

**THIS OPINION
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THE TTAB**

Mailed: June 13, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Dan-Foam APS

Serial No. 78723624

Ariana G. Voigt of Michael Best & Friedrich for Dan-Foam APS.

D. Beryl Gardner, Trademark Examining Attorney, Law Office 112 (Angela Wilson, Managing Attorney).

Before Walters, Drost and Mermelstein, Administrative Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

Dan-Foam APS has filed an application to register on the Principal Register the standard character mark THE DELUXEBED BY TEMPUR-PEDIC for "mattresses," in International Class 20.¹

The examining attorney has issued a final refusal to register, under Section 6 of the Trademark Act, 15 U.S.C.

¹ Serial No. 78723624, filed September 29, 2005, based on an allegation of a bona fide intention to use the mark in commerce.

§1056, on the ground that applicant's mark contains the merely descriptive term DELUXEBED which must be disclaimed apart from the mark as a whole.

Applicant has appealed. Both applicant and the examining attorney have filed briefs. We affirm the refusal to register.

The examining attorney contends that the term DELUXEBED consists of the laudatory term DELUXE and the merely descriptive term BED; that the merger of the two terms into a single word adds no incongruity or other meaning; and that DELUXEBED merely describes the quality and purpose of the identified goods, mattresses.²

Applicant contends that the examining attorney has not met the burden of establishing that DELUXEBED is merely descriptive in connection with mattresses; that its mark is a unitary mark with "a unified commercial impression that is suggestive, though the separate parts may be descriptive" (response of February 20, 2007); that DELUXEBED is at most suggestive and any doubt should be resolved in applicant's favor; and that its co-pending application for the mark THE

² The examining attorney characterizes applicant's argument that DELUXEBED is not merely descriptive as "moot," stating that because the examining attorney has the discretion to require a disclaimer, the examining attorney does not have the burden of establishing that the term to be disclaimed is merely descriptive. This convoluted argument is incorrect. Indeed, in order to justify the disclaimer requirement, the examining attorney *does* have the burden of establishing that DELUXEBED is merely descriptive in connection with the identified goods and that the mark as a whole is not unitary such that a disclaimer would be inappropriate.

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DELUXE BY TEMPUR-PEDIC³ was published without a disclaimer of DELUXE and, thus, the mark herein should also be approved without a disclaimer.

Both applicant and the examining attorney submitted numerous third-party registrations for marks including the term DELUXE for a wide variety of goods unrelated to mattresses. Those submitted by applicant do not have disclaimers of DELUXE; those submitted by the examining attorney have disclaimers of DELUXE or the marks are registered with a showing of acquired distinctiveness or on the Supplemental Register. Of all the third-party registrations submitted, only two are for mattresses or beds. The third-party registration containing a disclaimer of DELUXE (Registration No. 2700921) is for the mark SELECTAIR DELUXE for "therapeutic bed systems comprised of mattresses, pumps, and controls therefore." The third-party registration without a disclaimer of DELUXE (Registration No. 2349616) is for the mark REPLAMATTDELUXE for "mattresses for medical purposes."⁴

³ Serial no. 78723625 was filed on September 9, 2005 and published for opposition on January 23, 2007. It is currently awaiting the filing of a statement of use.

⁴ Applicant also submitted numerous third-party registrations for marks including the term LUXURY, arguing that LUXURY is essentially synonymous with DELUXE and that these registrations do not contain disclaimers of LUXURY. We do not find this evidence regarding an entirely different word to be probative.

The examining attorney submitted excerpts from twelve third-party Internet websites,⁵ of which the following are several examples:

- **www.isoform.com** indicates that Isoform provides a Deluxe Bed made of thick foam.
- **www.electricbeds.info** advertises "Golden Tech Deluxe Beds," noting that the 3000 Series is the standard bed and the 5000 Series is the deluxe bed.
- **http://adroncanton.craigslist.org** is a posting from Craigslist by an individual who is offering for sale his King Size Deluxe Bed and attaches to the posting the label for a Serta® Perfect Sleeper.
- **www.americanmedicalwholesale.com** indicates that, as an alternative to the standard mattress, consumers can order an adjustable bed with a Full, Queen or King size Deluxe mattress.
- **www.healthyback.com** includes the statement "The Tempur-Pedic® Deluxe mattress has all of the attributes of the original Tempur-Pedic® mattress but it is thicker and more luxurious... The Deluxe Tempur-Pedic® mattress retains ... the luxurious look and feel of a plush mattress."⁶
- **www.bltbodybeds.co.uk** indicates that Sealy® provides a Deluxe mattress that is made for any type of bedstead

⁵Applicant objects to the probative value of the websites from the United Kingdom and Australia. The examining attorney submitted excerpts from twelve websites, of which seven clearly originate in the United States. The foreign websites are in English and, while U.S. consumers are unlikely to purchase beds or mattresses from these foreign sites, they are likely to view these sites as part of any Internet search for mattresses or beds. Therefore, we have considered these websites to be probative in this case as they support the connotation of the term DELUXE as it appears on the U.S. websites. See *In re King Koil Licensing Co., Inc.*, 79 USPQ2d 1048, 1050 (TTAB 2006), wherein the Board stated that general consumers in the United States "... may visit foreign web sites for information purposes, even if they are more likely to focus on internet retailers that can easily ship items or make items available for pick up in a store in a location convenient to the purchaser"

⁶ Applicant notes that this is a third-party website.

or fashion bed and includes a mattress with a luxury damask cover.

Additionally, we take judicial notice of the definitions from *Merriam-Webster's Online Dictionary* (which is the online version of a print dictionary), submitted with the examining attorney's brief, of "deluxe" as "notably luxurious, elegant, or expensive"; of "bed" as "a piece of furniture on or in which to lie and sleep," "a place for sleeping," and "a mattress filled with soft material"; and of "mattress" as "a fabric case filled with resilient material (as cotton, hair, feathers, foam rubber, or an arrangement of coiled springs) used either alone as a bed or on a bedstead."

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, or intended to be used. *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007); *In re Engineering Systems Corp.*, 2 USPQ2d 1075 (TTAB 1986); *In re Bright-Crest, Ltd.*, 204 USPQ 591 (TTAB 1979). 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 Venture Lending Associates*, 226 USPQ 285 (TTAB 1985). 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 Recovery*, 196 USPQ 830 (TTAB 1977).

The evidence clearly establishes that "deluxe" is a word used regularly in connection with beds and mattresses to indicate a level of quality and comfort beyond that of a "standard" bed or mattress; and that the terms "bed" and "mattress" are somewhat interchangeable as a bed may consist of only a mattress or both a mattress and a bedstead. Thus, the individual words, "deluxe" and "bed," are each merely descriptive in connection with mattresses. Furthermore, the phrase "deluxe bed" is equally merely descriptive in connection with mattresses because its connotation of a high quality and/or luxurious bed/mattress. The elimination of the space between the two words DELUXE and BED to create a single term does not change the connotation of the individual words and the resulting term has the same connotation as the individual words together.

When applied to applicant's goods, the term DELUXEBED immediately describes, without conjecture or speculation, a significant feature or function of applicant's goods,

namely, that its mattresses are of superior quality and comfort. Nothing requires the exercise of imagination, cogitation, mental processing or gathering of further information in order for purchasers of and prospective customers for applicant's services to readily perceive the merely descriptive significance of the term DELUXEBED as it pertains to applicant's goods.

Therefore, we conclude that the examining attorney correctly required a disclaimer of the merely descriptive term DELUXEBED. We do not find applicant's arguments to the contrary to be persuasive. In particular, we are not bound by the decision of the examining attorney in applicant's co pending application for the mark THE DELUXE BY TEMPUR-PEDIC, nor is that application before us herein. See *In re Nett Designs*, 236 F.3d 1339, 57 USPQ2d 1564 (Fed. Cir. 2001); *In re First Draft Inc.*, 76 USPQ2d 1183 (TTAB 2005); and *In re Sunmarks Inc.*, 32 USPQ2d 1470, 1472 (TTAB 1994).

Decision: The refusal under Section 6 of the Act is affirmed.

This affirmance of the Section 6 refusal will be set aside and the mark forwarded for publication for opposition if applicant, no later than thirty days from the mailing date of this decision, submits an appropriate disclaimer of DELUXEBED. See, 15 U.S.C. §1056 and Trademark Rule 2.142(g), 37 C.F.R. 2.142(g).