

**THIS OPINION IS NOT A
PRECEDENT OF THE TTAB**

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re CSS Archery, LLC, assignee of Richwood Archery
Products, Inc.

Serial No. 76607721

Todd E. Stockwell of Stockwell & Associates for CSS
Archery, LLC

John T. Lincoski Jr., Trademark Examining Attorney, Law
Office 113 (Odette Bonnet, Managing Attorney)

Before Seeherman, Kuhlke and Wellington, Administrative
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

CSS Archery, LLC, assignee of Richwood Archery
Products, Inc., has appealed from the final refusal of the
Trademark Examining Attorney to register TUNERZ, in
standard characters, for "sporting goods, namely compound
bow and traditional bow oscillation and vibration

dampeners" in Class 28.¹ Registration has been refused pursuant to 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, and its evidence of acquired distinctiveness is insufficient to entitle it to registration under Section 2(f).

Applicant and the Examining Attorney have filed briefs. Applicant had requested an oral hearing, but subsequently withdrew that request. With its appeal brief applicant submitted a number of exhibits. The Examining Attorney has objected to Exhibit 6, which "purports to show the results of a Google search performed on November 29, 2006." Examining Attorney's brief, n. 1. Because the notice of appeal was filed on October 20, 2006, the Examining Attorney contends that this exhibit is untimely. We agree. Trademark Rule 2.142(d) provides that the record in the application should be complete prior to the filing of an appeal. Accordingly, we have not considered Exhibit 6 in rendering our decision.²

¹ Application Serial No.76607721, filed August 16, 2004. The application was originally filed on the basis of an intent to use the mark, but applicant subsequently filed an amendment to allege use, asserting first use and first use in commerce in August 2004. The amendment to allege use was accepted on May 8, 2005.

² Even if we had considered this exhibit, it would not have changed our decision herein. The exhibit essentially updates the Google search originally submitted, but using as part of the search term the name of the current applicant, rather than its

We note that in its appeal brief applicant has argued that its mark is suggestive and not merely descriptive. However, as the Examining Attorney pointed out in his brief, after issuance of the July 7, 2005 Office action making final the refusal of registration on the ground of mere descriptiveness, applicant amended its application to seek registration pursuant to Section 2(f), asserting that its mark is entitled to registration because it has acquired distinctiveness. This amendment represents an acknowledgement by applicant that its mark is not inherently distinctive. See *Yamaha International Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 6 USPQ2d 1001, 1005 (Fed. Cir. 1988) (in cases where registration was initially sought on the basis of distinctiveness, subsequent reliance by the applicant on Section 2(f) assumes that the mark has been shown or conceded to be merely descriptive).³

predecessor-in-interest. For the same reasons, as discussed infra, that the first search has very limited probative value, so would this search.

³ The Examining Attorney, in his brief, pointed out that applicant did not seek registration under Section 2(f) in the alternative, and therefore the amendment acts as an admission of the mark's descriptiveness. Applicant did not respond or otherwise contradict this statement. It appears that applicant may have simply inserted in its brief language about the suggestiveness of its mark identical to that it had previously used in its response filed June 2, 2005. At that time, applicant had not yet amended its application to seek registration under Section 2(f).

Thus, the only issue for the Board to determine in this appeal is whether TUNERZ has acquired distinctiveness as a mark showing source in applicant. The burden is on applicant to show acquired distinctiveness, and the more descriptive the term is, the greater the amount of evidence that is required to establish acquired distinctiveness. See *Yamaha International Corp. v. Hoshino Gakki Co.*, supra. Accordingly, we must consider the evidence of the descriptiveness of the mark in our assessment of whether applicant has proven that its mark has acquired distinctiveness.

First, we note that even at the point that applicant was asserting that its mark was inherently distinctive, it never denied that "tuners" is a merely descriptive term. Rather, applicant has relied only on the misspelling of the descriptive term "tuners" to assert that the mark is suggestive. "It is the presence of the letter 'Z' that causes the suggestion in the consumer's mind." Brief, p. 4.

Second, the Examining Attorney has submitted evidence from third-party websites that shows "tuner" is a term used in archery to reference a device used to dampen vibration along the bowstring, or is used in combination with

dampeners as part of a stabilization system that absorbs vibration. See, for example:

Greatree Archery
3D Stabilizer, 5-Rod w/Silicon Tuner
Silicon tuner absolutely eats all vibrations and won't change shape in any condition.
www.greatreearchery.com

BEITER
As with all Beiter products, the Centralizer was tested by top archers world-wide and used successfully in competitions.
Four carbon rods, positioned to form a square are held together by plastic blocks (called tuners) made from high quality thermoplastics and elastomers: the result is a new concept of stabilization. Tests have shown that the system is able to absorb more vibration, so giving the archer less problems while aiming and performing the shot.
The distance between tuners (2 to 5) can be individually chosen... The factory setting of the tuners avoids resonance in the system; the tuners themselves can be moved to offer the opportunity of an individual adaptation. However, if you don't feel comfortable with the stabilizer you have tried, switch to a longer one with, possibly, more tuners.
www.wernerbeiter.com

Online Catalog
Bowsports Online Shop
Cartel Multi-Rod Damper
A tuner and dampener built into one. Will fit most carbon quad stabilizers including Beiter and Cartel. Sold individually.
www.leisure-tech.com

Merlin Archery Centre
Brand new stabilizer range from OMEGA
SYSTEMS. The ultimate stabilizer
system for recurve and compound bows.
This stabilizer set includes a long
rod, complete with tuner and dampeners,
plus 2 V-Bar short rods and dampeners.
(V-Bar mount sold separately)
Features—{listing, inter alia]
Easily adjustable tuner weight and
dampener that can also be rotated to
give a bias on one side.
[listing of other products, including]
Petron Tuner Weight
www.merlinarcherycentre.co.uk

Ebay listing
Beiter Centralizer 28" Long Rod 2
Tuners
One Beiter 28" Long Rod with two tuners
and an end cap that has been drilled
and tapped to accept a weight. ...
Please view my other items for the
matching short rods and other archery
items.
<http://cgi.ebay.com>

Chiltern Online
Beiter centralizer with 2 tuners
Considered one of the best multirod
stabilizers available. Light design
and good damping qualities.
The two tuner version comes in lengths
of 26, 28 and 30 inches.
Beiter centralizer with 3 tuners
Considered one of the best multirod
stabilizers available. Light design
and good damping qualities.
The three tuner version...
www.chiltern-archery.co.uk

The foregoing evidence shows that "tuner" or the
plural "tuners" are highly descriptive terms for

applicant's identified goods.⁴ Although applicant spells "tuners" with a "Z,", the resulting mark TUNERZ retains its highly descriptive meaning. The Examining Attorney has pointed to numerous cases in which the Courts and the Board have found a mark to be merely descriptive despite the fact that it is misspelled. See, for example, *In re Hercules Fasteners, Inc.*, 203 F.2d 753, 97 USPQ 355 (CCPA 1953) (FASTIE is phonetic spelling of "fast tie" and describes feature of tube sealing machine); *In re Hubbard Milling Co.*, 6 USPQ2d 1239 (TTAB 1987) (MINERAL-LYX generic for mineral licks for feeding livestock); *In re State Chemical Manufacturing Co.*, 225 USPQ 687 (TTAB 1985) (FOM equivalent to "foam," and merely descriptive for foam rug shampoo).

Applicant's mark TUNERZ would be immediately recognized by consumers as the equivalent of the descriptive word "tuners." Not only is TUNERZ identical to "tuners" for the first five letters, but the substitution of a "Z" for an "S" as the last letter is not a particularly odd spelling variation. In this connection, the Examining Attorney has made of record third-party

⁴ We point out that the Examining Attorney has never taken the position that TUNERZ is a generic term. In fact, throughout examination, he has suggested that applicant consider amending its application to the Supplemental Register, making this suggestion for the first time shortly after applicant filed its amendment to allege use.

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registrations for marks in which a "Z" has been substituted for an "S" to make the plural form of the word, i.e., Registration No. 1823962 for READERZ for eyeglasses and Registration No. 24772546 for PROPERTYMANAGERZ.COM for, inter alia, providing an on-line bulletin board in the field of real estate property management issues. These marks were registered on the Supplemental Register, thus showing that the "Z" did not obviate the descriptiveness of the marks.

Accordingly, the slight misspelling of TUNERZ does not take away from the highly descriptive nature of this word. Because the mark is highly descriptive, a greater amount of evidence is required to establish acquired distinctiveness.

The evidence submitted by applicant consists of the declaration, dated August 4, 2005, of Richard D. Stoll, the president of applicant's predecessor-in-interest. Mr. Stoll states, essentially, "that print and Internet marketing have been increased each year for goods since the mark's first use in August 2004"; that applicant has had repeat customers of the product associated with the mark as well as new customers; and that applicant has made "frequent and substantial use of the mark." The declaration provided no actual sales or advertising figures.

Applicant also submitted an undated letter, rather than a declaration, from Chuck Nease, Vice President of Marketing and Product Development for applicant's predecessor-in-interest. Although the letter is undated, a fax date of March 13, 2006 is printed on it. Mr. Nease states that his company has been marketing and advertising archery accessories under the TUNERZ brand "for the past 24 months." This statement alone raises some questions, because applicant's amendment to allege use states that it did not begin to use the mark until August 2004 (less than 24 months before Mr. Nease's letter), and Mr. Stoll's declaration confirms the August 2004 use date. The letter also says that the products are used "in all states and many foreign countries from France to Australia," and that the accessories include "silencers, stabilizers and string stops." Mr. Nease states that "in the last 18 months over 25 articles and advertisements have been ran [sic] in the major trade and consumer magazines (Bowhunting World--Arrow trade [sic]" and that "three of the largest archery distributors are running our full-page Tunerz product ads in their catalogs and web sites (Papes Archery--Kinsel's Archery--Mike's Archery--3Rivers Archery) [sic]." He also states that over 50,000 individual Tunerz brand products were sold over the past 18 months, and that other

manufacturing companies "are using our Tunerz products as standard equipment for their crossbows and bows"; and that "Horten Manufacturing and Excalibur Crossbows (two of the largest crossbow companies in the world) have been selling the Tunerz line in Cabela's Bass Pro shops, and many other major catalog sales companies." Finally, he states that "thousands of hours and thousands of dollars have been invested into the Tunerz line of accessories to build a brand name that shows the innovation and quality in all the present and future products that we manufacture."

Given the highly descriptive nature of applicant's mark, the declaration and letter and associated exhibits are insufficient for applicant to meet its consequently greater burden of proving acquired distinctiveness. The information in Mr. Stoll's declaration is, to say the least, rather general and vague. Statements such as print and Internet advertising have been increased since the introduction of the product one year earlier do not provide any real information about the extent of such advertising. Since presumably there was no advertising prior to the introduction of the product, any change from zero would represent an increase. Nor does the general statement that applicant has made frequent and substantial use of the mark provide any real evidence about applicant's use, --the

terms "frequent" and "substantial" are very subjective. Certainly these general statements provide no evidence about whether the relevant public has come to recognize TUNERZ as a trademark of applicant's.

Although Mr. Nease's letter provides somewhat more information, he has not provided any specific advertising figures, merely making the general statement that "thousands of hours and thousands of dollars have been invested." Although he states that applicant has sold 50,000 individual products, it is not clear that these products are the ones that are the subject of the application. In this connection, we note that Mr. Nease's letter says that accessories sold under the TUNERZ mark include "silencers, stabilizers and string stops." Mr. Nease also says that the products are sold in many foreign countries, so we cannot ascertain how many of the 50,000 items were sold in the United States; obviously, acquired distinctiveness of the mark relates to recognition by consumers in the United States, not elsewhere.

Applicant has also submitted the search summary results from a search retrieved by the Google search engine for "Richwood Archery TUNERZ" (Richwood Archery is the name of applicant's predecessor-in-interest). We consider this exhibit to have very limited probative value. Although the

summary states that 53 results were found, it appears from the results excerpts that most of them are duplicates. For example, the first two listings are from www.customshootingsystems.com, and both have the date August 14, 2005. Seventeen are from www.archerysite.net, and all appear to be listings of "Reply #3 on January 3, 2005" at 10:04 pm, while another nine are from the same website, and have identical text information. In any event, the summaries are so truncated that we cannot ascertain anything from them as to their content. See TBMP Section 1208.03 and the cases cited therein (a search result summary from a search engine, such as Yahoo! or Google, which shows use of a phrase as key words by the search engine, is of limited probative value).

In conclusion, the evidence submitted by applicant fails to prove that its highly descriptive mark has acquired distinctiveness. The mark has been in use only since August 2004, and the limited time that the mark has been used, and the rather vague evidence regarding the extent of applicant's use and advertising of the mark for its identified goods, is simply insufficient for us to conclude that the mark has acquired distinctiveness.

Decision: In view of the fact that applicant has not shown that its mark is entitled to registration pursuant to

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Section 2(f) of the Trademark Act, the refusal under
Section 2(e)(1) is affirmed.