

THIS DISPOSITION IS
NOT CITABLE AS
PRECEDENT OF THE
TTAB

Mailed:
7 November 2006
AD

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Guntersville Breathables, Inc.

Serial No. 76565906

Larry W. Brantley of Wadley & Patterson, P.C. for
Guntersville Breathables, Inc.

Jason F. Turner, Trademark Examining Attorney, Law Office
108 (Andrew Lawrence, Managing Attorney).

Before Grendel, Drost and Cataldo, Administrative Trademark
Judges.

Opinion by Drost, Administrative Trademark Judge:

On December 8, 2003, Guntersville Breathables, Inc.
(applicant) filed an application to register the mark
CHILLY PAD, in standard character form, on the Principal
Register for "evaporative cooling pads" in Class 28.¹ The
examining attorney refused to register applicant's mark on

¹ Serial No. 76565906. The application alleges dates of first
use and first use in commerce of December 3, 2003.

the ground that the mark was merely descriptive under Section 2(e)(1) of the Trademark Act, 15 U.S.C.

§ 1052(e)(1). In addition, the examining attorney required applicant to amend its identification of goods to indicate that the goods function as towels and that they are classified in Class 24.

The examining attorney argues:

The applicant's proposed mark, "CHILLY PAD" consists of the term "PAD" being modified by the term "CHILLY." The applicant's submitted definition of "pad" is "a piece of soft material that is used to absorb moisture." "Chill" is defined as "to make cool especially without freezing." "Chilly" is defined as "noticeably cold." Taken as a whole, the proposed mark can therefore be interpreted as a "noticeably cold piece of soft material which absorbs moisture." The examining attorney contends that this is merely descriptive of the identified goods, "evaporative cooling pads." The use of the term "pad" in both the mark and the identification evidences the descriptive nature of that particular term.

Brief at unnumbered p. 5 (footnote and citation to record omitted).

Regarding the identification of goods, the examining attorney points out that applicant's towels are not used only by sports participants, but they are "also for 'landscapers,' 'construction workers' and 'manufacturing workers.'" Most significantly, however, 'towels' appear to be classified in Class 24, even when used in a specific sport. For example, 'golf towels' are classified in Class

24 and not 28 with other golf items." Brief at unnumbered p. 14. The examining attorney suggests that the phrase "for use as towels" be added to the identification of goods. Brief at unnumbered p. 13.

Applicant argues that the "consumer must exercise some thought in order to determine what qualities or characteristics of the goods are being described by the mark CHILLY PAD. The mark is an obvious play on the word 'lily pad.' 'Chilly' sounds like 'lily' and 'pad' is the same in both cases." Brief at 10. Applicant maintains that this is a double entendre and, therefore, the mark is not merely descriptive.

Regarding the identification of goods, applicant argues that its "flyer further shows the goods to be a thin cushion like mass of soft material. The evidence indicates that the goods are pads rather than towels. Thus, the associated goods are sporting articles. In addition, the associated goods do not appear to be included in any of the other International Classes." Reply Brief at 6.

After the examining attorney made the refusals final, applicant filed a notice of appeal.

"A mark is merely descriptive if it 'consist[s] merely of words descriptive of the qualities, ingredients or characteristics of' the goods or services related to the

mark." In re Oppendahl & 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). "Such qualities or properties include color, odor, function, dimensions, or ingredients." In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009, 1010 (Fed. Cir. 1987) (internal quotation marks omitted). Descriptiveness of a mark is not considered in the abstract, but in relation to the particular goods or services for which registration is sought. In re Abcor Dev. Corp., 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978).

The examining attorney relies on several dictionary definitions, submitted during the prosecution of the application, to support his refusal.

Chilly - Cool or cold enough to cause shivering

Pad - a piece of usually folded absorbent material (as gauze) used as a surgical dressing or protective covering.

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

Chilly - noticeably cold

Chill - to become cold

Merriam-Webster OnLine Dictionary

Applicant has submitted a definition of "pad" as "a piece of soft material that is used to absorb moisture."

See Response dated January 31, 2005, p. 21

(<http://encarta.msn.com>).

The examining attorney also submitted evidence from the LEXIS/NEXIS database.

Wilson took to wrapping a towel soaked in chilly water around his head.

Journal-News (Westchester County, NY), July 4, 2002.

Injections into the back can reduce inflammation and also provide pain relief. Electrical stimulation as well as heating and cooling pads are also used.

Arkansas Democrat-Gazette, October 26, 2003.

A cooling pad "Perfect For Dogs That Are Always Hot And Panting" is at thepamperedpetmart.com.

New York Times, October 16, 2003.

Customers are treated to a foot soak, heated neck wrap and cooling eye pads...

Des Moines Register, October 7, 2003.

Then after a long night of partying or whatever, saturate two pads with the chilled chamomile water...

Orange County Register, January 3, 2005.

DuWop I Gels offers three sets of gel-filled eye pads that can be chilled to soothe dark circles...

Detroit Free Press, December 19, 2003.

Rays fans will be able to buy chemically chilled pads to cool them off.

Sarasota Herald-Tribune, December 30, 2000.

In addition, the examining attorney points to statements that are included on applicant's literature.

This literature refers to:

- Chilly Pad Sports Towel
- When wet, the towel becomes considerably cooler than the outside air.

- When it stops cooling (between 1-4 hours depending on conditions) you simply re-wet the towel in hot or cold water

The literature also identifies potential users of the goods to include: golfers, team sports participants and spectators, fishing enthusiasts, runners, landscapers, construction workers and manufacturing workers. Furthermore, the goods are "made from a new hyper-evaporative material that retains water while remaining dry to the touch."

When we consider this evidence, we agree with the examining attorney that the terms "Chilly" and "Pad" describe applicant's goods. First, regarding the term "pad," applicant has described its goods as "evaporative cooling pads." Inasmuch as applicant's definition of a pad is a "piece of soft material that is used to absorb moisture," the term "pad" describes applicant's goods that are made of soft, absorbent material that "retains water."

Next, we look at the term "chilly." This term is related to the word "chill." Chilly means "noticeably cold" while chill means "to become cold." Applicant's literature indicates that its goods, when wet, become "noticeably cooler than the outside air" and "[w]hen it stops cooling... you simply re-wet the towel in hot or cold

water and wring it out. Within minutes it is cool again." The LEXIS/NEXIS articles similarly refer to soaking a towel "in chilly water" and "pads with the chilled chamomile water" as well as sports fans being able to buy "chemically chilled pads to cool them off." Furthermore, there are pads used for "cooling" humans and even pets. In effect, applicant's pad or towel, when wet, becomes "cool" or "chilly." Therefore, the term "chilly" merely describes the goods.

However, the question is not whether the terms individually are descriptive of the goods or services. We must consider whether the mark in its entirety is merely descriptive of the goods. P.D. Beckwith, Inc., 252 U.S. at 545-46. Merely because the individual words may describe a product, when the terms are combined, they may be more than merely descriptive. See, e.g., In re Colonial Stores Incorporated, 394 F.2d 549, 157 USPQ 382, 385 (CCPA 1968) (footnote omitted):

We are cognizant of the usual practice of selling baked goods in stores which also sell sugar and spices as individual commodities. As appellant concedes, the terms "sugar" and "spice" used individually are well known and well understood by the purchasing public. However, when combined and used on bakery goods, we think they may function as an indication of more than a mere description of the ingredients of the goods on which the mark is used and, on the record made below, are not "merely descriptive" of such goods within the meaning of section 2. On the record below, the mark

clearly does not tell the potential purchaser only what the goods are, their function, their characteristics or their use, or, of prime concern here, their ingredients.

The immediate impression evoked by the mark may well be to stimulate an association of "sugar and spice" with "everything nice." As such, on the record below, the mark, along with the favorable suggestion which it may evoke, seems to us clearly to function in the trademark sense and not as a term merely descriptive of goods. To the extent that the nursery rhyme is familiar to one seeing or hearing the mark, his recall is undoubtedly stimulated to make the association with "everything nice" but this in no way defeats the distinctive nature of the composite word mark as applied to the listed products.

When the terms "Chilly" and "Pad" are combined into the mark CHILLY PAD, they would describe a pad or towel that is chilled or chilly and, therefore, the combined term would also be descriptive. Indeed, applicant appears to admit that the term has a descriptive meaning. See Response dated January 31, 2005, p. 16 ("The proposed mark has two meanings to consumers when it is used in connection with the identified foods... One of these meanings, 'cold pad,' is arguably descriptive of the evaporative cooling pads").

However, applicant argues that its mark has a second meaning of "lily pad" and this creates a double entendre that shows that the mark is not merely descriptive. Applicant relies on the fact that its CHILLY PAD mark is used in association with its mark FROGG TOGGS and its

specimen (but not its literature) shows "a drawing of a frog footprint." Brief at 11.

We have several problems with applicant's double entendre argument. First, even if we consider the specimens, it is not at all clear that, when consumers view applicant's goods, they would make the association between frogs and lily pads even when the specimen contains an image of frogs. To do so, they would have to dissect the word "chilly" and understand that part of the word "chilly" is similar in sound to the word "lily" and then associate the term "lily" with the word "frog" and the picture of the frog. It simply does not seem that this meaning would be understood by a significant numbers of consumers.

Second and even more significantly, applicant's argument must fail because we do not consider how the mark is displayed to determine if the mark creates a double entendre.

A mark thus is deemed to be a double entendre only if both meanings are readily apparent from the mark itself. If the alleged second meaning of the mark is apparent to purchasers only after they view the mark in the context of the applicant's trade dress, advertising materials or other matter separate from the mark itself, then the mark is not a double entendre.

In re The Place Inc., 76 USPQ2d 1467, 1470 (TTAB 2005).

Applicant is not seeking to register the trade dress or the mark FROGG TOGGS CHILLY PAD. Furthermore, the context and the packaging that applicant uses with its mark can change at any time. Therefore, we conclude that applicant's mark does not create a double entendre that overcomes the descriptiveness of the mark CHILLY PAD.

We add that even if no competitor is using the term CHILLY PAD for its goods, this fact, by itself, does not "alter the basic descriptive significance of the term." In re Gould, 173 USPQ 243, 245 (TTAB 1972).²

Therefore, we affirm the examining attorney's descriptiveness refusal.

Regarding the identification of goods, we note that Congress has authorized the Director to set up a classification system of goods and services for the convenience of the Office. 15 U.S.C. § 1112. Classification does not limit or extend an applicant's or registrant's rights. Id. Along with being properly classified, the goods or services must also be properly identified. "The identification of goods or services must

² Applicant refers to a search of the Internet and describes how the search could be duplicated (Brief at 12 n.43). However, a "mere reference to a website does not make the information of record." In re Planalytics Inc., 70 USPQ2d 1453, 1457 (TTAB 2004).

be specific, definite, clear, accurate and concise." TMEP § 1402.01 (4th ed. rev. April 2005).

Here, applicant has identified its goods as "evaporative cooling pads" in Class 28. The examining attorney has objected to this identification of goods inasmuch as the examining attorney determined that the goods are properly classified in Class 24 and the identification of goods is not sufficiently definite. The examining attorney has suggested that the phrase "for use as towels" be added to the identification of goods. Applicant argues that the "flyer further shows the goods to be a thin cushion like mass of soft material. The evidence indicates that the goods are pads rather than towels." Reply Brief at 6.

We agree with the examining attorney that the term "evaporative cooling pads" is indefinite. "As a general rule, the specimen(s) in an application under § 1 of the Trademark Act helps to determine the correct classification." TMEP § 1401.06. The examining attorney has pointed out that pads are classified in numerous classes depending on the type of pad and that towels made of fabric are classified in Class 24. Specifically, even golf towels are classified in Class 24. In this case, when we look at applicant's specimen and literature, it is clear

that applicant's goods are properly classified in Class 24 and they are for use as towels. Applicant's specimen and literature describes its goods as follows:

If the towel starts to dry out, re-wet with cold or warm water.

Wring towel out for reuse when using it to dry off.

Use it to dry off or use it to cool down.

When wet the towel becomes considerably cooler than the outside air, thereby providing cooling relief to the user.

When it stops cooling (between 1-4 hours depending on conditions), you simply re-wet the towel in hot or cold water and wring it out.

Applicant's literature depicts people wearing the item as a towel on the person's head or neck.

Furthermore, applicant itself commonly describes its goods as "towels." In addition, like a towel, applicant's goods according to its specimen, can be used "to dry off."³ Therefore, the phrase "for use as towels" accurately describes the goods for searching and classification purposes.

In addition, the classification of goods in Class 24 is appropriate. Towels of all types including golf towels are classified in that class. Even if sports towels were

³ This specimen contradicts applicant's argument that "there is no evidence that the goods are used either to wipe or dry." Brief at 16.

classified in Class 28, applicant's literature specifically indicates that its goods are not simply a sports towel. Among the potential users that applicant identifies for its goods are sports spectators, landscapers, construction workers, and manufacturing workers. We conclude that applicant's goods are properly classified in Class 24 and that the identification of goods is indefinite without additional language such as "for use as towels."

Decision: The examining attorney's refusals to register on the grounds that the mark is merely descriptive and the identification of goods is indefinite are affirmed.