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PRECEDENT OF THE TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Point Noir Pty Ltd

Serial No. 78588436

Bradley M. Ganz of Ganz Law, P.C., for Point Noir Pty Ltd.

Julie A. Watson, Trademark Examining Attorney, Law Office
109 (Dan Vavonese, Managing Attorney).

Before Hairston, Bergsman, and Ritchie, Administrative
Trademark Judges.

Opinion by Ritchie, Administrative Trademark Judge:

Point Noir Pty Ltd, applicant herein, seeks
registration on the Principal Register of the mark "FOOT
THONG," in standard character format, for goods ultimately
identified as "footwear for dance and ballet," in
International Class 25.¹ The trademark examining attorney

¹ Serial No. 78588436, filed on March 16, 2005, under Trademark
Act Section 1(a) of the Trademark Act, 15 U.S.C. §1051(a),
alleging dates of first use and first use in commerce of June 8,
1998.

refused registration on the ground that applicant's mark is merely descriptive of the identified goods under Trademark Act Section 2(e)(1), 15 U.S.C. §1052(e)(1).² Both applicant and the examining attorney filed briefs. After careful consideration of all of the arguments and evidence of record, we affirm the refusal to register.

A term is deemed to be merely descriptive of goods or services, within the meaning of Section 2(e)(1), if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services. *See, e.g., In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987); and *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). Whether a term is merely descriptive is determined not in the abstract, but in relation to the goods or services for which registration is sought, the context in which it is being used on or in connection with those goods or services, and the possible significance that the term

² After receiving a final office action refusing registration of the proposed mark as merely descriptive, applicant sought an amendment to register it on the Supplemental Register. However, the examining attorney then issued a genericness refusal, and applicant withdrew its proposed amendment. The examining attorney again issued a final refusal to register on the Principal Register on the ground that applicant's proposed mark is merely descriptive. In its reply brief, applicant asked us to rule on whether applicant's mark is generic. Since that ground was not raised in the final refusal however, it is not before us

would have to the average purchaser of the goods or services because of the manner of its use. That a term may have other meanings in different contexts is not controlling. *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979). Moreover, it is settled that "[t]he question is not whether someone presented with only the mark could guess what the goods or services are. Rather, the question is whether someone who knows what the goods or services are will understand the mark to convey information about them." *In re Tower Tech Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002); *See also In re Patent & Trademark Services Inc.*, 49 USPQ2d 1537 (TTAB 1998); *In re Home Builders Association of Greenville*, 18 USPQ2d 1313 (TTAB 1990); and *In re American Greetings Corporation*, 226 USPQ 365 (TTAB 1985).

We consider a composite mark in its entirety. The composite is registrable only if as a unitary mark it has a separate, non-descriptive meaning. *In re Colonial Stores, Inc.*, 394 F.2d 549, 157 USPQ 382 (CCPA 1968) (holding SUGAR & SPICE not merely descriptive of bakery products). Thus, we consider whether the words "FOOT THONG" have a descriptive meaning as a unitary phrase. We have taken judicial notice of the relevant portions of the dictionary

and therefore we cannot render a decision as to whether "FOOT THONG" is generic.

definitions of the separate words "foot," and "thong."³ The examining attorney has also submitted a dictionary definition of the composite, "foot thong."

Definitions:

"Foot": Noun 1. The lower extremity of the vertebrate leg that is in direct contact with the ground in standing or walking . . . 3. Something suggestive of a foot in position or function . . . 5. The part of a stocking or high-topped boot that encloses the foot. **Intransitive verb** . . . 2. To dance. *American Heritage Dictionary of the English Language* (4th ed. 2000).

"Thong": Noun 1. A narrow strip . . . 3. A sandal held on the foot by a strip that fits between the first and second toes and is connected to a strap, usually passing over the top or around the sides of the foot. *American Heritage Dictionary of the English Language* (4th ed. 2000).

"Foot thong": Dance shoe that only protects the ball of the foot. It has little straps that run between the toes, hence the fabulous name - FOOT THONG! *Urban Dictionary*. (www.urbandictionary.com)

The examining attorney argues that "FOOT THONG" in relation to applicant's identified goods would be perceived by consumers as indicating a feature or characteristic of the goods, namely, that they are dance shoes with a strap between the toes. In addition to the dictionary definition listed above for "foot thong," the examining attorney submitted evidence of third-party trademark applications

³ The Board may take judicial notice of dictionary definitions. *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594 (TTAB 1982), *aff'd* 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

and advertisements that use the term "foot thong" descriptively in discussing, promoting, or identifying the nature of a footwear product. A sampling of the examining attorney's evidence includes the following:

Third Party Applications:

BUSHWACKERS, Appl. No. 74317021, filed 9/25/92, for "clothing articles, namely, sweatshirts, T-shirts, slippers, cape, hats, tank tops, foot thongs . . ." in International Class 25 (abandoned).

FABULOUS FEET, Appl. No. 77118933, filed 2/28/07, for "Gel and foam insoles and other products for footwear and footcare, namely, heel cushions, ball of foot cushions, gel spots, gel strips, gel insoles, foam insoles, gel foot thongs . . ." in International Class 25 (abandoned).

Advertisements:

Foot Thong: Suede sole pad provides protection for the ball of your foot. Gives the illusion of barefoot dancing while protecting the ball of your foot. Elastic strap across the top of foot provides a snug fit. *Dance 4 Less*.

Foot Thong Dance Shoe: *Foot thong*: Modern dancers need to protect the skin on the ball of their feet. Yet they do not like the look of a shoe. This product is as close to invisible as possible and is extremely comfortable and efficient. *The Movement Connection, Inc.*

Capezio "Footundeez" foot thong: *Women's "Footundeez" leather/mesh foot thongs*. *Barry's Capezio*.

While applicant admits that the word "thong" describes "a casual, flimsy sandal," (Applicant's Brief at 10), applicant argues that the mark is suggestive, rather than merely descriptive, when applied to footwear for dance and ballet. Furthermore, applicant argues against giving undue

weight to the dictionary definition of "foot thong" submitted by the examining attorney. However, we view dictionary definitions, as we view the other evidence, to show the relevant public's understanding of the term "foot thong." The record overwhelmingly demonstrates that the relevant public perceives the term "foot thong" as indicating a type of product, consisting of footwear with a strap between the toes, including footwear for dance or ballet. Accordingly, consumers would require no imagination to arrive at the understanding that applicant's proposed mark refers to a feature of its product. Applicant's other argument that the evidence of the term "foot thong" actually refers to applicant's own mark falls flat, since the record shows that the term is used by various third parties without trademark notation or source attribution, including as an identifying term within third-party trademark applications.

The primary purposes for refusing registration of a merely descriptive mark are "(1) to prevent the owner of a mark from inhibiting competition in the sale of particular goods; and (2) to maintain freedom of the public to use the language involved, thus avoiding the possibility of harassing infringement suits by the registrant against others who use the mark when advertising or describing

their own products." *In re Abcor*, 200 USPQ at 217. It would be difficult for competitors to describe this apparently common feature of their own footwear, including footwear for dance and ballet (*i.e.*, that it is a thong for a foot) if applicant were allowed to register "FOOT THONG."

In sum, it is clear that a consumer would understand "FOOT THONG" used in connection with applicant's goods as conveying information about them. *See In re Tower Tech Inc.*, 64 USPQ2d at 1316-17; *see also In re Conductive Services, Inc.*, 220 USPQ 84, 86 (TTAB 1983). Therefore we find that the mark is merely descriptive of the identified goods. Accordingly, we affirm the refusal to register.

Decision: The refusal to register under Trademark Act Section 2(e)(1) is affirmed.