

**THIS DISPOSITION IS  
NOT CITABLE AS  
PRECEDENT OF THE  
TTAB**

Mailed:  
October 20, 2006

**UNITED STATES PATENT AND TRADEMARK OFFICE**

---

**Trademark Trial and Appeal Board**

---

In re Mehy Holdings<sup>1</sup>

---

Serial No. 76522942

---

John G. Tutunjian, of Keusey, Tutunjian & Bitetto, P.C. for  
Mehy Holdings.

Laura G. Kovalsky, Trademark Examining Attorney, Law Office  
110 (Chris A. F. Pedersen, Managing Attorney).

---

Before Seeherman, Zervas and Cataldo, Administrative  
Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

Mehy Holdings, by assignment from Rollup Shutters and  
Awnings, Inc., is the owner of an application to register  
on the Supplemental Register the term ROLLUP (in typed or  
standard character form) for goods ultimately identified as  
"laterally retractable non-metal awnings and awning systems  
comprising awning housings, support frames, shock absorbing

---

<sup>1</sup> The Assignment Division of the U.S. Patent and Trademark Office  
has recorded an assignment of the present application from Rollup  
Shutters and Awnings, Inc. to Mehy Holdings at Reel No. 3211,  
Frame No. 0239.

bars, wiper bars and hardware; outdoor fabric canopy systems comprising housings, support frames, shock absorber bars, wiper bars and hardware" in International Class 22.<sup>2</sup> The application claims first use anywhere and first use in commerce in January 1998.

The application was originally filed on the Principal Register, at which time the examining attorney refused registration on the ground that the term ROLLUP is merely descriptive of applicant's goods. 15 U.S.C. § 1052(e)(1). After applicant claimed that ROLLUP had acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. §1052(f), the examining attorney found applicant's evidence of acquired distinctiveness to be insufficient. In its "Request for Reconsideration" of January 31, 2005, applicant amended the application to seek registration on the Supplemental Register. Subsequently, the examining attorney refused registration pursuant to Section 23(c) of the Trademark Act, 15 U.S.C. § 1091(c), on the ground that the term was generic for the goods, and therefore incapable of distinguishing applicant's goods.

After the refusal under Section 23(c) was made final, applicant filed a notice of appeal. The appeal has been fully briefed.

---

<sup>2</sup> Application Serial No. 76522942, filed June 17, 2003.

The excerpt submitted with the examining attorney's final Office action from the *Bangor Daily News* (August 15, 2000) explains the operation of an awning and how it "rolls up." It states as follows:

What is unique about a retractable awning is that it is only supported where it attaches to the house wall. This eliminates the inconvenience of having awning supports at the outer corners that rest on the deck or patio. The awning can be opened from only a few inches out to its maximum depth.

Retractable awnings are attractive with hundreds of styles, patterns and colors of decorative fabrics. Since the fabric rolls up and is stored against the wall when it is closed, it is not continually exposed to the sun's rays or harsh weather. This gives it a long life with little fading.

To visualize how a retractable awning works, hold your arms chest high and tight against your chest with your elbows out to the sides. Now straighten out your arms and imagine them covered with fabric. This is exactly how a retractable awning over your patio or deck opens and closes.

Evidently, an awning has both a retracting function due to the movement of lateral arms and a rolling function due to the rolling of the awning, when the awning system is closed. There is no question, therefore, that "rollup" is merely descriptive of a significant feature of applicant's goods. Applicant has admitted this both by its initial claim of acquired distinctiveness and its subsequent

amendment of its application to seek registration on the Supplemental Register.

The examining attorney argues that the terms "roll up" and "retractable," which appears in the identification of goods, are both "used to refer to a way of closing awnings, and the phrase 'roll up awning' is used generically in the awning industry and is often all-encompassing." Brief at p. 4. She adds that "[t]he cumulative evidence of synonymous and interchangeable use [of roll up and retractable] clearly indicates that 'roll up awning' is a specific class or genus of awnings, including retractable awnings and canopies." Brief at p. 6.

Applicant maintains that ROLLUP is not generic; that the burden is on the examining attorney to show that ROLLUP is generic by clear evidence of generic use; and that the examining attorney "has failed to show any evidence, beyond a *de minimis* use, that the term ROLLUP ... is used by the relevant buying public to refer to the Applicant's goods." Reply at p. 1. According to applicant, "the term 'rollup' has been used only sparingly to describe the Applicant's goods"; and the general public uses terms such as "retractable awning," "electric awning" or "lateral arm awning" to refer to laterally retractable awnings.

The Court of Appeals for the Federal Circuit has held that "[t]he 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* explains 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?

*Id.* The Office bears the burden of establishing genericness based on clear evidence of generic use. *In re American Fertility Society*, 188 F.3d 1341, 51 USPQ2d 1832 (Fed. Cir. 1999).

Turning to the first *Ginn* factor, i.e., the genus of goods, applicant identifies the genus as "laterally retractable awning systems, outdoor fabric canopy systems and related hardware systems." Brief at p. 3. The examining attorney states that "'roll up awning' is a specific class or genus of awnings, including retractable awnings and canopies." Brief at p. 6. In view of the identification of goods and the evidence that is of record,

we find that the relevant genus of goods is awnings and canopies that retract.

Next, we consider whether the term is understood by the relevant public to refer to the product included in the genus of the goods. *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, Pierce, 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. In this case, the relevant public consists of members of the general public, which includes homeowners.

The examining attorney has submitted with the various Office actions excerpts of numerous stories taken from the Nexis database; web pages from Internet web sites; and a dictionary definition of "retractable" from [www.dictionary.reference.com](http://www.dictionary.reference.com). Two of her submissions from the Internet, however, have extremely limited probative value. First, the submission from [loftliving.ca](http://loftliving.ca) is from a

Canadian website - we are concerned with generic use in the United States, not abroad, and there is no evidence that purchasers in the United States would look to foreign web sites in purchasing awnings or canopies, or in making their purchasing decisions. Second, the listing of search results for "roll-up awning" from the Google database - showing "about 1,660" results - is of limited probative value because the excerpts that appear in the Google listing are extremely truncated with brief bits of text, and we do not have the web pages themselves from which to examine the context within which the search terms are used (see, e.g., "Mambo Combo by Small World Toys" stating "Hide in Hideout dome tent with flap door, mesh windows, and roll-up awning windows"). Evidence of use of a term or phrase in headings or content on individual web sites has far greater probative value. See *In re Fitch IBCA Inc.*, 64 USPQ2d 1058 (TTAB 2002).

In her Internet search and a search for "roll up awning(s)," "rollup awning(s)" or "roll-up awning(s)" on the Nexis database, the examining attorney located several web pages and a total of twenty-five Nexis stories, eighteen of which showed use of "roll-up awning" and "rollup awning," and seven of which showed use of phrases

such as "roll up the awning."<sup>3</sup> See, e.g., *Fort Worth Star-Telegram* (January 28, 2003) "The Terry brand trailer is white with red trim and has a roll-up awning over the door"; *Newsday* (September 9, 2001) "It was just an open deck with a roll-up awning, and I thought it would be really nice to have a screen-and-glass porch for plants and people ...; [www.rvsafety.com](http://www.rvsafety.com) (regarding sun shades for awnings) "They're attractive - color-coordinated binding. Easy to install - will fit any conventional roll-up awning"; and [www.alohapatio.com](http://www.alohapatio.com) "Awnings - fabric roll ups." These references show use of "roll up," "rollup" or "roll-up" as an adjective. Certainly, an adjective can be a generic term. See, e.g., *In re Reckitt & Colman, North America Inc.*, 18 USPQ2d 1389 (TTAB) 1991) (the expression "generic name for the goods or services" is not limited to noun forms but also includes "generic adjectives," that is, adjectives which refer to a genus or species, category or class, of goods or services). However, because these terms are used as adjectives, we cannot ascertain with certainty whether they are being used as generic adjectives, or are being used in a merely descriptive fashion, to describe a

---

<sup>3</sup> The record reflects that the examining attorney requested that "All Documents" be printed for her search; printouts of twenty-five documents followed.

feature of the awnings rather than to name a genus of awnings.

The examining attorney also relies on one of applicant's web pages, stating:

Applicant's own web page clearly identifies the applicant's awnings with which the mark is used in a photograph, and explains that its retractable awnings have a "rollup feature" in which "[t]he front bar seals the housing, arms and fabric when your awning is rolled up." This photograph and description of the applicant's goods support the argument that rollup awnings clearly encompass retractable awnings and, therefore, the term "rollup" or "roll-up" is generic for the goods at issue.

Brief at p. 7. The web page of record states as follows in relevant part:

1. Fully Enclosed Tubular Housing  
Exclusive Patented Rollup Feature ...
2. Chainlink Windflex Arm®  
Exclusive Patented Rollup Feature ...
3. Adjustable Pitch  
Exclusive Patented Rollup Feature ...
4. Construction  
Exclusive Patented Rollup Feature ...
  - 5A. "Exclusive Rollup Feature"  
Rollup's coordinating front bar  
decorating color strip.

There is no dispute that applicant's awnings have a rollup feature; as indicated previously, applicant has admitted the descriptiveness of ROLLUP by amending its application to the Supplemental Register. However, we cannot accept

the examining attorney's argument that rollup awnings encompass retractable awnings and, therefore, the term "rollup" is generic for the goods at issue. While a "rollup" awning may be retractable, this does not establish that "rollup" is a generic term for awnings that are retractable.

We next focus on the web page from www.screenhouse.com, depicted below, and made of record by the examining attorney with her second Office action.



This excerpt shows product categories, some of which are identified as "Retractable Patio Awnings"; "Fabric Window Awnings with Arms"; "Aluminum Window Awnings with Arms"; "Fabric Window Awnings with Sides"; "Aluminum Roll Up Window Awnings"; "Fabric Roll Up Window Awnings"; "Aluminum

Casement Roll Up Window Awnings"; and "Fabric Casement Roll Up Window Awnings." The text at the bottom of the web page states: "Residential roll up window awnings are our specialty. ... You can also choose to get a fixed awning over your window or door for consistent protection from the sun and rain. Rollup window awnings in both fabric and aluminum give you the ultimate in flexibility." Evidently, this website uses "roll up" in connection with window awnings, but not with patio awnings - "retractable" is the term used with such awnings.

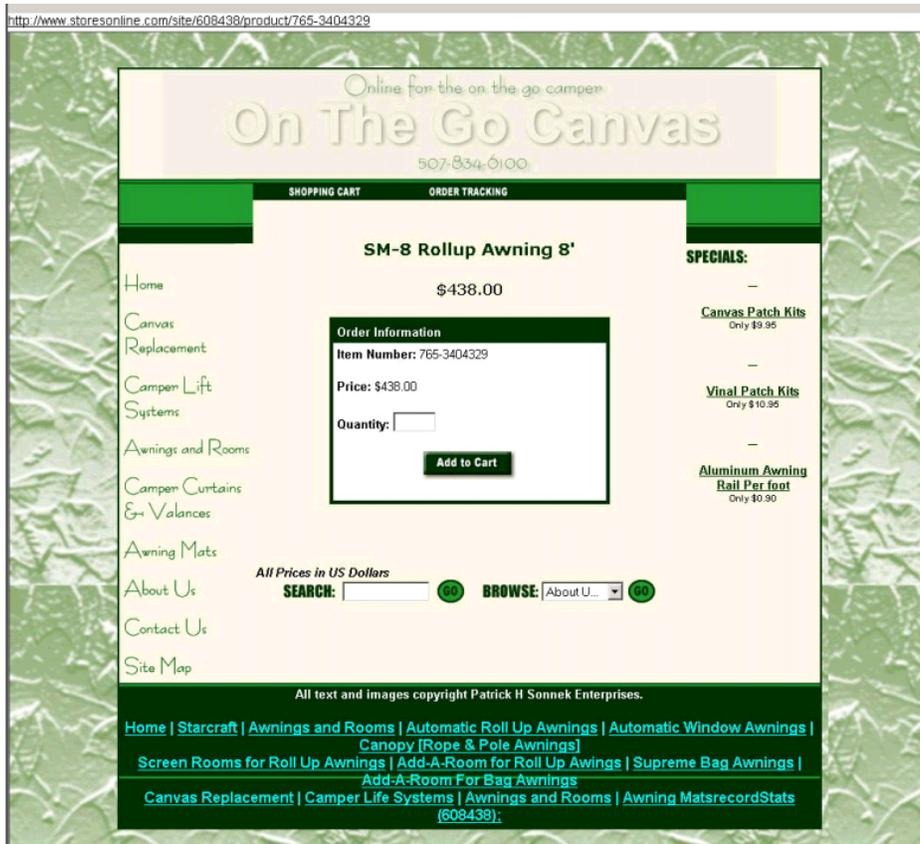
The [www.screen-house.com](http://www.screen-house.com) web page displays various product categories for "window awnings" and a product category for a "retractable patio awning," both of which are within the scope of applicant's identification of goods. "Rollup" does not appear alone, but in each instance appears next to or in the same sentence with an adjective such as "fabric" or "aluminum," which describes a feature of the awning. Thus, while "roll up" may be used as part of the name of a product, it is also possible that "roll up" is being used to describe a feature or characteristic of the product.<sup>4</sup>

---

<sup>4</sup> Similarly, the excerpt from *Sun-Sentinel* (July 8, 2001), made of record by the examining attorney, shows use of "roll-up," but it is likely to be viewed as a descriptive term in view of the context in which it appears. "Awnings" is included within a list of items, each of which is preceded by an adjective describing a

Ser. No. 76522942

The record also includes this web page from  
www.storesonline.com:



This web page lists product categories which include "Roll Up Awnings" and identifies an awning for sale as "SM-8 Rollup Awning 8'." However, it also identifies, for example, "Rope & Pole Awnings" as a product category, with "Rope & Pole" used to describe a feature of the awnings.

---

characteristic of the item: "The Cottage Suite on the second floor captures an old-timey beach cottage spirit with lots of white wicker, sea grass carpet, roll-up awnings and terra-cotta nightstands displaying specimen shells."

Thus, again, the evidence does not clearly show that "rollup awning" is a generic term for the goods.

Another web page submitted with the examining attorney's second Office action is one from [www.silvercrestawning.com](http://www.silvercrestawning.com), which includes the phrase "place your mouse over the photo to see the roll up in action!" While the reference to "roll up" is as a noun, and hence could be considered the name of the goods, an equally plausible reading is that "the roll up" is a reference to the rolling action of the awning as it is being closed. Also, the web page states, "The Rollup Awning is made from a special hardened and spring-tempered aluminum alloy," with "Rollup Awning" shown in initial capitalization. "Rollup Awning" hence may be a reference to applicant's awnings, being sold by Silvercrest Awning. Thus, this web page does not clearly show use of "roll up" in a generic manner.

Additionally, the examining attorney submitted with her second Office action web pages from [www.maskedflowerimages.com](http://www.maskedflowerimages.com) showing product categories for, e.g., "Horizontal Awning"; "Deluxe Awnings"; and "Automatic Roll-up Awnings." In view of the fact that the product categories include terms that are clearly descriptive, rather than generic, we cannot say that this evidence

unequivocally demonstrates generic usage of "Roll-up" for awnings. The same holds true for the evidence from [www.carefreeofcolorado.com](http://www.carefreeofcolorado.com), which offers "Power Awnings"; "lateral arm box awning[s]"; "traditional patio awning[s]"; "traditional roll-up awning[s]"; and "box awning[s]."

With her final refusal on the issue of genericness, the examining attorney submitted two additional searches from the Nexis database. She searched for "roll up" or "rollup" or "roll-up" within forty words in one instance (returning eight stories), and within seventy-five words in the other instance (returning nine stories), of "retractable" or "retracting," within ten words of "awning." According to the examining attorney, the results of these searches show that "'rollup' or 'roll up' [are] both a feature of retractable awnings and used synonymously therewith." Final Office action on genericness at p. 3. See, e.g., *Pittsburgh Post-Gazette* (June 30, 2001) "But retractable awnings, which roll up on demand either by hand crank or electric motor, are growing in popularity. ... Retractable (also called lateral arm awnings) cost about 10 percent to 20 percent more than fixed models"; and *Bangor Daily News* (August 2, 1994) "When you crank the retractable awning open, an elbow joint in

each of two lateral support arms straightens." We do not find this evidence persuasive. First, most of the excerpts obtained in the first search are the same as the results that were obtained in the second search, and both searches only yielded a handful of results. Second, essentially all of these results refer to the awnings as "retractable awnings," which, of course, supports applicant's position.<sup>5</sup>

We now consider the evidence submitted by applicant in support of its argument that "retractable awning" is the generic term for the goods and not "rollup." One search applicant performed was "for the term 'retract! awning', [which] shows a total of 785 new stories using forms of the terms 'retractable awning' and 'retract[ing] the awnings.'" Response of July 14, 2005 at p. 5. A second search applicant performed was for "rollup," which yielded an indication that more than 3000 stories would be obtained. Applicant did not submit any of such stories. A third

---

<sup>5</sup> One excerpt made of record by the examining attorney includes both "rollup" and "retractable" in the same sentence. Specifically, the excerpt states, "[r]etractable and roll-up awnings allow you to choose sun blocking in the summer but let the warming sun enter in the winter." *Wilkes-Barre Times Leader* (April 17, 2004). We cannot determine from this excerpt whether the writer is using "retractable" and "roll up" as separate generic terms for awnings, but because the terms "retractable and roll-up awnings" are used together, they may certainly be viewed as referring to functions of the goods, i.e., that they retract and that they roll up, rather than exhibiting generic use of "rollup."

search for "rollup awning" returned five results, all of which applicant maintains refer to applicant. The excerpts all show "rollup awning" with the first letter in each word capitalized. The results of these searches, too, are of limited probative value because we are concerned in this appeal with whether the term "rollup" is a generic term for applicant's goods. If there are other terms which are also generic terms for such goods, such terms are of no moment. We need only determine whether the examining attorney has established that "rollup" is one of the generic terms for applicant's goods.

Additionally, applicant submitted with its July 12, 2005 response search results from a search by the Google search engine which showed "about 1,140,000" results for the term "rollup." According to applicant, this evidence shows that "the term 'rollup' is most frequently used to describe software updates"; and that "[n]one of the top 100 search results for ROLLUP indicate[s] any generic link in the public's mind between the term 'rollup' and laterally retractable awnings or canopy systems." Brief at p. 4. We are not concerned here with whether "roll-up" has any meanings outside the category of awnings and canopies, and therefore this listing of search results that purports to show such other meanings is of no probative value.

Applicant also submitted evidence in support of its contention that ROLLUP has acquired distinctiveness. This evidence was submitted during the phase of prosecution in which applicant was attempting to assert a Section 2(f) claim; with the amendment of the application to the Supplemental Register, the question of acquired distinctiveness is no longer before us. However, because in determining whether a term is generic we must look to all the evidence of record, including evidence of acquired distinctiveness, we have considered the evidence for this purpose. Applicant's evidence of acquired distinctiveness includes samples of advertising and statements of appreciation and gratitude from applicant's customers. The advertising and the customer statements consistently use ROLLUP as a trademark, and not in a generic manner. This evidence thus suggests that the consuming public has been exposed to some degree to use of ROLLUP as a trademark. We add too that the examining attorney has not pointed out generic uses of the term "rollup" in such evidence. In this respect, the present case differs from *In re Central Sprinkler Co.*, 49 USPQ2d 1194 (TTAB 1998), in which the Board found the adjective ATTIC to be generic for "automatic sprinklers for fire protection." There, the record included evidence that applicant's particular

sprinklers were intended for placement and use in an attic. No similar evidence regarding applicant's goods appears in applicant's evidence or web page, discussed earlier in this decision.

As noted above, the Office bears the burden of proof and genericness must be shown by clear evidence. *In re Merrill Lynch, supra* at 1143. After reviewing all of the evidence of record, we cannot say that the Office has met its burden. Much of the evidence is equivocal: we cannot determine whether "rollup," "roll up" or "roll-up" is being used in a merely descriptive manner or as a generic adjective. See *In re Volvo White Truck Corp.*, 16 USPQ2d 1417 (TTAB 1990) (refusal to register INTEGRAL SLEEPER reversed because of "grave doubts" and because the evidence contained "many ambiguities.") This is not to say that, on a different record, such as might be adduced during in an opposition or cancellation proceeding, we might reach a different result. However, given the limited resources available to the Examining Attorney, on the record herein we cannot say that ROLLUP is a generic term for the identified goods.

Decision: The refusal to register is reversed.