

THIS DECISION IS NOT
CITABLE AS PRECEDENT
OF THE TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Closet Clothing Co. Limited

Serial No. 76623748

Timothy J. Lockhart of Willcox & Savage P.C. for applicant.

Ingrid Eulin, Trademark Examining Attorney, Law Office 111
(Craig Taylor, Managing Attorney).

**Before Quinn, Grendel, and Mermelstein, Administrative
Trademark Judges.**

Opinion by Mermelstein, Administrative Trademark Judge:

Closet Clothing Co., Ltd. seeks registration on the
Supplemental Register of the mark MINK BIKINI for:

Articles of outerwear for women, namely, dresses,
trousers, skirts, jumpsuits, pantsuits, blouses,
vests, cardigans, sweaters, waistcoats, coats,
jackets, raincoats, scarves, belts, headbands,
caps, hats, socks, hosiery, and footwear,
excluding bikini swimwear, bikini underwear, and
all other types of bikini clothing and all
clothing made of mink.

International Class 25 (as amended).¹

¹ Filed December 8, 2004, based upon Trademark Act § 44(d),
claiming a priority date of June 29, 2004. Applicant perfected
its basis for registration under Trademark Act § 44(e) by filing
a copy of United Kingdom Registration No. 2366971.

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Registration has been finally refused on the ground that the mark as used on the identified goods is deceptive. Trademark Act § 2(a); 15 U.S.C. § 1052(a). Applicant and the examining attorney have filed briefs.

We affirm.

A brief review of the pertinent procedural history of this application will be useful: Applicant originally sought registration on the Principal Register, which the examining attorney refused, alleging that the mark was descriptive under Trademark Act § 2(e)(1). After applicant amended its identification of goods to "exclud[e] bikini swimwear and clothing made of mink," the examining attorney approved the application for publication. However, the approval was withdrawn and the descriptiveness refusal reinstated. The Examining attorney further refused registration of the mark as deceptive. Following amendment of the application to seek registration on the Supplemental Register, the examining attorney withdrew the refusal under Trademark Act § 2(e)(1) and made final the descriptiveness refusal.

I. Applicable Law

The test for determining whether a mark is deceptive under Trademark Act § 2(a) has been stated by the Court of Appeals for the Federal Circuit as follows: 1) Is the term

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misdescriptive of the character, quality, function, composition or use of the goods? 2) Are prospective purchasers likely to believe that the misdescription actually describes the goods? and 3) Is the misdescription likely to affect the decision to purchase? *In re Budge Manufacturing Co., Inc.*, 857 F.2d 773, 8 USPQ2d 1259, 1260 (Fed. Cir. 1988). Trademark Act § 2(a) is a bar to registration on both the Principal and the Supplemental Register. Trademark Act § 23(a); 15 U.S.C. § 1091.

II. Record on Appeal

The examining attorney has submitted various evidence in support of the refusal to register. We find the following particularly relevant:

- Dictionary definitions:²
 - **mink**
 -
 - 1. Any of various semiaquatic carnivores of the genus *Musatela*, especially *M. vison* of North America, resembling the weasel and having short ears, a pointed snout, short legs, and partly webbed toes.
 - 2. a. The soft, thick, lustrous fur of this animal. b. A coat, stole or hat made of the fur of this animal.
 - **bikini**
 -

² Two more dictionary definitions of "mink" were added to the final Office action, although it is not clear what, if anything, they add to the one quoted above.

1. a. A very brief, close-fitting two-piece bathing suit worn by women. b. A very brief, close-fitting bathing suit worn by men.
2. Often bikinis. Brief underpants that reach up to the hips rather than to the waist.

THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. 1992) (electronic version).

- The first page of search results lists for the words "mink clothing" from both Google and Ebay
- Copies from numerous webpages³ indicating advertising and sale of clothing made of (or including parts made of) mink fur, and information regarding the use of fur as clothing, including:
 - Two web pages advertising fur products by "Attila the Hun." "Attila specializes in customized fur ... apparel and accessories.... Categories include ... fur hats, mitts, and headbands, fur swimwear.... Select from premium taxidermy furs in wolf, fox, wolverine, mink, marten, beaver, otter and more!" and "The beaver bikini is a Hun exclusive.... Available also in otter for the shorter, cropped look."
 - amazon.com listing for a "Fox Fur Thong Bikini," at \$220.00 - \$320.00.
 - Wild Things Trading-Post web listing for a fur bikini: "Rabbit fur thong bikini with adjustable deerskin ties and fur tail."
 - Several articles from the Internet
 - From the New York Times, October 30, 2006, an article discussing the recent use of mink for sportswear;

³ None of the examining attorney's web-based evidence includes the URL or the date on which the image was captured. Such information should be included so that the applicant may examine the source of the evidence. Nonetheless, because applicant did not object to the use of such evidence, it waived any objection on that basis.

- Steve Rubin, *From Bardot to Graf, from Ground Zero to Grass, Here's the Skinny on the Two-Piece*, Bikini Atoll. This article discusses the history of bikini swimwear, noting many variations on the theme. The mink bikini, it is explained, first debuted at the Venice Film Festival in 1955, providing partial cover for "pinup girl Diana Dors."
 - From StyleHive, a description of a "Faux Fur kini top" selling for \$35.00.
 - Dan Monk, *Business Courier, Fake Fur Firm Dressing for SI Bikini Shoot*. This article discusses a "faux-fur bikini" for Sports Illustrated's swimsuit edition.
- A number of articles extracted from the LEXIS/NEXIS database discussing generally the quality and selection of fur clothing, and mink clothing in particular.⁴

Applicant has submitted the following evidence in support of registration:

- Three "Declaration[s] ... that the mark is at most misdescriptive." One declaration was signed by applicant's "co-director," one by a dealer in applicant's goods, and one by a customer of applicant's goods. Attached to applicant's declaration was:
 - Applicant's registration of MINK BIKINI from the U.K. Trade Marks Registry.

⁴ This evidence comprises approximately 75 pages, although none of the articles is specifically mentioned or quoted in the examining attorney's Office actions or brief. The relevance of much of this submission is unclear, and it seems to have been attached simply to support the assertion (not contested by applicant) that mink is a highly-desired fur which "convey[s] a sense of wealth and opulence to the owner." It would have been helpful in reviewing this record if the examining attorney had been more specific as to why this evidence was submitted.

- o The webpage of a shop in the U.K. which carries applicant's goods, www.bath.co.uk/pinstripes.
- o A copy of a page (no source or URL indicated) which discusses applicant's "Silk Bow Dress."⁵

III. Deceptiveness under Trademark Act § 2(a)

At the outset, we note applicant's argument that the misdescriptiveness of its mark "comes from the phrase MINK BIKINI," not just the word "mink" in isolation. For instance, applicant claims that the examining attorney has

[d]isregard[ed] why the mark "works" - that is, disregard[ed] the fact that joining the words "MINK" and "BIKINI" to create a trademark for the relevant goods results in a mark so highly misdescriptive - in fact, so ironic - that the prospective purchasers are simply not likely to believe that the mark actually describes the goods or to be influenced by the misdescription.

Reply Br. at 1. The mark as a whole, applicant argues, is therefore not deceptive.

There is no requirement that the entire mark be deceptive (or even descriptive) in order to refuse registration under Trademark Act § 2(a). Many cases have found compound marks deceptive based on only one element of the mark. See, e.g., *In re Budge Mfg. Co.*, 8 USPQ2d 1790 (TTAB 1987), *aff'd* 857 F.2d 773, 8 USPQ2d 1259 (Fed. Cir. 1988) (LOVEE LAMB); *In re Phillips-Van Heusen Corp.*, 63

⁵ This page includes the following notation: "Length (centre back): 42 in (107 cm)." The use of the British spelling of

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USPQ2d 1047 (TTAB 2002) (SUPER SILK); *In re Perry Mfg. Co.*,
12 USPQ2d 1751 (TTAB 1989) (PERRY NEW YORK); *In re Shapely,*
Inc., 231 USPQ 72 (TTAB 1986) (SILKEASE); *Evans Products Co.*
v. Boise Cascade Corp., 218 USPQ 160 (TTAB 1983) (CEDAR
RIDGE).

Moreover, we disagree with applicant that its mark would be seen as "ironic" or incongruous, such that prospective purchasers would not believe the misdescription. The examining attorney's evidence shows that the mark is not incongruous because bikinis made of mink and other furs are actually available, and have been exposed to the public through celebrities and well-distributed fashion photographs. While we doubt that the market for fur swimwear is a large segment of the larger swimwear market, it nevertheless does exist, making the mark plausible, rather than incongruous. In short, the addition of "bikini" to the word "mink" does not transform the latter into something else which would not be understood to refer primarily to fur or fur swimwear.

A. Is MINK BIKINI Misdescriptive?

There is no dispute as to the meaning of "mink," and the evidence of record amply supports the examining

"center" and inclusion of the measurement in centimeters implies that this website is also from a U.K. source.

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attorney's contention that a wide variety of clothing is made of (or includes) mink fur. Here, applicant has indicated that its goods are not made of mink, and has amended its identification of goods to specifically exclude such products. There is no doubt that applicant's mark is misdescriptive; indeed, applicant agrees that its mark misdescribes the composition of its goods. Applicant's Br. at 3.

We are aware, of course, that applicant has expressly "exclud[ed] bikini swimwear, bikini underwear, and all other types of bikini clothing and all clothing made of mink" from its identification of goods. Nonetheless, this exclusion is ineffective to avoid a deceptiveness refusal. Applicant argues that customers could not possibly mistake something like silk (which some of its goods are made of) for mink. But while applicant has excluded mink from its mark, it has not excluded articles made of other types of fur, or even fake fur, which could clearly be confused with mink. Thus, applicant's goods include items made of other furs or fur-like material that could indeed be mistaken for mink.

Moreover, it is highly unlikely that prospective purchasers of applicant's products would be aware of applicant's narrow exclusion of mink or bikinis from its

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trademark registration, should one issue. *Cf. Electro Corp. v. Electro Sensors, Inc.*, 196 USPQ 315, 320 (TTAB 1977) ("prospective purchasers ... would not be aware of the disclaimers, much less of their significance; as it has been indicated, they slumber in the archives of the Patent Office."). Exclusion of goods in this way simply guarantees the falsehood of an otherwise plausible feature or characteristic named in the mark, and is ineffective to mitigate the effect of an otherwise deceptive mark. *See In re Budge*, 8 USPQ2d at 1261, n.3 (LOVEE LAMB found deceptive for "automotive seat covers"; applicant's proffered amendment to "simulated sheepskin automotive seat covers" would not have helped).

B. Are Prospective Purchasers Likely to Believe the Misdescription?

Applicant focuses much of its argument on its belief that purchasers of its products are not likely to believe that applicant is offering clothing made of mink. Applicant correctly states the general proposition that "[i]f a term immediately conveys such an idea but the idea is false, *although plausible*, then the term is deceptively misdescriptive and is unregistrable under [Trademark Act]

§ 2(e)(1),"⁶ and that "the test for deceptiveness focuses on the potential for confusion among Applicant's prospective customers rather than among the population in general."

Applicant's Brief at 3-4.

It is apparent, however, that applicant's argument has gone off-track when applicant describes the potential purchaser of its goods:

Applicant's customers are almost exclusively women in their late teens, 20s, and early 30s who live in urban areas, follow fashion trends closely, buy much of their clothing at small boutique stores for women, are sophisticated, discerning, and careful shoppers, and fully understand that the [g]oods do not include any type of mink clothing or bikini clothing. Such sophisticated shoppers are highly unlikely - far more than just "not likely" - to believe that the misdescriptive MINK BIKINI mark actually describes the [g]oods.

Applicant's Br. at 4 (citations omitted).

While this passage may indeed describe applicant's actual customers, it is important to realize that we are

⁶ Applicant appears here to confuse the issues of deceptiveness under Trademark Act § 2(a) and deceptive misdescriptiveness under Trademark Act § 2(e)(1). The latter may be cured by disclaimer, amendment to the Supplemental Register, or by a showing of acquired distinctiveness, as appropriate, while the former is an absolute bar to registration. The concepts are related, however; the test for determining deceptive misdescriptiveness consists of the first two elements of the test for deceptiveness set out above. In this case, the examining attorney properly withdrew the refusal to register under Trademark Act § 2(e)(1) when applicant sought registration on the Supplemental Register; deceptive misdescriptiveness is not a ground for refusal of registration on the Supplemental Register. See Trademark Act § 23.

for the most part, not concerned with applicant's actual practice in the marketplace;⁷ applicant seeks to obtain a trademark registration, and it is thus the application which is at issue here. Notwithstanding applicant's arguments, we are required to construe the application as broadly as it is written, because what is in the application will determine the metes and bounds of any registration which issues from it. See, e.g., *Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank*, 1 USPQ2d 1813 (Fed. Cir. 1987); *In re Linkvest S.A.*, 24 USPQ2d 1716, 1717 (TTAB 1992); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981).

In this case, applicant identifies ordinary items of woman's clothing. While applicant's current products may indeed be high-fashion, small-production clothing sold to a hip and sophisticated clientele, we may not read such a

⁷ This application is based on Trademark Act § 44, as noted above, and applicant has deleted its originally-asserted intent-to-use filing basis. We assume that applicant's discussion of its use of the mark refers to use in another country. This assumption is supported by applicant's evidence relating to actual use of the mark, all of which appears to be from U.K. sources.

Applicants under Trademark Act § 44 are entitled to a U.S. registration without demonstrating use of the mark. Nonetheless, to the extent applicant here relies on evidence of its use in another country as support for arguments about how consumers would perceive the mark here, we must view that evidence with caution, because it is not clear that such perceptions would be the same in this country. As George Bernard Shaw famously quipped, "England and America are two countries separated by a common language."

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limitation into applicant's broadly-described goods. There is nothing in applicant's identification of goods that distinguishes them from the mine run of women's dresses, trousers, skirts, jumpsuits, etc. sold in any other store. On the contrary, we must construe its goods to include all such items, whether expensive or cheap, fashionable or plain. Further, in the absence of any restrictions, we must also presume that applicant's customers include all of the usual purchasers for such goods. *E.g. In re Elbaum*, 211 USPQ at 640. Thus construed, it hardly merits discussion to say that the potential purchasers of such goods are not necessarily sophisticated or knowledgeable, since the relevant class includes all people who buy women's clothing.

The relevant question then is not whether applicant's actual purchasers would believe that applicant's actual goods include mink; instead, we must determine whether ordinary purchasers of the type of goods identified in the application would so believe. The evidence of record indicates that such purchasers would. The examining attorney has submitted evidence indicating the use of mink on a variety of clothing items, including coats, jackets, caps, hats, and even bikinis. It is plain to see that - in applicant's own words - the "idea [conveyed by the mark]

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is ... *plausible*," and that it is thus deceptively misdescriptive, answering in the positive the first two factors in the test for deceptiveness.

C. Is the Misdescription Likely to Affect the Decision to Purchase?

We finally consider whether the misdescriptiveness of the mark would be a factor in a decision to purchase the goods. The examining attorney submitted pages from several websites to show that fur in general and mink in particular is a desirable material for woman's clothing in general, and in particular with respect to at least some of applicant's goods. This evidence is sufficient to establish that mink is perceived by prospective purchasers as a luxury and high-quality item that imbues the owner with status and would materially affect the purchasing decision.

IV. Other Issues

We have carefully considered the declarations submitted by applicant. Three declarations were submitted, one each by the applicant's co-director, a dealer in applicant's goods, and by a customer. The declarations are largely identical, except for the parts of applicant's declaration which discuss the attached exhibits.

We do not find that these declarations support a different result in this case for a number of reasons. First, many of the averments are simply legal arguments which add nothing to the briefs. Second, the factual allegations are largely directed to the issue of what applicant's goods actually are and to whom they are actually sold. As discussed above, these issues are not relevant because the application contains no relevant limitations on applicant's goods, channels of trade, or classes of customers. Third, although some of the allegations might possibly be relevant, e.g. Applicant's Dec. ¶ 17 ("Applicant is not aware of a single customer for its Goods who has ever requested any MINK BIKINI brand mink clothing or bikini clothing of any type whatsoever."), it is difficult to assess the probative value of such statements without further information, such as how long applicant has been selling MINK BIKINI clothing, the volume of its sales, how many retail outlets it has, and where they are. It is likewise not stated how long the dealer and customer have maintained their respective relationships with applicant.

As noted, applicant has submitted a United Kingdom certificate of registration for MINK BIKINI. Applicant argues that this registration is evidence that the

examining attorney's refusal is unfounded. Suffice it to say that decisions made in another country based on a different statute have absolutely no relevance here.

Applicant also argues that refusal of its registration would be inconsistent with the USPTO's treatment of the registered marks FRENCH LAUNDRY and GRASS. While consistency is a worthy goal, each application must be examined on its own, based on the evidence in the record. The Board is not bound by the decisions of examining attorneys in approving other marks for registration.⁸ *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001).

Finally, applicant notes that the examining attorney at one point approved applicant's mark for registration on the Principal Register, and implies that the subsequent withdrawal of that approval was unfair or improper. We cannot take up this question because the Board does not have supervisory authority over examining attorneys; the only question we may properly answer is whether a mark is registrable, which we do here. If applicant believed the action of the examining attorney was improper, it could have raised that issue by way of a petition to the Director

⁸ We do not mean to imply that registration of these third-party marks was in error. We have not examined these registrations for

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of the Patent and Trademark Office. See Trademark Rule 2.146(a)(3). But applicant did not do so, and we must decide the question at hand.

V. Conclusion

After careful consideration of the evidence of record and of the entire file, we conclude that applicant's mark is deceptive under Trademark Act § 2(a), and that registration is accordingly barred.

Decision: The refusal to register is affirmed.

that purpose because even if they are deceptive, that fact would not give applicant the right to register another deceptive mark.