

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF  
THE TTAB

Oral Hearing: May 3, 2006

Mailed: September 6, 2006

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re Sharp Kabushiki Kaisha

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Serial No. 76554990

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Robert W. Adams of Nixon & Vanderhye P.C. for Sharp  
Kabushiki Kaisha.

James A. Rauen, Trademark Examining Attorney, Law Office  
103 (Michael Hamilton, Managing Attorney).

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Before Hairston, Holtzman and Kuhlke, Administrative  
Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Sharp Kabushiki Kaisha has filed an application to register 3D (in typed form) on the Principal Register for "cellular phones, electronic organizers, personal digital assistants, computer terminal units for data processing, car navigation computers and displays, digital still cameras, video camcorders, DVD players, DVD recorders, notebook computers, monitors, liquid crystal display panels, liquid crystal display modules, slot machines" in International Class 9 and "hand-held devices with liquid

crystal displays for playing electronic games, pinball machines" in International Class 28.<sup>1</sup>

The examining attorney refused registration 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 of its goods.<sup>2</sup>

When the refusal was made final, applicant requested reconsideration of the final decision. On August 22, 2005 the examining attorney denied the request for reconsideration and applicant filed this appeal. Briefs have been filed, and an oral hearing was held. We affirm the refusal to register.

As a preliminary matter we address two points raised during the appeal. It is applicant's contention that it is seeking registration of the proposed mark 3D in a stylized depiction (while applicant refers to this mark as 3D and design, it is more appropriately designated 3d in stylized form). The stylized mark is shown below.



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<sup>1</sup> Application Serial No. 76554990, filed October 24, 2003, alleging a bona fide intention to use the mark in commerce.

<sup>2</sup> The examining attorney also refused registration under Section 2(d) of the Trademark Act based on a likelihood of confusion with a prior registration; however, this refusal was withdrawn at oral

It is also applicant's contention that it has disclaimed the term 3D apart from the stylized mark. The examining attorney maintains that the applied-for mark is 3D in typed form. In addition, the examining attorney maintains that applicant never amended the application to disclaim the term 3D and in any event such an amendment would not be allowed inasmuch as it would be a disclaimer of the entire mark.

After a careful review of the record, we agree with the examining attorney that the applied-for mark is 3D in typed form. Although, as originally filed, the mark was presented in stylized form on the drawing page, applicant amended the mark to 3D in typed form in response to the first Office action. Applicant's response was accompanied by a drawing page which clearly depicts 3D in typed form. In the final Office action the examining attorney accepted the substitute drawing and informed the applicant that "in the substitute drawing submitted with its response to the previous Office action, the applicant has removed any design element or stylization and has substituted a typed drawing. Thus, any argument based on that design or stylization is now moot." Final Office Action p. 2. While

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hearing in view of the cancellation of the prior registration under Section 8 of the Trademark Act.

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applicant's arguments in the response, and in the brief, erroneously refer to its proposed mark as 3D and design, the drawing page controls, thus, the mark is 3D in typed form. See Trademark Rule 2.52 which provides in pertinent part "A drawing depicts the mark sought to be registered." See also *In re L.G. Lavorazioni Grafite S.r.l.*, 61 USPQ2d 1063 (Dir. USPTO 2001); TMEP §807.01 (4<sup>th</sup> ed. 2005) (if an applicant submits a separate drawing page showing a mark, and a different mark appears in the written application, the application will receive a filing date, and the drawing page will control for purposes of determining what the mark is and the USPTO will disregard the mark in the written application); and TMEP 807.15 (when a substitute drawing is submitted and accepted, the original drawing is cancelled and the substitute drawing substituted). Applicant's attempt in its appeal brief to amend back to the stylized form "if the refusal to register is reversed" (br. p. 5 n. 2) is untimely and cannot be considered.<sup>3</sup> The Board is without authority to remand the case for further prosecution. See *In re Phillips-Heusen Corp.*, 63 USPQ2d

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<sup>3</sup> We note applicant's argument that it amended its drawing "without prejudice." To the extent this has any meaning in the context of a drawing amendment, whether with or without prejudice, applicant never sought amendment back to the stylized version until its brief filed in this appeal. Moreover, the relevant issue in an amendment to the mark is whether or not such amendment would be a material alteration.

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1047, 1047 n.2 (TTAB 2002). See also TBMP §1218 (2d ed. rev. 2004) ("An application may not be 'reopened,' that is, an applicant may not amend its application, or submit additional evidence, at this stage, except in two very limited situations." See Trademark Rule 2.142(g).)

With regard to the alleged disclaimer, we agree with the examining attorney that applicant did not clearly seek to amend its application to add a disclaimer of the term 3D. In its response to the first Office action applicant stated: "In addition, applicant amends its application without prejudice to indicate that the phrase 3D is merely descriptive." App. Response p. 3. We note applicant's request for reconsideration includes the following argument in response to the likelihood of confusion refusal: "In this regard, applicant notes that it disclaimed (without prejudice) the '3D' portion of its mark in the Amendment dated December 6, 2004 (at page 3)." App. Request for Reconsideration p. 2. Applicant's intention is not completely clear and, in any event, as the examining attorney stated applicant may not disclaim its entire mark.

We turn now to the question of whether the term 3D is merely descriptive of applicant's goods as identified in the application. "A mark is merely descriptive if it 'consist[s] merely of words descriptive of the qualities,

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ingredients or characteristics of' the goods or services related to the mark." In re Oppedahl & Larson LLP, 373 F.3d 1171, 71 USPQ2d 1370, 1371 (Fed. Cir. 2004), quoting, Estate of P.D. Beckwith, Inc. v. Commissioner, 252 U.S. 538, 543 (1920). See also In re MBNA America Bank N.A., 340 F.3d 1328, 67 USPQ2d 1778, 1780 (Fed. Cir. 2003). 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 a mark merely descriptive, that the mark describe each feature of the goods or services, only that it describe a single ingredient, quality, characteristic, function, feature, purpose or use of the goods. In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987).

The examining attorney argues that as "demonstrated in the first Office action, '3D' is a well-known abbreviation of 'three dimensional.' This indicates a characteristic of the applicant's goods: they create or display images that are three dimensional." Br. p. 5. In support of his

argument he has submitted the following dictionary definition:

3D: A three-dimensional medium, display, or performance, especially a cinematic or graphic medium in three dimensions.

The American Heritage Dictionary of the English Language,  
(3d ed. 1992).

We also take judicial notice of the following dictionary definitions:<sup>4</sup>

3D: adj. 1. Short for three-dimensional. Of, pertaining to, or being an object or image having or appearing to have all three spatial dimensions (length, width, and depth). 2. Having the illusion of depth or varying distances, as in 3-D audio.

3-D audio n. Short for three-dimensional audio. Recorded as stereo sound, 3-D audio enables the listener to feel immersed in the sound and to determine its exact location (up, down, left, right, forward, or backward). This technology is commonly used in video games and virtual-reality systems, as well as in some Internet applications. Also called: 3-D sound, binaural sound.

3-D graphic n. Any graphical image that depicts one or more objects in three dimensions - height, width, and depth. A 3-D graphic is rendered on a two-dimensional medium; the third dimension, depth, is indicated by means of perspective and by techniques such as shading or gradient use of color.

Microsoft Computer Dictionary (5<sup>th</sup> ed. 2002)

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<sup>4</sup> 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) (Board may take judicial notice of dictionary definitions).

Three-dimensional or 3D: adjective (image) which has three dimensions (width, breadth and depth), and therefore gives the impression of being solid.

Dictionary of Computing (3d ed. 1998).

Applicant argues that 3D is not descriptive of some of its recited goods; however, it is well settled that where a mark may be merely descriptive of one or more items of goods in an application but may be suggestive or even arbitrary as applied to other items, registration is properly refused if the subject matter for registration is descriptive of any of the goods for which registration is sought. In re Analog Devices, Inc., 6 USPQ2d 1808 (TTAB 1988). See also In re Cannon, Inc., 219 USPQ 820 (TTAB 1983). Applicant, in fact, appears to concede that 3D in typed form is descriptive as to many of its goods.

Throughout the case applicant has referred to 3D as being descriptive. See App. Response p. 3; and App. Request for Reconsideration p. 2. Moreover, the record here supports a determination that 3D is descriptive of applicant's goods. When we view the proposed mark 3D in the context of the identified goods, as we must, 3D describes a feature of the applicant's goods, namely, the ability to display images in a 3D format. In re Abcor Development Corporation, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978) (determination of mere

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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). This is particularly true of applicant's "car navigation computers and displays, DVD players, notebook computers, monitors, liquid crystal display panels, liquid crystal display modules" in International Class 9 and the "hand-held devices with liquid crystal displays for playing electronic games" in International Class 28, in view of the Microsoft Computer Dictionary definitions where 3D is used to describe three-dimensional graphic displays in two-dimensional medium (monitors and display panels) and audio elements commonly used in video games and virtual-reality systems.

As to applicant's argument regarding the stylized version of the mark, these arguments are not relevant in view of the operative drawing page for the mark. However, even considering the stylization, we agree with the examining attorney's observation that not only is the stylization minimal but also the stylization "renders it even more descriptive [because] ... it shows the mark in three dimensions, or '3D.'" Br. p. 6. We note that applicant, in support of its argument that its mark is not descriptive, has made of record printouts of two use-based

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third-party registrations on the Principal Register for marks that include the term 3D in stylized form or with a design, which are registered with a disclaimer of 3D. The registered marks are shown below:



As expressly stated by the court in *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001), "The Board must decide each case on its own merits, ... Even if some prior registrations had some characteristics similar to Nett Designs' application, the PTO's allowance of such prior registrations does not bind the Board or this court." (Internal citation omitted.) Moreover, the marks in the two registrations contain significant design and stylization elements in contrast to applicant's applied-for mark which merely depicts 3D in a three-dimensional format.

The record before us contains dictionary definitions that conclusively establish the mere descriptiveness of 3D. Thus, we are persuaded that when applied to applicant's goods, the term 3D immediately describes, without conjecture or speculation, a significant feature or function of applicant's goods, namely the capability to display three-dimensional images. Nothing requires the

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exercise of imagination, cogitation, mental processing or gathering of further information in order for prospective consumers of applicant's goods to perceive readily the merely descriptive significance of the term 3D as it pertains to applicant's goods.

Finally, we do not have any doubt that this mark is merely descriptive in connection with the identified goods. In re Atavio, 25 USPQ2d 1361, 1362 (TTAB 1992).

**Decision:** The refusal to register is affirmed.