

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF  
THE TTAB

Mailed: September 9, 2005

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Pet Food Centers, LLC

Serial No. 78975330

Timothy D. Pecsénye of Blank Rome LLP for Pet Food Centers, LLC.

Jennifer D. Chicoski, Trademark Examining Attorney, Law Office 101 (Ronald R. Sussman, Managing Attorney).

Before Hohein, Drost and Kuhlke, Administrative Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Pet Food Centers LLC has filed an application to register PLAY THINGS (in standard character form) on the Principal Register for "pet treats" in International Class 31.<sup>1</sup>

<sup>1</sup> Application Serial No. 78975330, filed March 24, 2003, alleging a bona fide intent to use the mark in commerce. On November 20, 2003 applicant filed an Amendment to Allege Use, with a specimen and claiming November 19, 2003 as applicant's date of first use and first use in commerce, which was accepted by the USPTO. This application is the resulting divisional or "child" application of Serial No. 78228919, based on a request to divide filed on January 20, 2004. The "parent" application Serial No. 78228919

The examining attorney refused registration under 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 its goods.

When the refusal was made final, applicant appealed and requested reconsideration of the final decision. On December 2, 2004 the examining attorney denied the request for reconsideration and the appeal was resumed. Briefs have been filed, but applicant did not request an oral hearing. We affirm the refusal to register.

"A mark is merely descriptive if it 'consist[s] merely of words descriptive of the qualities, ingredients or characteristics of' the goods or services related to the mark." In re Oppendahl & Larson LLP, 373 F.3d 1171, 71 USPQ2d 1370, 1371 (Fed. Cir. 2004), quoting, Estate of P.D. Beckwith, Inc. v. Commissioner, 252 U.S. 538, 543 (1920). See also In re MBNA America Bank N.A., 340 F.3d 1328, 67 USPQ2d 1778, 1780 (Fed. Cir. 2003). 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

---

contains goods (pet toys) in International Class 28; it is not the subject of this appeal and has been abandoned.

used, or intended to be used. 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 a mark merely descriptive, that the mark describe each feature of the goods or services, only that it describe a single ingredient, quality, characteristic, function, feature, purpose or use of the goods. In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987); In re Venature 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 Abcor Dev. Corp., 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978).

The examining attorney contends that the proposed mark PLAY THINGS is merely descriptive of a purpose or use of the goods. In support of this argument, the examining attorney submitted the following dictionary definitions of the word "plaything": (1) "Something to play with, a toy";<sup>2</sup>

---

<sup>2</sup> The American Heritage® Dictionary of the English Language Electronic Version (3d ed. 1992).

(2) "an object used for pleasure or amusement, such as a child's toy";<sup>3</sup> (3) "a thing to play with, a toy, anything that serves to amuse";<sup>4</sup> and (4) "an artifact designed to be played with."<sup>5</sup> The examining attorney asserts that the "immediate impression created by the two terms 'PLAY THINGS' is that of 'things' or objects to 'occupy oneself in amusement, sport or other recreation.'" Final Office Action p. 2. In addition, the examining attorney submitted excerpts from various websites "advertising goods in the nature of pet treats with which dogs and cats play or amuse themselves including treats shaped like bones, shoes, toothbrushes and balls, and toys which feature treats to motivate and engage the animal" (brief p. 3) and excerpts from certain websites "featuring on-line pet supply retailers who categorize items such as rawhide strips, compressed bones, jerky and edible chews as 'pet treats'" (brief p. 7). The examining attorney concludes that "[b]ased upon its commonly understood meaning, the wording comprising the mark clearly indicates that the purpose or

---

<sup>3</sup> The Cambridge Advanced Learners Dictionary, Cambridge University Press 2004, available at [www.dictionary.cambridge.org](http://www.dictionary.cambridge.org).

<sup>4</sup> Webster's Revised Unabridged Dictionary, (1998) available at [www.dictionary.com](http://www.dictionary.com).

<sup>5</sup> WordNet 1.6 (Princeton University 1997) available at [www.dictionary.com](http://www.dictionary.com)

use of the goods is that pets are able to play with them, and the mark is thus merely descriptive." Brief p. 3.

In arguing that its proposed mark is not descriptive, applicant contends that by separating the compound word playthings, "the components of [a]pplicant's PLAY THINGS trademark coalesce to form the essence of a wholly unique source identifier." Brief p. 13. Applicant also argues that the "evidence provided by the examining attorney serves only to suggest a limited relationship between the marketing of toys and treats, but no relationship between applicant's trademark and such goods." Brief p. 14. In support of its argument applicant submitted: (1) printouts from the Trademark Electronic Search System (TESS) of a list of third-party registrations and applications in International Class 31 that contain the word PLAY (the list does not include the actual goods for the entries); (2) printouts of third-party registrations from TESS that contain the word THINGS without disclaimer (e.g., COOL THINGS for toys, WARM THINGS for a retail store in the field of bed linen and clothing, LINENS 'N THINGS for retail store services in the fields of rugs, sheets, towels, etc.); and (3) excerpts from websites containing the term "playthings" and "play things" (to show that play things is "suggestive of many ware [sic] outside of toys,

but not merely descriptive of them"). Applicant argues that "due to its various meanings, the mark does not immediately convey information concerning an ingredient, quality, or characteristic of the relevant goods." Request for Reconsideration p. 4. PLAY THINGS, applicant continues, can be used in connection with children's toys, outdoor swing sets, musical instruments, and educational teaching aids. Id. In addition, applicant contends that the dictionary definition does not support a finding of descriptiveness because pet treats are not "things to play with." Request for Reconsideration p. 5. Finally, applicant asserts that any doubt should be resolved in favor of applicant.

In this case, we are persuaded that the phrase PLAY THINGS when used in connection with pet treats would immediately inform the potential consumers of those goods that the goods are things to be played with or serve to amuse. Applicant's argument that these words are used with many different goods and "[w]hen consumer's hear the words PLAY THINGS, certainly pet treats do not immediately come to mind" (brief p. 11) is not persuasive. The issue is not whether the phrase brings to mind the goods when used in a vacuum, but rather whether the phrase brings to mind a feature or purpose of the goods when the consumer sees the

phrase in the context in which the mark is used. In re Abcor Dev. Corp., supra.

With regard to the argument that "the examining attorney was unable to cull evidence with any tenable relationship to the manufacture and sale of pet treats under the identifying phrase, PLAY THINGS" (brief p. 14), as has long been stated, the fact that the applicant may be the first to use a merely descriptive designation does not "justify registration if the term projects only merely descriptive significance." See In re National Shooting Sports Foundation, Inc., 219 USPQ 1019, 1020 (TTAB 1983).

Further, we do not find applicant's dissection argument, that "the separation between the words...enables the customer's imagination to engage in mental leaps" (brief p. 11), persuasive. The separation of the compound word does not create a new incongruous meaning.<sup>6</sup> In re Associated Theatre Clubs Co., 9 USPQ2d 1660 (TTAB 1988).

---

<sup>6</sup> Thus, the third-party registrations of the separate components PLAY and THINGS, are not probative of the meaning or impression of the term PLAY THINGS. Moreover, third-party registrations are not probative inasmuch as prior decisions of other examining attorneys are not binding upon the Office and the Board must decide each case on its own facts and record. In re Nett Designs, Inc., 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001); In re International Taste Inc., 53 USPQ2d 1604 (TTAB 2000); In re Consolidated Foods Corp., 200 USPQ 477 (TTAB 1978). We must consider each application on its own merits based on the record in that application and current circumstances. In re Sun Microsystems Inc., 59 USPQ2d 1084, 1088 (TTAB 2001).

Moreover, we must consider whether the mark as a whole is merely descriptive and not just the individual elements. In re Oppedahl & Larson LLP, supra.

When applied to applicant's goods, the phrase PLAY THINGS immediately describes, without conjecture or speculation, a significant feature or function of applicant's goods, namely treats that serve to amuse or may be played with. Nothing requires the exercise of imagination, cogitation, mental processing or gathering of further information in order for prospective consumers of applicant's goods to perceive readily the merely descriptive significance of the term PLAY THINGS as it pertains to applicant's goods. The evidence of record shows pet treats: (1) marketed with pet toys; (2) as a combination product (e.g., combining a jerky dog treat in a braided ball); and (3) as an edible toy (e.g., edible chew bones in various shapes). Applicant's specimens of use submitted in support of its Amendment to Allege Use further demonstrate that a pet treat, in addition to being edible, is something to play with or serves to amuse. The packaging depicts a cat and a dog playing and lists the following items as the goods: chews, toys, and other fun stuff. Finally we do not have any doubt that this mark is

**Ser No. 78975330**

merely descriptive in connection with the identified goods.

In re Atavio, 25 USPQ2d 1361, 1362 (TTAB 1992).

**Decision:** The refusal to register is affirmed.