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Paper No. 8

CEW

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Progressive International Corporation

\_\_\_\_\_  
Serial No. 75/934,495

John R. Benefiel, Esq., for Progressive International Corporation.

Tanya Amos, Trademark Examining Attorney, Law Office 101 (Jerry Price, Managing Attorney).

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Before Cissel, Hohein and Walters, Administrative Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

Progressive International Corporation has filed an application to register on the Principal Register the mark CAN COLANDER for "household utensils, namely strainers adapted to be fit to the end of an opened can."<sup>1</sup>

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<sup>1</sup> Serial No. 75/934,495, in International Class 21, filed March 1, 2000, based on use of the mark in commerce, alleging first use and use in commerce as of May 1996.

The Trademark Examining Attorney has issued a final refusal to register, under Section 2(e)(1) of the Trademark Act, 15 U.S.C. 1052(e)(1), on the ground that applicant's mark is merely descriptive in connection with its goods.<sup>2</sup>

Applicant has appealed. Both applicant and the Examining Attorney have filed briefs, but an oral hearing was not requested. We affirm the refusal to register.

The Examining Attorney contends that CAN COLANDER is merely descriptive of applicant's goods because applicant has merely combined two descriptive words to form its proposed mark and the combined term merely describes that the goods "are used with cans to drain off liquids in the can." The Examining Attorney submitted numerous dictionary definitions of "can," "colander" and "strainer." We repeat definitions for each term from *The American Heritage Dictionary of the English Language*, 4<sup>th</sup> ed. 2000, below:

Can - [a] usually cylindrical metal container.

Colander - [a] bowl-shaped kitchen utensil with perforations for draining off liquids and rinsing food.

Strainer - one that strains, as a device used to separate liquids from solids.

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<sup>2</sup> The Examining Attorney included a requirement that applicant disclaim "colander" if the application was amended to the Supplemental Register. Since no such amendment was made, in her brief, the Examining Attorney withdrew the disclaimer requirement and stated, further, that the mark is generic. Since the Examining Attorney concluded that the mark is generic for the first time in her brief, this issue is not before us and we decide only the issue of mere descriptiveness.

Additionally, the Examining Attorney submitted several excerpts from Internet web sites advertising items identified as "colander/strainer"; and excerpts of articles retrieved from the LEXIS/NEXIS database, reciting recipes that call for the cook to take a particular food that is in a liquid and "drain in colander."

Applicant contends that "strainer" is a generic term that would include a colander, but that "colander" describes a particular type of strainer "describing a bowl which sits on a supporting surface, normally the bottom of a sink, and into which the liquid containing contents of a container are freely poured"; that applicant's product is different from a colander because it is "a strainer manually held by the user against or within the end of an opened food can which is inverted to drain the liquid"; that consumers will not immediately grasp the nature of the goods from the term CAN COLANDER. Applicant also states the following:

[T]he mutisyllabic term "colander" has a somewhat elegant connotation as colanders are often of a refined design and being self supporting in resting on a supporting surface presents an image as an object of some dignified aesthetic appeal. The identified goods on the other hand are more prosaic items of pure utility, and the use of the term CAN COLANDER in this context is slightly comical.

Note also the fancy script used to depict the term on the specimen submitted, adding to this impression.

Thus, applicant urges that there is an element of whimsy or fancifulness in the mark's incongruous

juxtaposition of the word "CAN" and "COLANDER," reinforced by the alliteration formed by the words.

Shown below is the picture of applicant's product as it appears on the specimen of record:



The test for determining whether a mark is merely descriptive is whether it immediately conveys information concerning a quality, characteristic, function, ingredient, attribute or feature of the product or service in connection with which it is used, or intended to be used. *In re Engineering Systems Corp.*, 2 USPQ2d 1075 (TTAB 1986); *In re Bright-Crest, Ltd.*, 204 USPQ 591 (TTAB 1979). It is not necessary, in order to find that a mark is merely descriptive, that the mark describe each feature of the goods or services, only that it describe a single, significant quality, feature, etc. *In re Venture Lending*

*Associates*, 226 USPQ 285 (TTAB 1985). Further, it is well-established that the determination of mere descriptiveness must be made not in the abstract or on the basis of guesswork, but in relation to the goods or services for which registration is sought, the context in which the mark is used, and the impact that it is likely to make on the average purchaser of such goods or services. *In re Recovery*, 196 USPQ 830 (TTAB 1977).

It is clear from the dictionary definitions submitted by both applicant and the Examining Attorney that a colander is used to drain liquids from foods, which is what applicant's product does. The additional evidence submitted by the Examining Attorney supports this meaning of the term "colander." There is nothing in the record to support applicant's statement that its product is not actually a colander because of its manner of use. Applicant's product drains liquids from food in cans. Thus, applicant's product is a colander for cans, or a "can colander." Despite any alliteration, in combination these two merely descriptive words retain their original meanings and become a merely descriptive combined term. We are not persuaded otherwise by applicant's arguments to the contrary.

When applied to applicant's goods, the term CAN COLANDER immediately describes, without conjecture or speculation, a significant feature or function of

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applicant's goods, namely that applicant's product is a type of strainer, i.e., a colander, that is used to strain or drain liquids from a can. Nothing requires the exercise of imagination, cogitation, mental processing or gathering of further information in order for purchasers of and prospective customers for applicant's goods to readily perceive the merely descriptive significance of the term CAN COLANDER as it pertains to applicant's goods.

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