant to Section 2(f). See Yamaha International Corp. v. Hoshino Gakki Co. Ltd., 840 F.2d 1572, 6 USPQ2d 1001, 1005 (Fed. Cir. 1988) ["Where, as here, an applicant seeks a registration based on acquired distinctiveness under Section 2(f), the statute accepts a lack of inherent distinctiveness as an established fact"]. Although the Trademark Examining Attorney has argued in a largely conclusory fashion that this mark is "highly descriptive," in light of our disposition of this case, it is not necessary for us to decide that particular question.

Accordingly, we turn to whether applicant has sustained its burden of proof with respect to establishing a *prima facie* case that the merely descriptive term PowerBroom has in fact acquired distinctiveness in connection with applicant's goods. In this regard, applicant has submitted a variety of types of circumstantial evidence in support of its claim of acquired distinctiveness.

In addition to applicant's basic declaration of use under 37 C.F.R. §2.20 evidencing exclusive and continuous use of the PowerBroom mark in connection with these goods for ten years, applicant has submitted ten declarations signed by distributors and dealers of applicant's product stating that they consider PowerBroom to be a source identifier. Applicant alleges that it has spent more than \$100,000 on promotional activities over the past ten years -

on print advertising,²⁰ a videotape for dealers, as well as brochures, catalogues, posters, etc. The record also shows various unsolicited articles reviewing and discussing applicant's products found in many of the same types of periodicals where the paid advertisements appeared. Among these articles, Outdoor Power Equipment Magazine published an article having a list of readers' "most requested products of 2001." Applicant's PowerBroom sweeping machine was ranked as No. 4 in the "Sweepers" category and No. 17 in the "Snow Removal Equipment" category. Although the PowerBroom sweeping machine is sold in thirty-nine countries throughout the Western Hemisphere, Europe, Asia and Africa, applicant has not provided any evidence as to the volume of sales. Finally, applicant conducted an Internet search of "powerbroom" using the Google search engine, reporting that most of the 203 hits were references to applicant and its product involved herein.

Whether one concludes that this term is merely descriptive or highly descriptive, the mere fact that applicant has a decade of use is not sufficient for us to find that it has acquired distinctiveness as a trademark. Hence, we must consider the specific evidence of record.

²⁰ Appearing in periodicals such as Ground Maintenance, Heavy Equipment News, Construction Site News, Athletic Turf, Ground Maintenance Equipment Specifier, Turf National, Landscape Management and Outdoor Power Equipment.

As to the form declarations of ten individuals, all these declarants appear to be distributors or dealers of applicant's product. Each declarant states that he/she considers "PowerBroom to identify the source or manufacturer of [applicant's] sweeping tool and is, I believe, a trademark."

Although we have considered these form declarations, they are not the most probative type of evidence in this situation for several reasons. First, before getting to the critical conclusory language, these declarants presumably read through the following tutorial passage. This "Statement" about the difference between generic designations and trademarks, as drafted by counsel, makes it difficult for any literate person to choose the wrong conclusion:

The company Shindaiwa is soliciting your statement as concerns your understanding of the term PowerBroom as applied to Shindaiwa sweeping tools. Your statement may be used to assist Shindaiwa in its attempt to register PowerBroom with the U.S. Patent and Trademark Office.

Shindaiwa markets a sweeping tool that consists of a drum having fins attached to the periphery of the drum. A handle extends from the drum and the drum with radiating fins is rotated by an engine to thereby perform a sweeping action. Shindaiwa applies the term PowerBroom to this sweeping tool with the intent to distinguish the tool as a tool produced by Shindaiwa. It is assumed that you are familiar with Shindaiwa's PowerBroom sweeping tool and only in that event are you requested to sign this statement.

This intended use of PowerBroom as a trademark will have failed if you consider that the term PowerBroom merely describes a product type and does not indicate the source of the product. As an example, the term "string trimmer" describes a product that is produced by many manufacturers and is not a trademark. The term Weed Eater likely indicates to you a string trimmer produced and sold by a particular company and is accordingly a trademark. In what category does the term PowerBroom fit as far as you are concerned. Similar to "string trimmer" or similar to "Weed Eater"?

Second, even without this leading tutorial, these dealers comprise a select population of individuals who likely know the source of this unique product. See In re Edward Ski Products Inc., 49 USPQ2d 2001 (TTAB 1999). Given these individuals' relationship with applicant, their declarations play only a minor role in determining public perception of the mark. More telling is the absence of declarations or any other direct evidence from applicant bearing on the perception of ultimate purchasers from among members of the general public.

As to applicant's Internet search of "powerbroom," it should come as no surprise that most of these Google hits would be stories about applicant's product. Applicant's search would find only those instances where this combination of words has a single string of ten-letters unbroken by a hyphen or a space. Clearly, doing a search of "power broom" (as the Trademark Examining Attorney did) would have returned a larger and more meaningful group of

hits for the usage of the combined term. The fact that applicant chose to eliminate the space between these two words ("power" and "broom"), thereby compressing two words into a single word, is immaterial to the result under Section 2(e)(1) of the Lanham Act. Especially in light of applicant's special form drawing and repeated textual usage (as PowerBroom with upper-case letters "P" and "B"), relevant purchasers will readily interpret applicant's mark to be "power broom" in the context of applicant's goods. In fact, several NEXIS stories reprinted above that were provided by the Trademark Examining Attorney referring to applicant's sweeping tool displayed the term as two words.

While applicant's website does list thirty-nine countries where Shindaiwa has dealerships, for a variety of reasons, this listing is in no way probative of the acquired distinctiveness of the term PowerBroom in the United States. First, there is no information provided as to annual (or cumulative) sales figures anywhere. Second, it is not clear that each and every Shindaiwa dealer carries this sweeping tool. Third, the only relevant inquiry for our purposes would be the sales volume of PowerBroom sweeping products within the United States.

Moreover, as to applicant's promotional activities of its PowerBroom product, it is not clear whether applicant's

promotional expenditures of \$100,000 over a ten-year period is a total figure for the United States or worldwide. Even if this expenditure represents promotion limited to the United States, we note that much of it would appear to be directed to promotional items for dealers like videotape and in-store posters. This volume of promotion is not very persuasive under these circumstances, and clearly is not sufficient for us to find this term has acquired distinctiveness as a trademark. In any event, even this approximation of applicant's level of promotion expenditure, like the other figures discussed above, is a representation of counsel unsupported by a declaration of applicant.

Finally, we consider the volume of inquiries during 2001 about the products appearing in advertisements and editorials in the Outdoor Power Equipment magazine. As shown in the listings, each of the entries begins with the name of the manufacturer, e.g., Shindaiwa Inc., followed by the parenthetical notation as to the model number, often followed by a generic designation, i.e., "snow thrower" or "sweeper/vacuum." In some cases, as with the two listings that applicant has highlighted, this parenthetical notation includes the manufacturer's product mark (PB270 PowerBroom). We conclude from this showing that with its

ads in this magazine, applicant has been fairly effective in creating a buzz among such readers over its unique product. However, even when taken in concert with all the other evidence of record, we do not find this piece of evidence to be probative of the distinctiveness of the term PowerBroom.

Accordingly, after considering all of applicant's evidence, we find that applicant has not met its burden of demonstrating that PowerBroom is entitled to registration under the provisions of Section 2(f) of the Trademark Act.

Decision: The refusal of registration on the ground that applicant's mark is generic is reversed; the refusal of registration on the ground that applicant's mark is merely descriptive of the identified services and has not acquired distinctiveness as a mark is affirmed.