

THIS DISPOSITION IS NOT A
PRECEDENT OF THE TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Rebecca Brough

Serial No. 78680981

Request for Reconsideration

Kenneth A. Linzer of Linzer & Associates, P.C. for Rebecca Brough.

Robert Clark, Trademark Examining Attorney, Law Office 101 (Ronald R. Sussman, Managing Attorney).

Before Zervas, Kuhlke and Taylor, Administrative Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

On February 29, 2008 applicant filed a request for reconsideration of the Board's decision issued on January 30, 2008, wherein the Board affirmed the refusal to

register applicant's mark  under Sections 2(e)(1) and 2(a) of the Trademark Act on the ground that applicant's mark is deceptively misdescriptive and deceptive. On April 9, 2008 the Board suspended

consideration of the request pending decision by the Commissioner on the concurrently filed petition to reopen. On May 30, 2008, the Commissioner denied the petition. In view thereof, we now take up for consideration applicant's request for reconsideration.

Applicant argues that the Board's decision is incorrect because 1) "the evidence does not support the unreasonable and inconsistent conclusion that consumers would believe that goods made of non-animal products are made of animal products"; 2) "[a]pplicant has been making substantial exclusive and continuous use of the 'mink' mark ... [and] is just two months shy of a five year claim of a prima facie case of acquired distinctiveness...thus overcoming a claim of deceptive misdescriptiveness" and 3) "[t]here is no basis to infer that the misdescription is likely to affect the decision to purchase based upon the evidence." Request for Reconsideration p. 2.

Turning to the first argument, applicant "does not dispute the Board's conclusion under the first part of the test, that mink, an animal, misdescribes goods made of non-animal products." Request p. 3. However, applicant contends that the Board "did not follow its own case law, by failing to take into consideration the disclaimer 'non-animal products' contained in the application when making

their analysis of the goods" and thus the Board's "unreasonable conclusion that consumers would believe Applicant's non-animal products do contain animal products, is inconsistent with their case law, and simply an inconsistent conclusion." Id.

We find no error on this point. The Board made its analysis by considering applicant's use of the mark on non-animal products, that is the point of the refusal based on deceptive misdescriptiveness.

Further, applicant's argument that the Board considered the examining attorney's inferences that the goods could include shoes, coats or hats with faux fur "flies in the face of their criticism to applicant" of her evidence of her use and publicity, is unavailing. The Board must make its determination on the goods as identified and cannot restrict the analysis to an applicant's particular use. Thus, applicant's actual use and marketing cannot be used to restrict our analysis when the registration applicant seeks would, on its face, include the scenario presented by the examining attorney, i.e., use of faux fur. Inasmuch as the identification of goods in the application does not exclude the possibility of faux fur or limit the use of the mark to applicant's specific marketing, there is no error in the Board's

analysis or conclusions.¹ The belief on a consumer's part that applicant's non-animal goods contain mink is plausible because mink is commonly used in such goods. In re Phillips Van Heusen Corp., 63 USPQ2d 1047 (TTAB 2002). The cases cited by applicant do not persuade us of a different result. In the case In re Jacques Bernier, Inc., 894 F.2d 389, 13 USPQ2d 1725 (Fed. Cir. 1990), the refusal was reversed because there was no evidence in the record to support a goods/place association between Rodeo Drive and perfume; however, we note that the mark in the same application was found to be primarily geographically deceptively misdescriptive based on a different record in a subsequent inter partes proceeding. See Fred Hayman Beverly Hills Inc. v. Jacques Bernier Inc., 38 USPQ2d 1691 (TTAB 1996). In the case In re One Minute Washer Co., 95 F.2d 517 (CCPA 1938), the court found that a consumer would think that the mark ONE MINUTE suggests washing with

¹ We further note that applicant states that the Board cited *Medinol Ltd. v. Neuro Vasx Inc.*, 67 USPQ2d 1205 (TTAB 2003) "for the proposition that a determination must be based on all goods listed in the application." Request p. 3. In fact, this case was cited because of its discussion of fraud in the procurement of a registration due to non-use on some of the listed goods in the application. Inasmuch as applicant's entire discussion of its use of the mark was only with footwear, it was not clear from the record in this case that applicant was, in fact, using the mark on each one of the goods listed in the identification of goods at the time the application was filed and the case was merely cited as informational only.

celerity and as such it is neither descriptive nor misdescriptive. The case *In re George Washington Ate Here, Inc.*, 167 USPQ 702 (TTAB 1970) cited by applicant is not applicable here, inasmuch as it involved a refusal to register GEORGE WASHINGTON ATE HERE on the ground that it is merely a statement of fact rather than a service mark and not on the ground of misdescriptiveness.

With regard to applicant's second argument, the issue of acquired distinctiveness is not before us inasmuch as the application was never amended to seek registration under Section 2(f) and it is past time for such an amendment.

Finally, applicant argues that the evidence of record does not establish that the misdescription is likely to affect the decision to purchase. Applicant takes issue with the examining attorney's evidence because it consists of excerpts from various websites stating that "the Board accepted the evidence submitted by the Examining Attorney as credible and persuasive, without explaining how the statements from certain websites are reliable sources for examining a trademark application." Request p. 7.

Applicant, for the first time, now on request for reconsideration, disputes the credibility of the examining attorney's evidence. Notably, much of applicant's evidence

consisted of excerpted web pages. Examining attorneys routinely uses web pages retrieved from the Internet in supporting their position and this is an acceptable practice. See generally TMEP 710.01(b) (5th ed. 2007). It is the applicant's burden to challenge the evidence in a timely manner, which applicant in this case did not do. That being said, we continue to find the evidence of record sufficient to support our determination that the presence of mink in the goods is material to the purchasing decision.

The purpose of reconsideration is to point out errors made by the Board in reaching its decision. The bases for the findings that the involved mark is deceptively misdescriptive and deceptive are clearly articulated therein and we do not find any error in reaching those findings. Thus, we do not find any error in our determination thereof. In view thereof, applicant's request for reconsideration of the Board's decision is denied, and the decision of January 30, 2008 stands.