

Oral Hearing held:
June 22, 2004

**THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT
OF THE TTAB**

*Decision mailed:
July 2, 2004
GDH/gdh*

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Nixalite of America Inc.
v.
Bird Barrier of America, Inc.

Opposition No. 91122927 to application Serial No. 75631260
filed on February 1, 1999

Thomas J. Moore of Bacon & Thomas, PLLC for Nixalite of America Inc.

Daniel M. Cislo of Cislo & Thomas LLP for Bird Barrier of America, Inc.

Before Quinn, Hohein and Bottorff, Administrative Trademark Judges.

Opinion by Hohein, Administrative Trademark Judge:

Bird Barrier of America, Inc. has filed an application to register on the Principal Register the mark "BIRD BARRIER" and



design, as reproduced below,

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for "pest control devices, namely, non-electric metal wire attached to a structure for deterring birds from landing and perching."¹

Nixalite of America Inc. has opposed registration on the sole ground that applicant's mark is unregistrable in the absence of a disclaimer of the generic term "BIRD BARRIER." In particular, opposer alleges that "[s]ince a date long before the earliest date on which Applicant may claim any rights in the opposed trademark or any colorable imitation thereof, Opposer ... has used in commerce the term 'bird barrier' as the generic name for goods sold by Opposer"; that applicant's mark includes "the generic term 'bird barrier' that is used by the relevant trade or industry for all goods in a particular category, and does not distinguish the goods of any party from the goods of any other party"; that opposer "needs to use the term 'bird barrier' as the generic name for certain goods that are sold by Opposer, in order to compete effectively in the relevant trade and market"; that opposer thus "would be injured by the registration of the opposed trademark"; and that, accordingly, in order for such mark to be registrable, "the opposed application be amended to include a disclaimer of 'BIRD BARRIER'."

Applicant, in its answer, has denied the salient allegations set forth in the notice of opposition.

The record consists of the pleadings; the file of the opposed application; and, as opposer's case-in-chief, notices of

reliance on excerpts from various printed publications and official records, namely, a building and construction trade directory, certain telephone directories, a magazine entitled "Your Church," a third-party registration, information with respect to two prior abandoned applications by applicant, and information concerning a prior abandoned application by a third party.² Applicant's case-in-chief consists of notices of reliance on various third-party registrations, articles from a magazine entitled "Pest Control Technology" and newspaper articles from the "Los Angeles Times."³ Neither party took

¹ Ser. No. 75631260, filed on February 1, 1999, which alleges a date of first use anywhere and in commerce of June 30, 1998. The word "BIRD" is disclaimed.

² However, in an order issued on June 18, 2004, the Board among other things granted a motion by applicant to strike opposer's notices of reliance to the extent that opposer's sixth and eleventh notices of reliance were stricken because the evidence attached thereto, consisting of printouts of pages from Internet websites, is not proper subject matter for a notice of reliance and hence is inadmissible. See TBMP §704.08 (2d ed., 1st rev. March 2004). Such evidence, therefore, has been given no further consideration herein.

³ The Board's order of June 18, 2004 also granted a motion by opposer to strike certain exhibits which were attached to a declaration by an attorney for applicant which applicant submitted in connection with its notices of reliance. The exhibits, consisting of printouts of pages from Internet websites, were stricken inasmuch as applicant conceded that such printouts were inadmissible. Cf. Michael S. Sachs Inc. v. Cordon Art B.V., 56 USPQ2d 1132, 1134 (TTAB 2000) [a printout retrieved from the Internet does not qualify as a printed publication under Trademark Rule 2.122(e) and thus its "introduction ... by way of a notice of reliance is improper"]; and Raccioppi v. Apogee Inc., 47 USPQ2d 1368, 1370 (TTAB 1998) ["[t]he element of self-authentication which is essential to qualification under [Trademark] Rule 2.122(e) cannot be presumed to be capable of being satisfied by Internet printouts"]. While the Board, in a footnote, additionally noted in its order that "the question of the admissibility of the declaration ... was not raised by opposer," it is pointed out that Trademark Rule 2.123(b) specifies in relevant part that: "By written agreement of the parties, the testimony of any witness or witnesses of any party, may be submitted in the form of an affidavit [or declaration] by such witness or witnesses." Given the absence, however, of any written agreement by the parties with respect to the submission thereof, the declaration forms no part of the record in this proceeding and has accordingly not been given any further consideration. We hasten to

testimony and opposer did not offer any evidence in rebuttal. Briefs have been filed and an oral hearing, attended by counsel for the parties, was held.

As a preliminary matter, applicant argues in its brief that, notwithstanding its disclaimer of the word "BIRD" (which it asserts was done to "advance allowance of the application"), its "BIRD BARRIER" and design mark is a unitary mark which, because the words therein are so integrated with the arc and bird designs as to form a single distinct commercial impression, a disclaimer of the term "BIRD BARRIER" is "unnecessary." We agree with opposer, however, that applicant's mark is not unitary and thus, if the term "BIRD BARRIER" is proven to be generic, a disclaimer thereof is required in order for applicant's mark to be entitled to registration.

Section 6(a) of the Trademark Act, 15 U.S.C. §1056(a), provides in relevant part that an applicant may be required "to disclaim an unregistrable component of a mark otherwise registrable."⁴ However, as explained in *Dena Corp. v. Belvedere International Inc.*, 950 F.2d 1555, 21 USPQ2d 1047, 1051 (Fed. Cir. 1991):

[Section 6(a)] adopts the ... policy of exempting unitary marks from the disclaimer requirement. A unitary mark simply has no "unregistrable component," but is instead an inseparable whole. A unitary mark cannot

add, nonetheless, that even if such declaration were to be considered, the result in this proceeding would be the same.

⁴ While Section 6(a) also provides that "[a]n applicant may voluntarily disclaim a component of a mark sought to be registered," applicant disclaimed the word "BIRD" pursuant to a requirement for such.

be separated into registrable and nonregistrable parts. Because unitary marks do not fit within the language of section [6(a), the United States Patent and Trademark Office] ... cannot require a disclaimer.

A unitary mark, as set forth in TMEP Section 1213.05 (3rd ed., rev. 2, 2003), has been defined as follows:

A mark or portion of a mark is considered "unitary" when it creates a commercial impression separate and apart from any unregistrable component. That is, the elements are so merged together that they cannot be divided to be regarded as separable elements. If the matter that comprises the mark or relevant portion of the mark is unitary, no disclaimer of an element, whether descriptive, generic or otherwise, is required.

Contrary to applicant's assertion, which is undercut by the fact that it has disclaimed the word "BIRD," in this case the term "BIRD BARRIER" is not an inseparable part of the mark "BIRD BARRIER" and design viewed as a whole. Plainly, the words "BIRD" and "BARRIER" are separate from the arc and bird designs in applicant's mark and neither is connected by any lines or other design features to the arc and bird design elements. Such words, therefore, are simply not so merged together in applicant's mark that they cannot be regarded as separate. The term "BIRD BARRIER" which results from the combination of such words clearly forms its own separate and distinct commercial impression. Applicant's mark consequently is not unitary and, if shown to be generic, the term "BIRD BARRIER" must be disclaimed.⁵

⁵ See, e.g., *Dena Corp. v. Belvedere Int'l Inc.*, *supra* at 1052 [mark consisting of the words "EUROPEAN FORMULA" depicted above a circular design on a dark square or background for cosmetics held not unitary]; *In re Lean Line, Inc.*, 229 USPQ 781, 782-83 (TTAB 1986) [mark "LEAN

Turning, therefore, to the issue of whether the term "BIRD BARRIER" is generic, applicant is correct that, as argued in its brief, it is opposer, as the party asserting such a ground for opposition, who bears the burden of proof with respect thereto.⁶ See, e.g., *Racine Industries Inc. v. Bane-Clene Corp.*, 35 USPQ2d 1832, 1838 (TTAB 1994) ["Opposer, as the party contending that the designation 'PCA' is a generic term for applicant's professional carpet cleaners' association, bears the burden of proof thereof"]. Moreover, while it is indeed curious that neither party made of record a definition of the word "barrier," we judicially notice⁷ for present purposes that, for instance, the Random House Webster's Unabridged Dictionary (2d

LINE" for low calorie foods found not unitary; requirement for disclaimer of "LEAN" held proper]; *In re IBP, Inc.*, 228 USPQ 303, 304 (TTAB 1985) [mark "IBP SELECT TRIM" for pork held not unitary; refusal of registration affirmed in absence of a disclaimer of "SELECT TRIM"]; *In re Uniroyal, Inc.*, 215 USPQ 716, 719 (TTAB 1982) [mark "UNIROYAL STEEL/GLAS" for vehicle tires found not unitary; requirement for disclaimer of "STEEL/GLAS" held appropriate]; and *In re EBS Data Processing, Inc.*, 212 USPQ 964, 966 (TTAB 1981) [mark "PHACTS POCKET PROFILE" for personal medication history summary and record forms held not unitary; refusal to register affirmed in absence of a disclaimer of "POCKET PROFILE"].

⁶ Although opposer, in its reply brief, contends that "[o]nce the issue of whether an alleged trademark is generic has been raised, the burden of proof is on the owner of the alleged trademark to prove that it is not generic, so long as the alleged trademark is not federally registered," the cases and other authority cited by opposer in support thereof are inapposite inasmuch as opposer is not asserting trademark rights in the term "BIRD BARRIER." Rather, opposer is alleging the antithesis thereof, that is, that such term is generic and hence is devoid of any trademark significance.

⁷ It is well established that the Board may properly take judicial notice of dictionary definitions. See, e.g., *Hancock v. American Steel & Wire Co. of New Jersey*, 203 F.2d 737, 97 USPQ 330, 332 (CCPA 1953); *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983); and *Marcal Paper Mills, Inc. v. American Can Co.*, 212 USPQ 852, 860 n. 7 (TTAB 1981).

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ed. 1998) at 171 defines such word as a noun meaning: "1.
anything built or serving to bar passage, as a railing, fence, or
the like: *People may pass through the barrier only when their*

train is announced. 2. any natural bar or obstacle: a mountain barrier. 3. anything that restrains or obstructs progress, access, etc.: a trade barrier. 4. A limit or boundary of any kind: the barriers of caste. 5. *Physical Geog.* An antarctic ice shelf or ice front. 6. See **barrier beach**. 7. **barriers**, *Hist.* the palisade or railing surrounding the ground where tourneys and jousts were carried on. 8. *Archaic* a fortress or stockade."⁸ In a like vein, Webster's Third New International Dictionary (1993) at 179 lists "barrier" as a noun connoting, *inter alia*, "1 obs : BARRICADE; esp : an outer defense to impede or stop an enemy 2 : a material object or set of objects that separates, keeps apart, demarcates, or serves as a unit or barricade ... 6 : a factor (as a topographic feature or a physical or physiological quality) that tends to restrict the free movement and mingling of individuals or populations." Although the above definitions have been set forth for the sake of completeness, it is obvious that, in the context of applicant's and opposer's bird control products, the most pertinent ones are the first and third definitions from the Random House Webster's Unabridged Dictionary and those which are numbered "2" and "6" in Webster's Third New International Dictionary.

According to the record, advertisements by both opposer and applicant have appeared together under the same product category heading in the same edition of a building and construction trade directory. Specifically, The Blue Book

⁸ The same definition is set forth in the Random House Dictionary of the English Language (2d ed. unabridged 1987) at 171.

Building & Construction (2000), which touts itself as "THE STANDARD REFERENCE BOOK for the BUILDING AND CONSTRUCTION INDUSTRY," sets forth ads by "Nixalite of America Inc." and "BIRD BARRIER AMERICA, INC." which appear on the same page under the category heading "BIRD BARRIERS, REPELLENTS & CONTROLS." In particular, the ad under opposer's name states that "Nixalite offers only the best barriers, controls and repellents for pest birds and animals" and offers "Bird Control That Works! Nixalite Stainless Steel Bird Barriers," while the ad that displays applicant's mark and illustrates a device of "Stainless Steel Spikes" refers to "Bird Control Solutions" which are "Guaranteed to out-perform all competitors." On the same page of such directory, an advertisement by a third-party, "NATION WIDE BIRD CONTROL," makes reference to "Quality Barriers Installed."

With respect to the telephone directory excerpts made of record by opposer, pages from the November 1999 "Quad Cities White and Yellow Pages" display "BIRD BARRIERS, REPELLENTS & CONTROLS" as a topical heading and set forth, among the three entities listed therein, "NIXALITE BIRD BARRIERS" by "NIXALITE OF AMERICA INC." Likewise, the November 1976 "Quad Cities ... Yellow Pages" lists "Bird Barriers, Repellents & Controls" as a product category heading, followed by the name of a third-party entity, while the November 1958 "DAVENPORT ... TELEPHONE DIRECTORY" sets forth the same product category heading and features a display ad by "NIXALITE CO. OF AMERICA," which is one of the two providers listed, containing the statement "RIDS

BUILDINGS OF BIRDS!" and picturing a device with multiple spikes. The same device is also illustrated in an ad by "NIXALITE COMPANY" for a "NIXALITE Stainless Steel Bird Barrier," which appears in a one-page excerpt from the magazine "Your Church," and contains the following statement: "Of course you're proud of your church! Keep its loveliness intact from damaging bird debris with a recognized and proven bird repellent."⁹

As to the various official records of the United States Patent and Trademark Office which have been introduced by opposer, the third-party registration for the mark "TOPRITE," which issued on November 11, 1980 as Reg. No. 1,141,349 and is indicated as being subsisting, utilizes the term "bird barrier" in identifying the goods listed therein, which are set forth as "olefin netting for the top of game bird pens and for use in other areas where it is necessary to erect a bird barrier made of netting." Similarly, information concerning a prior application by a different third-party reveals that Ser. No. 74679905, which was filed on May 25, 1995 to register "SPIKES" as a mark for a "bird barrier for pestiferous birds" based upon a claim of a bona fide intention to use such term in commerce, was abandoned on May 20, 1997. In addition, information with respect to two prior applications by applicant shows that Ser. No. 75342442, which was filed on August 18, 1997 to register "BIRD BARRIER" as a mark for "pest control devices" based upon an allegation of first use

⁹ Although the accompanying notice of reliance thereon recites that the excerpt is from "the September/October, 1967 edition," we can give no credence thereto since the only indication of a date on the excerpt itself is an obviously hand-written notation of "Sept/Oct 1967."

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thereof anywhere and in commerce on June 30, 1993, was abandoned on November 27, 1998, while Ser. No. 75084013, which was filed on April 4, 1996 to register "BIRD BARRIER" as a mark for "bird abatement systems and educational programs" based upon an allegation of first use thereof anywhere as of June 1993 and first use in commerce as of August 1993, was abandoned on March 21, 1997. No information is given, however, as to why such applications were abandoned.

The various third-party registrations made of record by applicant reveal, in each instance, that no disclaimer of the word "BARRIER" was made in connection with marks in which such word constitutes an element thereof. Specifically, applicant introduced registrations for the following: (a) the mark "SOUND BARRIER," which issued as Reg. No. 679,323 in connection with "ear protectors in the form of ear muffs for protection against noise" on May 26, 1959 and is indicated as being subsisting; (b) the mark "SKIN BARRIER," which issued, with a disclaimer of "SKIN," as Reg. No. 1,896,760 in connection with a "medicated antibacterial hand cream" on May 30, 1995 and is indicated as being subsisting; (c) the mark "RUST BARRIER," which issued, with a disclaimer of "RUST," as Reg. No. 1,902,273 in connection with a "rust sealant in the nature of a coating" on July 4, 1995 and is indicated as being subsisting; (d) the mark "BARNACLE BARRIER," which issued as Reg. No. 2,137,255 in connection with "exterior paints and sealer coatings for use on boats, underwater structures and equipment" on February 17, 1998 and is indicated

as being subsisting; (e) the mark "ROACH BARRIER," which issued, with a disclaimer of "ROACH," as Reg. No. 2,314,936 in connection with "insecticides for domestic use" on February 1, 2000 and is indicated as being subsisting; and (f) the mark "MOSQUITO BARRIER," which issued, with a disclaimer of "MOSQUITO," as Reg. No. 2,057,052 in connection with a "mosquito repellent to repel mosquitos [sic] from foliage, namely flowers, grasses, ornamentals, shrubs, trees, vines, edible plants, fruits, berries, vegetables, field crops and standing water" on April 29, 1997 and is indicated as being subsisting.¹⁰

Also made of record by applicant are two articles from a trade magazine entitled "Pest Control Technology" and two newspaper articles from the "Los Angeles Times." In particular, an article from the March 1998 issue of "Pest Control Technology," which is entitled "Taking The 'Nuisance' Out Of Nuisance Sparrows," states in relevant part that:

Sparrows can be denied from using and defacing building ledges with one or more of several different ledge denial repellents. These include mechanical spikes, wires and chemical repellents. When using these tools, the key to long term results, and thus cost effectiveness, is a careful and thorough installation. The small sparrow is quite adept at roosting on ledges only ½ inches wide. They will take quick advantage of any gaps or small spaces left to them by ledge repellents on their favorite ledges. Additionally, the mechanical prickly repellent devices must be inspected periodically and cleaned of debris such as leaves and twigs. Otherwise, accumulating debris will protect sparrows from the prickly

¹⁰ Applicant states in its brief, however, that "[a]fter Applicant submitted its Notice of Reliance [thereon], the registration for MOSQUITO BARRIER was cancelled under Section 8 on January 31, 2004."

effect of the projections and they will continue to use the building area.

Worse, sparrows will sometimes nest directly on top of the accumulating debris. The mechanical ledge repellents and their installation can be expensive, but for areas under heavy bird pressure, the results justify the cost.

The sticky bird repellents (e.g., Hot Foot®, Roost No More® and others) are most appropriate for small-to-medium-sized jobs and infestations where the mechanical repellents might be too cost prohibitive. And they can be used to supplement the more permanent programs of netting and mechanical repellents.

Regardless, it is important to consider that most chemical repellents last for about one year. In areas of excessive heat, dust, or the food debris resulting from food production, gel repellents may only last for several weeks.

Another article from the November 2002 issue of the same magazine, which is entitled "[VERTEBRATE PESTS] Managing Crows, Part II," provides in pertinent part that:

VISUAL REPELLENTS. For many crow problems around buildings, visual repellents offer a highly practical approach for managing crows that seem to be lingering around parking lots or building exteriors. Many visual repellents have been tried over the years, some proving more successful than others. Among the most effective are different types of metallic looking balloons, tapes and streamers.

....

REPELLENTS AND NETTING. As with other urban pest bird species, crows can be denied access to structural utility components ... by custom installment of any of the various types of structural repellents and/or bird netting products. Thus, prickly metal and plastic strips, tightly strung wires along ledges, bobbing Daddi-long-leg devices and so

forth can protect a specific area from crows and other pest birds.

With respect to the newspaper articles introduced by applicant from the "Los Angeles Times," the one from the June 9, 1991 edition, which is headlined "Tape Keeps Birds From Plundering Fruit Trees," recites in relevant part that:

If you have a bird problem in your home fruit orchard or vegetable garden, there's a new product that can help you humanely and inexpensively control the problem.

The product is "bird scare flash tape" and it comes from Japan, where it has been used with great success in protecting fruit and rice crops.

The scare tape consists of Mylar-coated plastic tape that is 7/16th wide. Sunlight is reflected off the tape and seems to signal danger to birds.

According to John Kaye, a Washington apple grower who imports the tape to this country, the scare tape results in a 75% to 90% reduction in bird damage to fruit or vegetable crops.

....

If you would like to sample the bird scare tape in your home orchard, the minimum order is five rolls for \$12

The other article, which carries the headline "Banishing Birds to Nature, Gently, Soars as Industry," is from the January 11, 1999 edition and states in pertinent part that:

Today the firm sells spikes, netting and wire to keep birds from roosting where they're not wanted. This isn't bird feed we're talking about. Bird-B-Gone has 50,000 clients, including Disneyland and Sea World.

'Bird Control' Yield More Firms, Profits

In the last six years the number of companies that specialize in the new industry, called "bird control," has jumped from fewer than 500 to more than 3,000, according to a trade magazine called Pest Control. No one has tracked how much money the firms take in overall. But one sector of the industry, companies that manufacture nets, repellents and other products to discourage birds, does more than \$30 million in sales annually, up from \$8 million five years ago.

....

A Redondo Beach firm called Bird Barrier America Inc., founded in 1993, is the second-largest manufacturer of bird repellents in the country. It has a newsletter called "Bird Droppings," and clients include Sea World and Walt Disney World. The federal government has installed its netting on the Capitol to keep birds from doing to our elected representatives what comes naturally.

As set forth in *H. Marvin Ginn Corp. v. International Association of Fire Chiefs, Inc.*, 728 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986), "[a] generic term is the common descriptive name of a class of goods or services." Moreover, as noted earlier, not only does opposer bear the burden of proof with respect to its claim of genericness, but such claim must be established by a preponderance of the evidence. See, e.g., *Capital Project Management Inc. v. IMDISI Inc.*, 70 USPQ2d 1172, 1178 (TTAB 2003). It is also well settled, however, that a showing of the genericness of a term requires "clear evidence" thereof. In *re Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987). See also *In re American Fertility Society*, 188 F.3d 1341, 51 USPQ2d 1832, 1835-36 (Fed. Cir. 1999). Consequently, as stated in *American*

Fertility Society, id. at 1836, a term's "[a]ptness is insufficient to prove genericness"; instead, "the correct legal test for genericness, as set forth in *Marvin Ginn*, requires evidence of 'the genus of goods or services at issue' and the understanding by the general public that the mark [or term at issue] refers primarily to 'that genus of goods or services.'"

Specifically, in *Marvin Ginn*, supra at 228 USPQ 530, our principal reviewing court held that:

Determining whether a mark [or a term] is generic therefore involves a two-step inquiry: First, what is the genus of goods or services at issue? Second, is the term sought to be registered ... understood by the relevant public primarily to refer to that genus of goods or services?

Furthermore, in applying such standard, the Board, for example, has noted that, as set forth in *In re Leatherman Tool Group Inc.*, 32 USPQ2d 1443, 1449 (TTAB 1994), "evidence of the relevant public's understanding of a term may be obtained from any competent source, including newspapers, magazines, dictionaries, catalogs and other publications," citing *In re Northland Aluminum Products, Inc.*, 777 F.2d 1566, 227 USPQ 961, 963 (Fed. Cir. 1985).

Applying the above standards, we must first identify the category of goods in issue. In this case, the category or type of goods identified in applicant's involved application is clear: "pest control devices, namely, non-electric metal wire attached to a structure for deterring birds from landing and perching." The record also includes references to and illustrations of mechanical spikes or wires, including

applicant's "Stainless Steel Spikes," which are for use on structures for deterring birds from alighting and/or roosting. Thus, for purposes of determining whether the term "BIRD BARRIER" is generic, we find that the category of goods under the first step of the test in *Marvin Ginn* is pest control devices consisting of non-electric metal wires or spikes for attachment to a structure to deter birds from landing and perching. As is plain therefrom, the relevant public for such goods constitutes those who are concerned with controlling the landing and perching of pest birds on structures such as commercial buildings and churches. The relevant public, therefore, would obviously include both those in need of pest bird control devices, e.g., building managers and maintenance personnel, and those who make, sell, furnish and/or install such devices, e.g., pest control companies in general and bird abatement businesses in particular.

Turning, then, to the second prong of the *Marvin Ginn* analysis, the critical inquiry in this case is whether the term "BIRD BARRIER" is understood by the relevant public primarily to refer to pest control devices consisting of non-electric metal wires or spikes for attachment to a structure to deter birds from landing and perching. We find that, like such terms as "bird repellent," "bird control" and "bird scare tape," which applicant admits are generic for various pest bird control devices and has introduced evidence sufficient to establish the genericness of such terms, the preponderance of the evidence clearly shows that the term "BIRD BARRIER" is a generic term in that it is understood by the relevant public as primarily referring to the

category or class of goods which constitutes pest control devices consisting of non-electric metal wires or spikes for attachment to a structure to deter birds from landing and perching.

Applicant, in this regard, concedes in its brief that the copy of the advertisement made of record by opposer from the publication "Your Church" "shows that Opposer used ... the phrase 'Nixalite Stainless Steel Bird Barrier' in its advertisement." Applicant contends, however, that "[t]his use by Opposer does not show that the relevant public understands the term 'BIRD BARRIER' to refer to Applicant's goods." In fact, applicant asserts that none of the evidence which opposer has properly made of record suffices to show the relevant public's primary understanding of such term and that, accordingly, "Opposer has failed to carry its burden of proof on the issue of genericness." We disagree.

In particular, applicant's admission in its brief that the ad in the magazine "Your Church" "shows that Opposer used ... the phrase 'Nixalite Stainless Steel Bird Barrier' in its advertisement" is sufficient to establish that opposer has a real commercial interest in using the term "BIRD BARRIER" and, thus, has standing to bring this proceeding. Similarly, the ads by opposer and applicant which appear in the excerpt from The Blue Book Building & Construction trade directory evidence that opposer is a competitor to applicant in the marketplace for "BIRD BARRIERS, REPELLENTS & CONTROLS." Applicant's ad, which appears under the same product heading as opposer's ad, even refers to "Bird Control Solutions" which are "Guaranteed to out-perform all competitors." In view thereof, opposer has plainly shown a real

commercial interest in using the term "BIRD BARRIER" generically to designate its "Nixalite Stainless Steel Bird Barriers" and therefore has standing to oppose.

In addition, the advertisements by opposer in "Your Church" magazine and The Blue Book Building & Construction trade directory evidence that, contrary to applicant's contentions, the relevant public understands the primary significance of the term "BIRD BARRIER" to refer to bird repellents like those offered by applicant. The "NIXALITE Stainless Steel Bird Barrier" which is illustrated in the "Your Church" magazine ad is touted as "a recognized and proven bird repellent," while the Nixalite Stainless Steel Bird Barriers" and the illustration of such a product which are promoted in the The Blue Book Building & Construction trade directory evidence that the relevant public would regard the term "BIRD BARRIER" (and the plural thereof) as a product designation or category for pest bird control devices consisting of metal wires or spikes, just as the relevant public would also understand, as applicant has admitted and the evidence shows, that the term "bird repellents" (and the singular thereof) likewise generically designates the same product category or class.¹¹ Indeed, the excerpts from The Blue Book Building & Construction trade directory and the November 1999 "Quad Cities White and Yellow Pages," which in each instance display "BIRD BARRIERS, REPELLENTS & CONTROLS" as a topical heading, and the excerpts from the other telephone directories, which in each case

likewise show "Bird Barriers, Repellents & Controls" as a product or category heading, not only demonstrate that the relevant public would understand that "bird barriers," "bird repellents" and "bird controls" are each generic terms, but that such terms would be regarded as synonyms. Furthermore, the November 1999 "Quad Cities White and Yellow Pages" contains a listing for "NIXALITE BIRD BARRIERS" by "NIXALITE OF AMERICA INC." Such evidence, therefore, is additional proof of the genericness of the term "BIRD BARRIER" with respect to applicant's goods and the like goods of others in the bird abatement field, including opposer.¹²

To the extent that applicant, in light of the introduction to its brief,¹³ also appears to argue that "BIRD

¹¹ There is no material difference, in a trademark sense, between the singular and the plural form of a word or term. See, e.g., Wilson v. Delaunay, 245 F.2d 877, 114 USPQ 339, 341 (CCPA 1957).

¹² We agree with applicant, however, that none of the various official records of the United States Patent and Trademark Office which were introduced by opposer is probative of whether the term "BIRD BARRIER" generically designates goods of the kind for which applicant seeks registration of its mark. Specifically, the third-party registration for the mark "TOPRITE" does not pertain to goods of the genus or type involved in this proceeding; instead, it covers the kind of "bird barrier" which, as identified therein, consists of "olefin netting for the top of game bird pens and for use in other areas where it is necessary to erect a bird barrier made of netting." The information concerning a prior filed and subsequently abandoned application by a different third-party to register "SPIKES" as a mark for a "bird barrier for pestiferous birds" evidences only that such an application was filed. Likewise, the information as to two prior filed and later abandoned applications by applicant shows only that such applications were filed; such information does not, as previously noted, indicate any reason why the applications were abandoned. Nonetheless, the various official records offered by opposer are not necessary in order for there to be sufficient clear evidence which establishes opposer's claim of genericness by the preponderance of the evidence properly of record.

¹³ Applicant asserts therein that:

BARRIER" has not been shown to be a generic term for its products because the record shows that such goods are advertised and known to the relevant public solely as "bird repellents," it is settled that a product can have more than one generic name. See, e.g., In re Sun Oil Co., 426 F.2d 401, 165 USPQ 718, 719 (CCPA 1970) (J. Rich, concurring); In re Recorded Books Inc., 42 USPQ2d 1275, 1281 (TTAB 1997); and In re National Shooting Sports Foundation, Inc., 219 USPQ 1018, 1020 (TTAB 1983). The significance of the fact that a product can have multiple generic names is, in this case, twofold. First, the fact that the articles introduced by applicant from the "Pest Control Technology" trade journal and the "Los Angeles Times" newspaper use terms other than "bird barrier" or "bird barriers" to refer to bird control products (e.g., "bird scare tape" and various types of "repellents," including "visual repellents" and "ledge denial repellents" such as "mechanical spikes, wires and chemical repellents") does not mean that, by the absence of any references therein to "bird barrier" or "bird barriers," those terms cannot be generic.

Second, while applicant is correct in arguing that "there is no dictionary definition of the phrase 'BIRD BARRIER,'" ¹⁴ the dictionary definitions of the word "barrier,"

Bird Barrier America, Inc. ("Applicant"), founded over ten years ago, is the second largest manufacturer of bird repellents in the United States and its products have been featured in publications such as the *Los Angeles Times* Applicant's clients include large companies such as Sea World® and Walt Disney World®, and its bird repellent products can be found protecting famous monuments, such as the United States Capitol (see, Id.).

¹⁴ The fact, however, that a term or phrase is not found in a dictionary or other standard reference work is not controlling on the

which we have judicially noticed, confirm that pest control devices consisting of non-electric metal wires or spikes for attachment to a structure to deter birds from landing and perching are, in a sense, a kind of "barrier." Specifically, as the illustrations of applicant's and opposer's goods make plain, the protruding metal wires or spikes on such products act as a barrier to deter birds from landing or perching in the sense that they serve to bar passage, as a railing, fence or the like, to a building ledge, roof or other structural feature where birds would otherwise alight or roost. That is, applicant's and opposer's bird repellents obstruct birds' access to structural elements of a building, thereby preventing them from landing or perching thereon. Such goods are obviously material objects that separate, keep apart or serve as a unit or barricade to birds in that they tend to restrict their free movement and mingling. We have no doubt, therefore, that as clearly shown by the excerpts made of record by opposer from various printed publications, the relevant public primarily understands "BIRD BARRIER" as a generic term for the genus of goods at issue herein. Indeed, such evidence suffices to demonstrate that the term would only have a generic significance.

Nonetheless, applicant further contends that the various third-party registrations which it has made of record for marks which include the word "BARRIER" as a separate element but which do not also include a disclaimer thereof "are sufficient

question of the registrability thereof. See, e.g., In re Gould Paper Corp., 834 F.2d 1017, 5 USPQ2d 1110, 1112; and In re Orleans Wines,

to, at a minimum, raise doubts as to whether the phrase 'BIRD BARRIER' is a generic term for Applicant's goods." None of such registrations, however, is for any type of bird control or abatement product. Moreover, even if some of such registrations are considered to be analogous to applicant's mark, since they include marks in which the word "BARRIER" is preceded by the generic name for a kind of pest species (e.g., "BARNACLE BARRIER" for "paints and sealer coatings for use on boats," "ROACH BARRIER" for "insecticides for domestic use" and "MOSQUITO BARRIER" for a "mosquito repellent"), such fact does not entitle applicant to registration of its mark absent a disclaimer of "BIRD BARRIER." Each case, as applicant correctly notes in its brief, "must be decided on its own facts" and, like a merely descriptive term, a term which is generic¹⁵ "is not registrable merely because other similar marks appear on the register." See, e.g., In re Nett Designs Inc., 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) ["Even if some prior registrations had some characteristics similar to [applicant's] application, the ... allowance of such prior registrations does not bind the Board or this court"]; and In re Pennzoil Products Co., 20 USQP2d 1753, 1758 (TTAB 1991). In any event, none of the third-party registrations offered by applicant is persuasive of a contrary finding in this case, nor do they singly or collectively serve to

Ltd., 196 USPQ 516, 517 (TTAB 1977).

¹⁵ As pointed out in Marvin Ginn, supra at 228 USPQ 530: "The generic name of a thing is in fact the ultimate in descriptiveness."

create any doubt as to the genericness of the term "BIRD BARRIER," given the clear showing thereof made by opposer.

Finally, we note applicant's observation that "Opposer has offered only scant references" in support of its claim of genericness. Applicant speculates, in view thereof, that "[i]f the term 'BIRD BARRIER' was truly a generic term for 'pest control devices, namely non-electric metal wire attached to a structure for deterring birds from landing and perching' then there would likely be many references available to Opposer where that phrase is used in a generic manner." Suffice it to say, however, that while the evidence which supports opposer's claim of genericness is modest, it nonetheless is clear evidence that the primary--and indeed sole--significance of "BIRD BARRIER" to the relevant public is that of a generic term which refers to the class or genus of pest control devices consisting of non-electric metal wires or spikes for attachment to a structure to deter birds from landing and perching.¹⁶ Accordingly, opposer has met its burden of proof of genericness by a preponderance of the evidence and applicant's mark is not registrable in the absence of a disclaimer of the generic term "BIRD BARRIER."

Decision: The opposition is sustained and registration to applicant is refused. Nevertheless, in accordance with Trademark Rule 2.133(b), this decision will be set aside and applicant's mark will be forwarded for registration if applicant,

¹⁶ Such evidence, moreover, is more extensive than that offered by applicant to support its contentions regarding the existence of other generic terms for its goods.

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no later than thirty days from the mailing date hereof, submits an appropriate disclaimer of the words "BIRD BARRIER."¹⁷

¹⁷ See TMEP Section 1213.08 (3d ed. 2d rev. May 2003) for the proper format for a disclaimer.