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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Ethnic Home Lifestyles Corp.

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Serial No. 75/943,763

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Eric D. Paulsrud of Leonard, Street and Deinard for Ethnic Home Lifestyles Corp.

Amy Gearin, Trademark Examining Attorney, Law Office 107 (Thomas Lamone, Managing Attorney).

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Before Cissel, Hohein and Hairston, Administrative Trademark Judges.

Opinion by Cissel, Administrative Trademark Judge:

On March 14, 2000, applicant, a Minnesota corporation, filed the above-identified application seeking to register the mark "ETHNIC ACCENTS" on the Principal Register for "entertainment in the nature of television programs in the field of home decor," in Class 41. The basis for filing the application is applicant's assertion that it possesses a bona fide intention to use the mark in commerce in connection with these services.

The Examining Attorney refused registration under Section 2(e)(1) of the Lanham Act, 15 U.S.C. Section 1052(e)(1), on the ground that the mark is merely descriptive of the services specified in the application. She reasoned that the mark describes a feature of the services, "in that the applicant's television programs feature information, in part, on ethnic accents." Submitted in support of the refusal to register were excerpts from published articles retrieved from the Lexis/Nexis database showing use of the term sought to be registered in connection with home furnishings. Typical examples include the following:

"She found the answer by mixing British Colonial and Indonesian furniture with Asian and other ethnic accents"-(The Fort Lauderdale Sun-Sentinel, November 12, 1999);

"African mud-cloth pillows are used as ethnic accents in the living room"-(Chicago Tribune, July 11, 1999);

"... a showroom full of solidly built, stylish traditional furniture with a scattering of ethnic accents"-(The Bergen Record, December 6, 1998); and

"some combinations create exotic ethnic accents." (The Chattanooga News-Free Press, September 7, 1997).

Applicant responded to the refusal to register with argument that the term sought to be registered is not merely descriptive in relation to entertainment in the nature of television programs in the field of home decor.

Applicant contended that consideration of copies of dictionary definitions of "ethnic" as "member of an ethnic group; a member of a minority group who retains the customs, language, or social views of his group" and of "accent" as "to give prominence to: to make more prominent" would lead to the conclusion that the combined term "ethnic accents" means to make the ethnic more prominent.

Applicant also argued that "accent," in addition to having a meaning in the field of home decor, has a secondary meaning which is associated with someone who speaks with a foreign accent, and that the mark accordingly possesses a double entendre. Applicant claimed that "accent" "playfully suggests both home decor, but also the foreign or ethnic nature of the decor services. Because of the double meaning, the mark is suggestive and not merely descriptive."

The Examining Attorney was not persuaded by applicant's arguments, and in the second Office Action, she made final the refusal to register under Section 2(e)(1) of the Act. She took the position that in the context of television programs in the field of home decor, the mark merely describes a feature of those services, namely that the home decor featured in the programs includes ethnic accents. Submitted with the final refusal were additional

excerpts retrieved from electronic databases of published articles. Typical examples of her search for the words applicant seeks to register used in association with the word "home" include the following:

"She wanted to create a holiday home that captured the seasons and reflected her African-American Heritage... Both the Pear Tree and Ten Thousand Villages sell African mud cloth that will lend an ethnic accent to the traditional evergreen."-(The Boston Globe, November 11, 2001); and

"If you are looking for an unusual ethnic accent in wall tiles or want to create your own custom-tile look without hiring a decorator, check out the new line of Metal Mosaics from Dalriada Infinite Design of Denver, Colorado... [B]y allowing customers to express creativity through the finishing process, we're better able to meet their desires concerning the best tiles for their homes..."-(The Fort Lauderdale Sun-Sentinel, August 20, 2001).

In addition to these examples of how the term sought to be registered is used by others, one of the excerpted articles submitted by the Examining Attorney appears to be about applicant's business. That article, from the December 23, 2000 edition of The Orlando Sentinel, states that applicant's founder "believes that consumers want more ethnic accents for their home[s], accents that are not available on a large scale to consumers."

Applicant responded to the final refusal to register with a request for reconsideration on the issue of mere

descriptiveness, but the Examining Attorney was not persuaded to withdraw the refusal.

Applicant timely filed a Notice of Appeal, followed by its Appeal brief. The Examining Attorney filed her brief on appeal, and applicant filed a reply brief, but no oral hearing before the Board was requested.

The sole issue before the Board in this appeal is whether "ETHNIC ACCENTS" is merely descriptive within the meaning of Section 2(e)(1) of the Lanham Act in connection with "entertainment in the nature of television programs in the field of home decor." Based on careful consideration of the record before us in this appeal, as well as the arguments presented by applicant and the Examining Attorney and the relevant legal precedents, we find that the refusal to register is well founded.

A mark is properly refused registration as merely descriptive under Section 2(e)(1) if it describes a significant ingredient, quality, characteristic, function, feature, purpose or use of the relevant services (or goods). In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987); In re Bed & Breakfast Registry, 791 F.2d 157, 229 USPQ 818 (Fed. Cir. 1986); In re MetPath Inc., 223 USPQ 88 (TTAB 1984); and In re Bright-Crest, Ltd., 204 USPQ 591 (TTAB 1979). The determination of mere descriptiveness is

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made in the context of the services (or goods) identified in the application, rather than in the abstract. In re Omaha National Corp., 819 F.2d 1117, 2 USPQ2d 1859 (Fed. Cir. 1987); In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215 (CCPA 1978).

The evidence the Examining Attorney submitted with the first and second Office Actions clearly establishes that the term applicant seeks to register is merely descriptive in connection with decorations for the home. "Ethnic accents" are home furnishings or decorations which reflect or evoke particular ethnic traditions or themes. It would appear that including ethnic accents in one's home décor, whether the accents are directly related to one's own cultural heritage or are simply employed for their aesthetic interest, is somewhat of a trend. The story about applicant's business states that its founder believes that people want more ethnic accents for their homes. Contrary to applicant's assertion, the fact that the article is about applicant does not negate the fact that the term applicant seeks to register is used in a descriptive sense, rather than as a service mark indicating the origin of applicant's services.

We find that the term "ethnic accents" refers to items of home decor. The issue thus becomes whether the term is

merely descriptive of applicant's entertainment services, which are in the form of "television programs in the field of home decor." The term sought to be registered is merely descriptive in connection with these services because "ETHNIC ACCENTS" indicates that ethnic accents are significant features or the subject matters of such programs.

Applicant's arguments to the contrary are not persuasive. Although we cannot dispute the fact that some members of ethnic groups may, in fact, speak with discernible foreign accents, in the context of applicant's services, it is unlikely that viewers or potential viewers of applicant's programs will discern a double entendre in the word "accents." To have a double entendre, both meanings must be readily apparent, but the meaning suggested by applicant is not apparent upon seeing the mark in connection with the services. Contrary to applicant's illogical contention, the Examining Attorney's "failure to understand the double entendre created by Applicant's mark" does not "demonstrate that the mark is not merely descriptive." (Reply brief, p. 2). On the contrary, it shows that the mark does not create a double entendre.

Similarly, that applicant can take the dictionary definitions of the individual words in the term and come up

with a meaning that makes no sense in connection with the services recited in the application does not mandate a different conclusion on the issue of mere descriptiveness. As stated above, the determination of descriptiveness is made in the context of the identified services, and the meaning of "ETHNIC ACCENTS" in connection with applicant's services is clearly that of home furnishings or decorations relating to various ethnicities. As we explained above, in connection with applicant's services, the term sought to be registered is merely descriptive because it identifies a significant feature or characteristic of them.

Applicant's argument that the term is too broad to identify with any specificity or particularity the subject of its programs is not well taken either. We do not dispute the fact that there are a great number of ethnicities, nor do we dispute the fact that each may have its own distinctive racial, national, religious, linguistic or cultural heritage, but we cannot adopt applicant's argument that because of this fact, "ethnic" describes virtually everyone, and therefore does not describe anything with the specificity or particularity required in order for the refusal under Section 2(e)(1) to be appropriate in this case. Simply put, even though there could be an infinite variety of ethnic accents available

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for people to use when furnishing or decorating their homes, the term "ethnic accents" nonetheless describes both the things they use for this purpose and television programming which relates to those things.

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