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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Dana Innovations

Serial No. 78576297

Bruce B. Brunda of Stetina Brunda Garred & Brucker for Dana Innovations.

Richard F. White, Trademark Examining Attorney, Law Office 109 (Dan Vavonese, Managing Attorney).

Before Hairston, Bucher and Cataldo, Administrative Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

This is an appeal by Dana Innovations from the trademark examining attorney's final refusal to register SHAREMUSIC as a trademark for "audio equipment, namely, modules and connectors for interfacing home audio systems to portable audio players and recorders; speakers, volume controls, speaker switches, audio source switches,

amplifiers and tuners.”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 the identified goods. Applicant and the examining attorney filed appeal briefs.

It is the examining attorney’s position that “the mark SHAREMUSIC describes the purpose of the identified goods. Audio equipment is commonly used to share music between various users and mediums, especially in a digital format.” (First Office action, p. 2). In response to the examining attorney’s request for information about its goods, applicant submitted a product brochure for a “Sonance iPort In-Wall Docking System for iPod™.” The system is described as consisting of a chassis, back plates and base cradles, a wall plate, DC power supply, cables and mounting template. According to the brochure, “[T]he Sonance iPort makes it easy for the entire family to use the Apple iPod™ to enjoy their digital music and digital photo collections throughout the entire home.”

¹ Application Serial No. 78576279, filed February 28, 2005, based on an asserted bona fide intention to use the mark in commerce. Applicant subsequently filed an Amendment to Allege Use, alleging first use of the mark anywhere and first use in commerce on January 3, 2005. The application also covers articles of clothing, but these goods are not the subject of the refusal.

In support of his position that SHAREMUSIC is descriptive of applicant's goods, the examining attorney has relied on definitions of the words "*share*" ("to allow someone to use or enjoy something that one possesses") and "*music*" ("vocal or instrumental sounds possessing a degree of melody, harmony, or rhythm") from The American Heritage Dictionary of the English Language (4th ed. 2000).²

The examining attorney also submitted materials taken from various Internet websites. In particular, an article at www.halfbakery.com titled "Mp3 music share" states:

Share your music with others using FM/infrared headphones

Hiking in the mountains, dancing on the beach - two or more people could share music from a portable Mp3 player (like the i-Pod) by connecting the player to an FM or infrared transmitter, and companions could wear headphones designed to pick up the signal.

Another website www.gamesindustry.biz/news, in announcing the release of the "Digital Audio Essentials" guide, states that the guide shows persons how to "[d]ownload and share music without breaking the law." At the website www.sbomagazine.com, there is a description of the free software application "Quartz Audio Master" which states

² These particular definitions are those quoted by the examining attorney in his brief, and are presumably those which he believed to be most apt.

that "the program is intended for people who want to record, compose, mix, play and share music using a computer and a sound card." Finally, in a posting at the website www.enotalone.com, a writer offers a review of a "Y adapter" manufactured by Monster Cable:

Though overpriced, if you are looking for a Y adapter, this is the one to buy. I use this adapter to share music by headphones and split the audio of my audio card to headphones and speakers, so when I want to listen to my headphones, I leave the speakers off and vice versa, so I don't have to crouch behind the computer.

Applicant, in urging reversal of the refusal to register, argues that its mark is at most suggestive. Specifically, with respect to the examining attorney's reliance on the definition of the word "share," applicant argues:

There is no evidence or allegation that Applicant's goods function to communicate music or any other information to anyone other than the user of Applicant's goods. While Applicant's goods may allow multiple users to, for example, hear music broadcast by an FM station, or recorded in a music file, there is no showing that the experience is commonly referred to as "sharing" the broadcast or music file. (Brief at 13).

Further, applicant contends that its goods are "distinguishable" in "structure, common function, and use" from the equipment referred to in the Internet materials submitted by the examining attorney. (Brief at 15). Thus,

it is applicant's position that the Internet materials do not demonstrate that the mark SHAREMUSIC is descriptive of applicant's identified goods.

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. In re Abcor Development Corp., 588 F.2d 811 (CCPA 1978). It is not necessary, in order to find that a mark is merely descriptive, that the mark describe each feature of the goods or services, only that it describe a single, significant quality, feature, etc. In re H.U.D.D.L.E., 216 USPQ 358 (TTAB 1982); and In re MBAssociates, 180 USPQ 338 (TTAB 1973). Further, it is well-established that the determination of mere 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, the context in which the mark is used, and the impact that it is likely to make on the average purchaser of such goods or services. In re Bright-Crest, Ltd., 204 USPQ 591 (TTAB 1979).

If, however, when the goods or services are encountered under a mark, a multistage reasoning process, or resort to imagination, is required in order to determine

the attributes or characteristics of the product or services, the mark is suggestive rather than merely descriptive. See *In re Abcor Development Corp.*, supra; and *In re Atavio*, 25 USPQ 136 (TTAB 1992). To the extent that there is any doubt in drawing the line of demarcation between a suggestive mark and a merely descriptive mark, such doubt must be resolved in applicant's favor. *In re Atavio*, supra at 1363.

The examining attorney bears the burden of showing that a mark is merely descriptive of the identified goods or services. *In re Merrill Lynch, Pierce, Fenner, and Smith Inc.*, 828 F.2d 1567, 4 USPQ2d 1141 (Fed. Cir. 1987).

In this case, we cannot say, based on the meanings of the individual words, "share" and "music," that the combination SHAREMUSIC is merely descriptive of applicant's goods. Purchasers and prospective customers would have to use some degree of thought or imagination to understand that applicant's audio equipment allows persons to "share music" in the sense that the equipment allows multiple persons to listen to music from a Mp3 player such as an Apple iPod™. See *In re Southern National Bank of North Carolina*, 219 USPQ 1231 (TTAB 1983) [MONEY 24 suggestive, not merely descriptive of banking services, namely, automatic teller machine services].

We have also considered the Internet materials submitted by the examining attorney which show use of the words "share music" in connection with audio and related products. However, the use of the words "share music" in these materials does not persuade us that the term SHAREMUSIC is a recognized term used to describe the identified goods. As applicant points out, none of the articles appear to pertain to its type of audio equipment. Furthermore, this evidence does not show descriptive use of the words "share music." Thus, we cannot conclude, on the basis of these uses, that the trade and/or customers regard either "sharemusic" or "share music" as a descriptive term for applicant's audio equipment.

In sum, on this record, we cannot conclude that SHAREMUSIC is merely descriptive of the goods in this case. As we have noted, if there is doubt about the merely descriptive character of a mark, that doubt must be resolved in applicant's behalf. Accordingly, we resolve our doubt in favor of publication of the mark, thereby allowing any party who believes he will be damaged to file an opposition.

Decision: The refusal to register under Section 2(e)(1) is reversed.