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Mailed:
August 28, 2007
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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Outlast Technologies, Inc.

Serial No. 78793347

Andrew Roppel of Holland & Hart LLP for Outlast
Technologies, Inc.

Ira Goodsaid, Trademark Examining Attorney, Law Office
101 (Ronald Sussman, Managing Attorney).

Before Quinn, Walsh and Bergsman, Administrative
Trademark Judges.

Opinion by Walsh, Administrative Trademark Judge:

On January 17, 2006, Outlast Technologies, Inc.
(applicant) applied to register the mark COLD WRAP in
standard-character form on the Principal Register for goods
now identified as "paper labels for use on packaging for
foods and beverages" in International Class 16. Applicant
asserts a bona fide intention to use the mark in commerce
under Section 1(b) of the Trademark Act, 15 U.S.C.
§ 1051(b), as the basis for the application.

Serial No. 78793347

The Examining Attorney has refused registration on the ground that the mark merely describes the goods under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1). When the Examining Attorney made the refusal final, applicant appealed. Both applicant and the Examining Attorney have filed briefs. We affirm.

A term is merely descriptive of goods within the meaning of Section 2(e)(1) if it conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods. *See, e.g., In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987); and *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). A term need not immediately convey an idea of each and every specific feature of the applicant's goods in order to be considered merely descriptive; it is enough that the term describes one significant attribute or function of the goods. *See In re H.U.D.D.L.E.*, 216 USPQ 358, 359 (TTAB 1982); and *In re MBAssociates*, 180 USPQ 338, 339 (TTAB 1973).

Whether a term is merely descriptive is determined not in the abstract, but in relation to the goods identified in the application, and the possible significance that the term would have to the average purchaser of the goods because of the manner of use or intended use. *In re Polo*

Serial No. 78793347

International Inc., 51 USPQ2d 1061, 1062 (TTAB 1999); and *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979).

When two or more merely descriptive terms are combined, we must determine whether the combination of terms evokes a new and unique commercial impression. If each component retains its merely descriptive significance in relation to the goods, then the resulting combination is also merely descriptive. See, e.g., *In re Tower Tech, Inc.*, 64 USPQ2d 1314, 1317 (TTAB 2002) (SMARTTOWER merely descriptive of commercial and industrial cooling towers).

The Examining Attorney states, "COLD WRAP merely describes a primary feature of the labels, that is, the labels thermally insulate food and beverage packaging, the result being the food and beverages remain colder longer." Examining Attorney's brief at 2. The Examining Attorney also points out that, "[s]ince COLD WRAP labels keep the packaging cold of the goods (sic) around which they are wrapped, consumers would expect the labels to be a cold wrap that keeps food or drink cold." *Id.* at 4.

Applicant argues that COLD WRAP is not merely descriptive of its goods because, "the mark COLD WRAP suggests the desired end result of Applicant's goods, namely to create a wrap around foods and beverages that can be kept as cold as possible through the use of the reverse

thermal properties contained in Applicant's labels." Applicant's brief at 2-3 (emphasis omitted). Applicant also argues that it is the first and only user of the mark COLD WRAP in connection with labels and that it is a "recognized term of art" in a different industry and, thus, it "necessarily requires consumers to pause before discerning the nature of Applicant's goods." *Id.* at 3. While we have fully considered applicant's arguments, we do not find them persuasive.

First we note the definitions from *Merriam-Webster's Collegiate Dictionary* (11th ed. 2003) which, in relevant part, define the terms at issue here as follows:

"cold" adj. "1c: not heated: as ... (2) served chilled or with ice <a ~ drink>..."

"wrap" n. "1a (1): WRAPPER, WRAPPING (2): material used for wrapping..."

"label" n. "2b: written or printed matter accompanying an article to furnish identification or other information..."¹

The Examining Attorney has presented evidence to show that COLD WRAP is merely descriptive of the identified goods, including a copy of an advertisement for a wrap

¹ The Board may take judicial notice of dictionary definitions. See *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).

Serial No. 78793347

called "Cool2Go" from the dupont.com web site. The advertisement states:

New factory-applied wrap keeps things cooler, longer...

Super-thin DuPont™ Cool2Go™ insulated wraps help keep beverages cool longer. The wrap is smooth to the touch and easy to print, for brands that want to create a real difference for consumers. If it's winter where you are, think "Warm2Go™" -- same idea, for warmer-uppers.

Although applicant argues that the advertisement for the "Cool2Go" insulating wraps should be afforded little weight because the term COLD WRAP does not appear on the page (Applicant's September 28, 2006 Response,), this evidence shows that the beverage label industry uses the term "wrap" to refer labels, that is, "smooth to the touch and easy to print." Furthermore, this evidence reflects the fact that the beverage industry uses labels as "wraps" to keep beverages cold.

The Examining Attorney also provided examples from various articles and web pages that show the descriptive nature of applicant's mark COLD WRAP. For example, an article from the *American Pharmaceutical Review* of July 5, 2006 includes the following statements:

Coors is launching a cold wrap label on bottles of Coors Light this month that will keep the beer cold...

Serial No. 78793347

[The label] will keep the drink colder for longer outside the fridge...

Coors tested the label extensively both in refrigerated laboratories and in consumer trials to ensure it kept the beer cool....

The *Denver Post* web site (denverpost.com) also

discusses the new label:

[The label] keeps heat from reaching the beer...

[T]echnology to keep its beer cooler longer...

From beer to boardroom wear, Boulder firm's in the business of cool....

Convenience Store News also takes note of the development

of the new label (csnews.com), stating:

In Coors Light's case, the brewer is using packaging innovations to boost sales, including a plastic cooler box, cold wrap labels for bottles and stay cold glassware....

Thus, the Examining Attorney's evidence establishes that "cold wrap" has been used and is understood to refer to "paper labels for use on packaging for foods and beverages" with a particular feature or function, that is, the ability to keep beverages cold.

In fact, the articles in question refer to applicant's product, and applicant argues that some of the uses of its mark COLD WRAP in the articles submitted by the Examining Attorney are misuses and therefore should be accorded little, if any, weight. Applicant's Brief at 1-2. Under

Serial No. 78793347

the circumstances of this case, we cannot dismiss this evidence so easily, even though the references are to applicant's product. The dictionary definitions and common usage support the conclusion that relevant consumers will readily perceive the merely descriptive meaning of "cool wrap" as applied to labels for food and beverages. In this case the press usage appears to be consistent with the common meanings of the terms which make up applicant's mark.

Further, applicant argues that because the labels function to keep heat away from the goods that COLD WRAP does not describe their identified goods. Applicant's Brief at 2. It is of little consequence, however, whether the labels function by keeping in cold or keeping out heat - the bottom line is that the identified goods are wraps that keep foods and beverages cold. In other words, simply because the goods keep the foods and beverages cold by keeping heat away does not lessen the descriptive nature of mark COLD WRAP. In fact, this is essentially how all insulators function, *i.e.*, in order to keep something cold, heat is kept out, and likewise, in order to keep something hot, cold is kept out. Indeed, in this instance, the identified goods are wraps that keep foods and beverages cold.

Serial No. 78793347

Additionally, applicant argues that the mark COLD WRAP simply, "suggests the desired end result obtained by using the Applicant's labels," and is therefore not merely descriptive of the identified goods. Applicant's September 28, 2006 Response at 2 (emphasis omitted).

Applicant relies on a number of cases where the identified goods were found to be suggestive. *Id.* The facts before us, however, are distinguishable from marks which are suggestive of a desired result of the use of the goods such as in the cases cited by applicant, *In re The Realistic Company*, 169 USPQ 610 (CCPA 1971) (CURV' not merely descriptive of permanent wave curling solution); *In re Pennwalt Corporation*, 173 USPQ 317 (TTAB 1972) (DRI-FOOT not merely descriptive of anti-perspirant deodorant for feet); *In re Recovery, Inc.*, 196 USPQ 830 (TTAB 1977) (RECOVERY held not merely descriptive of providing group therapy in the form of self-help aftercare); and *In re Universal Water Systems, Inc.*, 209 USPQ 165 (TTAB 1980) (PURITY held not merely descriptive of water filtering units, water filter cartridges, and water softening units). Here, the goods do not create a "cold wrap" like a permanent wave curling solution creates a "curve" in the hair or a water filtration units create "purity" in water, rather, the goods themselves are the "cold wrap" described

Serial No. 78793347

by the mark, that is, labels or wraps for foods or beverages which keep them cold.

Moreover, these cases, which involve different marks and different goods and services from those at issue, fail to rebut the Examining Attorney's determination that COLD WRAP is merely descriptive in this context of this application. The Board must decide each case on its particular facts, and decisions based on different facts are of limited value. Even the same term can be either suggestive or merely descriptive depending on the circumstances of the case. *In re Nett Designs Inc.*, 236 F.3d 1339, 57 UPSQ2d 1564, 1566 (Fed. Cir. 2001).

Applicant also submitted evidence from online retailers offering "cold wrap" therapeutic devices and argues that its mark COLD WRAP is a "recognized term of art" in the home therapeutics industry and, thus, it "necessarily requires consumers to pause before discerning the nature of Applicant's goods." Applicant's Brief at 3. The fact that a term may have different meanings in other contexts, for example in the home therapeutic remedies arena, is not relevant here. We must determine whether the terms in the mark are merely descriptive as viewed by prospective purchasers, and not in the abstract, but in

Serial No. 78793347

relation to the goods identified in this application. *In re Bright-Crest, Ltd.*, 204 USPQ at 593.

Further, applicant argues that it is the first and only user of the term COLD WRAP in connection with labels. Where the evidence shows that the term is merely descriptive of the identified goods, because an applicant is the first or only user of a merely descriptive term does not make it any less descriptive of the relevant goods or justify registration. *In re Acuson*, 225 USPQ 790 (TTAB 1985).

Moreover, we find nothing in the combination of the terms "COLD" and "WRAP" which is new and unique. The combination is the mere sum of the parts which merely describes two features of the goods. *In re Tower Tech, Inc.*, 64 USPQ2d at 1317.

In sum, we find the evidence of record establishes that COLD WRAP is merely descriptive of "paper labels for use on packaging for foods and beverages."

Decision: The refusal to register on the ground that the mark is merely descriptive under Trademark Act Section 2(e)(1) is affirmed.