

THIS OPINION IS NOT A  
PRECEDENT OF THE  
TTAB

18 June 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Olin Corporation

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Serial Nos. 78496004 and 78501223

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Elizabeth D. Odell of Harness, Dickey & Pierce, PLC for  
Olin Corporation.

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(Tomas V. Vlcek, Managing Attorney).

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Before Grendel, Drost, and Cataldo, Administrative  
Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

Olin Corporation (applicant) applied to register the  
term XTENDED RANGE in standard character form (Serial No.  
78496004 filed October 7, 2004) and in the stylized form  
shown below (Serial No. 78501223) on the Principal  
Register:



The goods in both applications are identified as "ammunition and reloading parts of ammunition" in Class 13. The applications were eventually amended to claim a date of first use and a date of use in commerce of January 31, 2005, and to seek registration on the Supplemental Register. Trademark Act, § 23, 15 U.S.C. § 1091. In the '004 standard character application, applicant has disclaimed the term "Extended." In the '223 stylized application, "Applicant confirms that it disclaims the words 'Extended Range.'" Reply Brief at 3. See also Request for Reconsideration at 1 ("Applicant disclaims the words 'extended range' to make it clear that registration of Applicant's mark will not preclude third parties from using the words descriptively"). On September 20, 2007, after applicant's briefs were filed, the board ordered these appeals consolidated.<sup>1</sup>

The examining attorney (Brief at unnumbered p. 3) has set out three issues for these appeals:

1. Whether the mark XTENDED RANGE, a misspelling of the term "extended range" is capable of identifying the applicant's goods on the Supplemental Register.
2. Whether the applicant's misspelling and/or stylization of the marks XTENDED RANGE create a commercial impression separate and apart from the wording EXTENDED RANGE.

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<sup>1</sup> Unless otherwise indicated, references to the record will be to the '004 application.

3. Whether the applicant's amendment to seek registration on the Supplemental Register precludes consideration of a claim in the nature of acquired distinctiveness.

After the examining attorney made these refusals under Section 23 final, applicant filed requests for reconsideration and these appeals.

The '223 Application

Inasmuch as applicant has now amended the applications to seek registration on the Supplemental Register, it is clear that the term XTENDED RANGE is at least merely descriptive. *In re Consolidated Foods Corp.*, 200 USPQ 477, 478 n.2 (TTAB 1978) ("Registration of the same mark on the Supplemental Register is not prima facie evidence of distinctiveness; in fact, such a registration is an admission of descriptiveness"). *See also Quaker State Oil Refining Corp. v. Quaker Oil Corp.*, 453 F.2d 1296, 172 USPQ 361, 363 (CCPA 1972) ("We also agree with the observation of the board that, when appellant sought registration of SUPER BLEND on the Supplemental Register, it admitted that the term was merely descriptive of its goods").

As noted above, in the '223 application, applicant has disclaimed the wording "Extended Range" in accordance with standard USPTO disclaimer practice. TMEP § 1213.08(c) (5<sup>th</sup> ed. rev. September 2007):

If a mark comprises a word or words that are misspelled but nonetheless must be disclaimed, the examining attorney should require disclaimer of the word or words in the correct spelling. See *In re Omaha National Corp.*, 819 F.2d 1117, 2 USPQ2d 1859 (Fed. Cir. 1987); *In re Newport Fastener Co. Inc.*, 5 USPQ2d 1064, 1067 n.4 (TTAB 1987). The entry of a disclaimer does not necessarily render registrable a mark that is otherwise unregistrable.

With the wording disclaimed, in the '223 application, the question is simply whether the stylization of the mark is capable of indicating the origin of applicant's goods. In *In re The Wella Corp.*, 565 F.2d 143, 196 USPQ 7 (CCPA 1977), the Court of Customs and Patent Appeals held that the term, in the display shown below, was registrable on the Supplemental Register, with the word "Balsam" disclaimed.



Subsequently, the board found that the term YOGURT BAR displayed in the style shown below was also registrable on the Supplemental Register with a disclaimer of "Yogurt Bar." *In re Carolyn's Candies, Inc.*, 206 USPQ 356 (TTAB 1980).



In this case, applicant's mark is at least as capable of serving as a trademark as the "balsam" mark. The letter "X" is displayed in an unusual style that almost suggests a lightning design as part of the initial letter "X."



Because of the properly worded disclaimer of the terms in the '223 application, the amendment to the Supplemental Register, and the stylization of the mark, we conclude that the mark is capable of serving as a trademark and the examining attorney's refusal to register the mark under Section 23 of the Trademark Act is reversed.

We add that applicant's amendment to the Supplemental Register on November 7, 2005, while disagreeing with the examining attorney's descriptiveness refusal, was an unequivocal amendment to the Supplemental Register and not an alternative argument. Indeed, in its next response, applicant concludes by arguing that its mark "is not generic for applicant's goods, and that the refusal or registration should be withdrawn." Response dated July 24, 2006 at 2. Therefore, there is no issue regarding acquired

distinctiveness of applicant's mark. See *In re Rosemount Inc.*, 86 USPQ2d 1436, 1437 (TTAB 2008) ("[A]lthough applicant's initial request to register on the Supplemental Register was presented as an alternative, in its subsequent responses to the office actions in both applications applicant clearly requests registration on the Supplemental Register. In addition, in its supplemental brief, applicant only addresses the issue of genericness and in its reply brief applicant states that 'at most the marks are descriptive' and continues to request registration on the Supplemental Register. In view thereof, the only issue we must determine on appeal, as the examining attorney presented in his brief, is whether the term "REDUCER" is generic for the identified goods").<sup>2</sup>

#### Genericness

The central issue here is whether the term XTENDED RANGE is a generic term for ammunition. The Court of Appeals for the Federal Circuit has held that: "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

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<sup>2</sup> The examining attorney notes that while "in the nature of an acquired distinctive claim, [applicant's argument] was not nominally presented as either a 2(f) and/or acquired distinctiveness claim, nor was it supported by an acceptable declaration." Brief at 13.

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). See also *In re International Business Machines Corp.*, 81 USPQ2d 1677, 1679 (TTAB 2006).  
Generic terms are not limited to terms used as nouns.

Here, we recognize that applicant's mark does not present the classic case of a generic noun, but rather a generic adjective. In this case, because the term ATTIC directly names the most important or central aspect or purpose of applicant's goods, that is, that the sprinklers are used in attics, this term is generic and should be freely available for use by competitors. See: *In re Northland Aluminum Products, Inc.*, [777 F.2d 1566, 227 USPQ 961] (BUNDT for coffee cake held generic); *In re Sun Oil Co.*, 426 F.2d 401, 165 USPQ 718 (CCPA 1970) (CUSTOMBLENDED for gasoline held generic because category of gasoline was blended personally for the motorist)...

*In re Central Sprinkler Co.*, 49 USPQ2d 1194, 1199 (TTAB 1998).

The *Ginn* case explains that:

Determining whether a mark is generic therefore 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.*

In this case, the genus of the goods would be "ammunition and reloading parts of ammunition." We now must consider whether relevant public would understand the term "Extended Range" as referring to that genus.

"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, Fenner and Smith Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987). Here, the relevant purchasers would include all types of purchasers of ammunition for a wide variety of weapons.

The examining attorney has submitted the following evidence to support his argument that the term "Extended Range" is generic for ammunition. The examining attorney has included definitions of (1) "extended" as "to enlarge the area, scope, or range of" and (2) "range" as "the maximum extent or distancing limiting operation, action, or effectiveness, as of a projectile..." First Office Action, attachment. In addition, he included excerpts from LEXIS/NEXIS and the internet, some of which are set out below with emphasis added, that show how the term "extended range" is used.

**Extended range** ammunition is Remington's first entry into the premium quality field. Accuracy and performance were all important when the ammo development team started this project.  
[www.ableammo.com](http://www.ableammo.com)

Some were the exceptional Fiocchi Max 1-ounce slug, with a mix of various types from the shell box. These are noted for accuracy at **extended range**.

[www.gunweek.com](http://www.gunweek.com)

Remington's 190-gram **Extended Range** cartridge  
[www.shooting-hunting.com](http://www.shooting-hunting.com)

Shotguns in the 21<sup>st</sup> Century...

**Extended Range** - Life threatening stress often plays havoc with the officer's ability to hit beyond a few yards.

[www.policeone.com](http://www.policeone.com)

Remington Wingmaster HD Ammunition - Per Box...  
Enhanced per-pellet energy and **extended range** penetration  
[www.cabelas.com](http://www.cabelas.com)

Sellier & Bellot® Buckshot

**Extended range**, power, maximum penetration, consistent reliability

[www.sportsmanguide.com](http://www.sportsmanguide.com)

Lightfield Less Lethal Wildlife Control Ammunition

Gauge	Shell Length	Projectile Type	Range Class
12	2¾	Rubber Buckshot (21 pellets)	Close Range (8-25 yards)
12	2¾	.75 Caliber Twin Rubber Balls	Mid Range (25-50 yards)
12	2¾	.73 Caliber Rubber Slug	Mid Range (25-50 yards)
12	2¾	<b>Extended Range</b> .73 Caliber Rubber Slug	<b>Extended Range</b>

[www.lightfieldslug.com](http://www.lightfieldslug.com)

At a density of 12.0 grams/cc. Wingmaster HD's non-toxic tungsten/bronze/iron composition is 10% denser than lead and a whopping 56% denser than steel, which dramatically enhances per-pellet energy and **extended-range** penetration.

[www.remingtonproducts.com](http://www.remingtonproducts.com)

The **Extended Range** ammunition offers the customer ammo that shoots flatter, with a tighter group and more downrange energy than before.

*Shooting Industry*, October 1991

The Legacy is fitted with the superb Marbles rear tang sight, which is adjustable for windage and elevation without tools. It is a very good sight for **extended range** shooting.

[www.gunblast.com](http://www.gunblast.com)

Likewise, loads that are effective at **extended range** may be too powerful for humans at close range. In response to that situation, Lightfield has calibrated its wildlife control line into the following basic classes: Close range 8-25 yards, Mid-range 25-50 yards and **Extended range** 50+ yards.

[www.lightfieldslug.com](http://www.lightfieldslug.com)

Mid Range Extended Steel Shot Tubes for those situations where you are shooting 24 to 40 yards.

**Extended Range** Steel Shot Choke Tubes for taking shots 40 yards and up. The best patterning long range choke tube.

[www.wholesalehunter.com](http://www.wholesalehunter.com)

**Extended Range** ammo was Wilmington, Del.-based Remington's response last year to the competition's premium-type centerfire ammunition.

*Shooting Industry*, August 1992

SLUG: The 436 grain .70 caliber projectile comes out of the shotgun at a speed which allows it to maintain its accuracy for an **extended range**.

[www.blackwateruse.com](http://www.blackwateruse.com)

This approval qualified Federal's HEAVYWEIGHT as an acceptable waterfowl load, and will allow duck and goose hunters to take advantage of the **extended range** and powerful penetration HEAVYWEIGHT brings to the table.

[www.federalpremium.com](http://www.federalpremium.com)

Designed to gain compliance through pain, impact weapons shoot projectiles from guns or other **extended-range** launchers at varying distances. They include beanbags, rubber bullets, sponge rounds and baton

rounds the name given to circular blocks of foam, plastic, rubber or wood.

*Long Beach Press-Telegram*, January 18, 2003.

A man was in a vehicle with a rifle shooting at us, and we couldn't get close because of the rifle's **extended range**.

*Austin American-Statesman*, October 11, 2002.

The newer guns can fire the new **Extended Range** Guided Munition to enable targets to be hit far inland.<sup>3</sup>

*Navy Times*, July 8, 2002.

It is designed for modern muzzleloading rifles that have **extended range**.

*Shooting Industry*, December 1, 2001.

Dragon Fire will be a rapid fire, auto-loader with a 32-round magazine remote controlled mortar system capable of delivering highly lethal strikes up to 14 kilometers when using **extended-range** ammunition...

*C4I News*, April 9, 1998.

This is especially true when shots are taken at **extended ranges**, which in big game hunting we define as anything over 300 yards.

[www.gun-tests.com](http://www.gun-tests.com)

In response, applicant submitted copies of fourteen registrations that it owns for ammunition, firearms and other related goods and services for various marks containing the letter "X." See Request for Reconsideration, Attachments (X SUPER-MATCH (stylized), XPERT (Stylized), SUPER X, XX (stylized), DOUBLE X, SUPER GREX, CXP, and SXT).

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<sup>3</sup> We note that applicant's goods are broadly defined as "ammunition."

The examining attorney argues that the relevant goods "may be considered either extended range ammunition or ammunition for extended range rifles or extended range shooting... The examining attorney's arguments and evidence in support thereof clearly show that 'extended range' is a common unitary term as to firearms and ammunition, and as used must be considered a generic term for the goods in question." Brief at 10-11.

Applicant maintains (Reply Brief at 4) that:

XTENDED RANGE creates a double, or even triple entendre: the combination of the source indicator X with the words TENDED and RANGE can be suggestive of Applicant's role in more than one way to potential buyers of Applicant's ammunition and reloading parts of ammunition. Each of the marks is another of Applicant's "X" marks in which "X" is combined with other elements to indicate Applicant as the source of the goods while creating a double entendre. Such marks, for example, XPERT (Registration No. 0199903) and DOUBLE X (Registration No. 1027881). Marks registered outside the United States include XPEDITER and XTENDED RANGE.<sup>4</sup>

The evidence that the examining attorney has submitted shows that there is a type of ammunition that is referred

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<sup>4</sup> While applicant's declarant (Schrimp dec. ¶ 3) indicated that applicant "maintains approximately thirty different (30) marks outside the United States that include the letter X," the ownership of foreign registrations would not support applicant's argument that its mark is registrable in the United States. *Accord In re Thomas*, 79 USPQ2d 1021, 1025 n.7 (TTAB 2006) ("Applicant's arguments concerning the analysis used by the Japanese Trademark Office to determine the similarity of marks are not relevant").

to as "Extended Range" ammunition. The [www.lightfieldslug.com](http://www.lightfieldslug.com) site classifies 12-gauge shotgun shells by "Range Class." These classes include "Close Range," "Mid Range," and "Extended Range." The same site refers to "Extended Range" as being "50+ yards" for shotguns. The *Shooting Industry* publication similarly points out that "Extended Range ammunition offers the customer ammo that shoots flatter, with a tighter group and more downrange energy." The [www.ableammo.com](http://www.ableammo.com) also refers to "Extended range ammunition." As we indicated earlier, we must assume that applicant's ammunition includes all types of ammunition, including ammunition for shotguns that are designed for "extended range."

We add that the term "Extended Range" is also used to refer to all types of weapons, firearms, ammunition, and firearms parts (such as chokes) that enhance the range of the projectile. See [www.policeone.com](http://www.policeone.com) (shotguns); [www.wholesalehunter.com](http://www.wholesalehunter.com) ("Extended Range Steel Shot Choke Tubes"); *Navy Times* (Extended Range Guided Munition); *Shooting Industry* (Muzzleloading rifles); and *C4I News* (extended-range ammunition for mortars). The term is commonly used to refer to ammunition and firearms that enhance the range of the fired projectile ("extended range

penetration," "extended range, power, maximum penetration," and "accuracy for an extended range").

Based on this evidence, we agree with the examining attorney that the term "Extended Range" would be understood by the relevant public to refer to the genus of applicant's goods. *Ginn*, 228 USPQ at 530. The public would understand that the term "Extended Range" is a specific type of ammunition that increases the range of the projectile.

However, this finding is not the end of the case because applicant's mark is not EXTENDED RANGE but rather XTENDED RANGE. While applicant argues that the term XTENDED "is more than a 'mere misspelling' or 'phonetic equivalent' to the word 'extended' (Reply Brief at 4), except for the absence of the initial letter "E," applicant's term is identical to the term "extended range." Furthermore, while applicant suggests that its mark would be pronounced "with emphasis on the 'X'" (Brief at 6), it is not clear why that would result in a significantly different pronunciation from the term "extended," which would nonetheless be pronounced with an initial "X" sound. Therefore, there is no basis to conclude that the terms "extended" and "xtended" would not be pronounced virtually the same.

It has been recognized that a slight misspelling does not convert a generic term into a non-generic term. See *Nupla Corp. v. IXL Manufacturing Co.*, 114 F.3d 191, 42 USPQ2d 1711, 1716 (Fed. Cir. 1997) ("Based on overwhelming documentary evidence of record showing widespread and long-time prior use of the CUSHION-GRIP mark in the hand tool industry, we agree with the district court's conclusion that there is no genuine issue of material fact that Nupla's mark [CUSH-N-GRIP], which is merely a misspelling of CUSHION-GRIP, is also generic as a matter of law, and the registrations are therefore invalid"); *Weiss Noodle Co. v. Golden Cracknel And Specialty Co.*, 290 F.2d 845, 129 USPQ 411, 413 (CCPA 1961) ("In the instant case registration of the Hungarian name for noodles, 'haluska' or its phonetic equivalent in English, whether or not hyphenated, would be contrary to law..."); *In re A La Vielle Russie Inc.*, 60 USPQ2d 1895 (TTAB 2001) (RUSSIANART generic for particular field or type of art and also for dealership services directed to that field); *Micro Motion Inc. v. Danfoss A/S*, 49 USPQ2d 1628, 1631 (TTAB 1998) ("[T]he misspelling here still results in the phonetic equivalent of the generic term. The terms 'mass flow' and 'massflo' are pronounced the same and, given the commonly understood meaning of the term 'mass flow' in the trade, we have no

doubt that the two terms would be viewed as having the same meaning"). Omitting the letter "E" in the front of the term does not change the term from a generic term to a non-generic one when the terms would be pronounced virtually identically and have the same meaning.

Applicant does argue that potential purchasers would recognize the letter X as a source indicator "suggestive of Applicant's role." Reply Brief at 4. The fact that applicant owns several registration and that its declarant (Schrimp dec. ¶ 2) indicated that it "continues to use the X in its marks because potential purchasers, both in the United States and abroad, have come to associate the marks with ... Olin" does not show that purchasers will associate the letter X as part of a family of marks owned by applicant that would detract from the generic nature of the term. *In re 3Com Corp.*, 56 USPQ2d 1060, 1062 (TTAB 2000) (In a genericness case, applicant "has not established a family of 'link' marks. The mere existence of a number of registrations containing a particular term does not make it a 'family'"). In order to show that it has a family of marks, it "must be shown that the marks containing the family feature have been used and promoted together in such a manner as to create public recognition." *Id.* at 1063 n.4. The evidence in this case does not demonstrate this

family feature and we instead conclude that prospective purchasers will view the term XTENDED RANGE as simply a slight misspelling of the generic term EXTENDED RANGE and, therefore, it too is generic for ammunition.

After we have considered all the evidence in this case, we find that the term XTENDED RANGE is not capable of distinguishing applicant's goods from those of others and, therefore, we affirm the examining attorney's refusal to register.<sup>5</sup>

Decision: The refusal to register applicant's term XTENDED RANGE (stylized) in Serial No. 78501223 on the Supplemental Register is reversed. The refusal to register applicant's mark XTENDED RANGE (in standard character form) in Serial No. 78496004 on the Supplemental Register on the ground that it is incapable of distinguishing its goods from those of others is affirmed.

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<sup>5</sup> As we have indicated earlier, the issue of acquired distinctiveness is not before us. However, we have considered all the evidence of record and we point out that if a term is generic, which we have found in this case, then no amount of evidence of acquired distinctiveness can establish that the mark is registrable. *Northland Aluminum*, 227 USPQ at 964.