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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Jordan Drew Corporation

Serial No. 78254698

Kevin J. Harrington and John T.A. Rosenthal of Harrington, Ocko & Monk, LLP for Jordan Drew Corporation.

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(Tomas V. Vlcek, Managing Attorney).

Before Bucher, Grendel and Holtzman, Administrative Trademark
Judges.

Opinion by Holtzman, Administrative Trademark Judge:

An application has been filed by Jordan Drew Corporation to register the mark THE SALON SHOPPE for the following goods, as amended: "cosmetics and personal care products, namely, nail polish, skin care moisturizers, lotions and creams, hair shampoos and conditioners, hair removal creams," in International Class 3.¹

¹ Application Serial No. 78254698, filed May 27, 2003, based on an allegation of a bona fide intention to use the mark in commerce.

The trademark examining attorney refused registration on the ground that applicant's mark is merely descriptive of applicant's goods under Section 2(e)(1) of the Trademark Act.

When the refusal was made final, applicant appealed. Applicant and the examining attorney have filed briefs. An oral hearing was not requested.

The examining attorney argues that THE SALON SHOPPE merely describes the nature and characteristics of applicant's goods, namely that the goods are "salon products sold by a shop." The examining attorney argues that the term SALON identifies cosmetics and personal care products as being of salon quality or as being the kind used and/or sold in a salon; and that the term SHOPPE merely indicates to the consumer that the goods come from a shop or store. In support of her position, the examining attorney has submitted dictionary definitions of "salon" and "shoppe"; third-party registrations for goods containing a disclaimer of the product name in the mark as well as the term SHOPPE; and excerpts from the Nexis database and various websites containing references to "salon products" and "salon brands."

Applicant contends that THE SALON SHOPPE is suggestive rather than merely descriptive of its goods. Applicant argues that, as shown by the examining attorney's dictionary definitions of the two terms, the words "salon" and "shoppe" refer to physical establishments where goods are sold or services are

provided and not to the products themselves; that the mark is not used as a service mark or applied to a physical location where individuals can obtain services or goods; that a consumer would associate the mark with a "bricks-and-mortar" boutique providing beauty services rather than to the actual personal care products themselves; and that the mark is suggestive as it requires a consumer to associate the mark with personal care products rather than with a shop or physical location. Applicant argues that "despite the obvious meaning of 'shoppe' based upon the dictionary definitions of the terms the mark contains, the Examining Attorney came up with a wholly contrived definition of the meaning of the mark that is not supported by [the] very dictionary definitions she cites: namely that THE SALON SHOPPE means salon products sold by a shop." Brief at 9, emphasis in original. Applicant further argues that "almost all" of the examples of the examining attorney's third-party registrations are inapposite because some of the marks in those registrations are also for the retail stores themselves as well as the products, and other marks contain the word describing the product itself.² In addition, applicant argues that none of the website

² Applicant's request for reconsideration contained a list of third-party applications and registrations unsupported by any copies. The examining attorney, in her denial of the request for reconsideration, pointed out that a list is insufficient to make the third-party applications and registrations of record. Applicant has now attached TESS printouts of some of those registrations to its appeal brief along with portions of registration files. The examining attorney has

evidence shows instances in which a seller of personal care products uses the terms SALON or SHOPPE on the seller's products.

A term is merely descriptive within the meaning of Section 2(e)(1) if it immediately conveys knowledge of a quality, characteristic, function, feature, purpose or use of the goods or services with which it is used or intended to be used. In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987). Moreover, the question of whether a particular term is merely descriptive must be determined not in the abstract, but in relation to the goods or services for which registration is sought. See In re Engineering Systems Corp., 2 USPQ2d 1075 (TTAB 1986).

Applicant intends to provide "cosmetics and personal care products, namely, nail polish, skin care moisturizers, lotions and creams, hair shampoos and conditioners, hair removal creams" under the mark THE SALON SHOPPE. We agree with the examining attorney that the mark merely describes a significant characteristic of the goods.

The dictionary listing submitted by the examining attorney from *The American Heritage Dictionary of the English Language*,

objected to this evidence as untimely, and the objection is well taken. Accordingly, the evidence attached to applicant's brief will not be considered. See Trademark Rule 2.149(d). Applicant's request, in its reply brief, that the Board take judicial notice of these materials is denied. The Board does not take judicial notice of registrations or contents of registration files. See *Beech Aircraft Corporation v. Lightning Aircraft Company Inc.*, 1 USPQ2d 1290 (TTAB 1986); and *In re Duofold Inc.*, 184 USPQ 638 (TTAB 1974).

(Third Edition 1992), identifies "shoppe" as an alternate spelling of "shop" and defines the term as "a small retail store or a specialty department in a large store." Thus, the word "SHOPPE" would be descriptive for a retail establishment selling cosmetics. Applicant, however, is seeking registration for goods. It has been consistently held that a "a mark which names the type of commercial establishment from which particular goods come is merely descriptive of those goods." In re Taylor & Francis [Publishers] Inc., 55 USPQ2d 1213, 1216 (TTAB 2000) (PSYCHOLOGY PRESS for books in the field of psychology "directly and immediately conveys to purchasers that the books originate from a 'press,' that is, 'a printing or publishing establishment'"; the term PRESS "is as unregistrable for applicant's books as it would be for applicant's publishing services"); In re The Phone Company, Inc., 218 USPQ 1027, 1028 (TTAB 1983) (THE PHONE COMPANY for telephone equipment is no more registrable for the goods than it is for retail store services featuring such goods); In re The Paint Products Co., 8 USPQ2d 1863, 1866 (TTAB 1988) (PAINT PRODUCTS CO. is "no more registrable for goods [paints] emanating from a company that sells paint products than it would be as a service mark for the retail paint store services offered by such a company"); and In re Martin's Famous Pastry Shoppe, Inc., 221 USPQ 364, 367-68 (TTAB 1984) (PASTRY SHOPPE merely descriptive of both goods and

services emanating from a bakery and pastry shop), aff'd on other grounds, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984).

In addition, the third-party registrations submitted by the examining attorney show that the term SHOPPE, along with the product name, is disclaimed when the mark is used to identify a category of goods which would emanate from that establishment. Such registrations include Registration No. 1369639 for THE BIG CHEESE SHOPPE and design (CHEESE SHOPPE disclaimed) for "cheese and cheese food products"; Registration No. 1447790 for DIXIE CANDY SHOPPE (CANDY SHOPPE disclaimed) for candies; Registration No. 2476469 for TOYSHOPPE and design (TOYSHOPPE disclaimed) for toys for pets; and Registration No. 2754235 for MAPLE LEAF HAM SHOPPE stylized (HAM SHOPPE disclaimed) for "meats".³

³ Copies of these registrations were attached to the examining attorney's Office action denying applicant's request for reconsideration. Applicant appears to object to this evidence arguing that "At least fourteen of the [43] attachments [to the action denying reconsideration] are 'summary references' to registered marks without supporting documentation." Applicant maintains that "[t]he Examining Attorney never referenced any of these marks or provided documentation regarding any of these marks in the previous correspondence with Applicant." Our records show that supporting copies of the third-party registrations were properly made of record by the examining attorney with her denial of the request for reconsideration. Further, the Office action listed the 43 attachments by number and plainly stated, "Please ensure that you receive all of the aforementioned attachments, and if you do not, please contact the assigned examining attorney." We must presume applicant received the attachments since applicant never advised the Office otherwise. Further, to the extent that applicant is arguing that this evidence is not timely, applicant is simply incorrect. The examining attorney is entitled to introduce additional evidence in an Office action denying an applicant's request for reconsideration. See TBMP §1207.04 (2d ed. rev. 2004); and TMEP §715.03.

A "salon" is defined in *The American Heritage Dictionary of the English Language*, supra, as "a commercial establishment offering a product or service related to fashion: a beauty salon." The Internet evidence submitted by the examining attorney shows that salons offer cosmetics and personal care products for sale. See, for example, www.beautysalon.com which offers "the experience of shopping at a real salon" by providing a variety of cosmetics and beauty care products such as shampoos, facial peels and moisturizers. The Tutto Spa and Salon web page at www.tottospa.com offers spa packages from the salon along with products such as shampoos, conditioners, styling and sculpting lotions, waxes and hand creams.

However, the Nexis and Internet evidence made of record by the examining attorney also shows that the products that are sold in a salon are known as "salon products" or "salon brands." The term refers to products, or brands of products, which are usually, although not always, sold in salons and that are distinguishable from "mass market" products. The website at www.hair-styles.org discusses the nature of "salon products":

Are Salon Products Really Better? ...The simple answer is that salon products are for the most part much better than the products sold at your local grocer..."

The website goes on to explain "what makes salon products better than over the counter products," to describe salon products as having higher quality ingredients than typical "store bought"

products, and to compare the relative quality of certain salon product lines.

The following Nexis and Internet excerpts similarly demonstrate the meaning of "salon product" as a recognized category of beauty and personal care products (emphasis added):

... retailer that is a combination cosmetics store and hair salon. For a complete list of products and services, check the Web site ulta.com. Ulta carries both mass-market and department-store cosmetics and fragrances, as well as leading **salon brands**. *The Augusta Chronicle* (Georgia) (March 21, 2004)

Slick grooming products appeal to pet parents, too. Groomax is a line of coat-care products that Hollech describes as the pet equivalent of the Paul Mitchell **salon brand**. "It's a higher-grade shampoo..." *The Houston Chronicle* (July 7, 2003)

www.ulta.com offers salon services as well as **salon brands**

www.tottospa.com sells Tutto Enviroline Caresential-3 "Normal to oily **hair salon botanical shampoo, conditioner & finishing rinse**"

www.hairexpo.biz states, "Scroll through our many brands of **salon shampoo products** such as ARTEc, Amplify by Matrix, Back to Basics, Nioxin and more.... Also use the search facility to find the best **salon shampoo** for your hair."

www.hairproducts.com states, "Shampoo is an essential part of every hair care and beauty routine... Whatever your preference, we have the **salon shampoo or conditioner** you're looking for on HairProducts.com."

The mark THE SALON SHOPPE does not include the word "product." However, the word "product" would be readily understood in the context of the mark, and when the mark is

viewed in relation to applicant's cosmetics and personal care products. The word "SALON" as used in the context of the mark and the goods describes, not a store, but a type of product or a product with certain characteristics. It would take no imagination on the part of a purchaser to understand the significance of "SALON" as used, for example, on applicant's shampoo, or to make the transition from "SALON SHOPPE" to "salon products shoppe." See *In re Abcor Development Corp., Inc.* 588 F.2d 811, 200 USPQ 215, 219 (CCPA 1978) (Rich, J., concurring) (GASBADGE described as a shortening of the name "gas monitoring badge"); *DeWalt, Inc. v. Magna Power Tool Corp.*, 289 F.2d 656, 129 USPQ 275 (CCPA 1961) (POWER SHOP a short form of "power workshop" and merely descriptive of woodworking saws); and *In re Taylor & Francis [Publishers] Inc.*, supra (PSYCHOLOGY PRESS merely descriptive of books in the field of psychology emanating from a publishing establishment). See also, e.g., *Roselux Chemical Co., Inc.*, supra ("SUDSY", as an adjective, is "half of a common descriptive name" [for "sudsy ammonia"] and "as such it is clearly, and in common parlance, a type designation"); and *In re Central Sprinkler Co.*, 49 USPQ2d 1194, 1198 (TTAB 1998) ("[t]he fact that applicant has chosen to not include the term 'sprinkler' in the mark [ATTIC for sprinklers used in attics]... should not lead to the registrability of ATTIC standing alone").

We note, in addition, that at least one of the third-party registrations made of record by the examining attorney, namely Registration No. 1850174 for YARDLEY BATH SHOPPE (BATH SHOPPE disclaimed) for toilet preparations including bath soap and bath oil, contains a disclaimer of SHOPPE along with the adjective describing the product. Registrant's mark identifies a category of goods, "bath products," just as here, applicant's mark identifies the category of "salon products." Applicant argues that the disclaimer was required in the registration because the products themselves are identified as "bath products" as opposed to applicant's identification of goods where none of the products contain the word "salon." However, applicant's goods, for example, its shampoos, are identified broadly enough to encompass the particular types of shampoos known as "salon shampoos."

We find that the mark THE SALON SHOPPE as a whole describes a significant characteristic of applicant's goods. The term immediately, and without conjecture, informs consumers that applicant's products are salon products which come from a small retail establishment. The article THE in the context of this mark has no source-indicating significance and does nothing to detract from the descriptive meaning of the mark as a whole. See *In re The Place Inc.*, 76 USPQ2d 1467 (TTAB 2005); and *Fossil Inc. v. Fossil Group*, 49 USPQ2d 1451 (TTAB 1998).

Applicant argues that the mark is suggestive because consumers cannot immediately determine from viewing or hearing THE SALON SHOPPE that the mark applies to "mass-market" personal care products sold through "mass-market" retail stores. Whether or not applicant's product is in fact a "salon product" is not the issue. The question is whether the product would be perceived by consumers as a "salon product" wherever it happens to be sold. The evidence noted above shows that "salon products" are sold, not only in salons, but through other types of retail shops, such as beauty supply outlets, as well. See, e.g., *www.hairexpo.biz* and *www.hairproducts.com*. Further, applicant's identification of goods is not limited to sale in mass-market retail stores. Thus, we must presume that applicant's cosmetics and personal care products would be sold in salons as well as in other types of retail establishments.

Applicant further argues that while the website evidence shows that salons may sell certain cosmetics and personal care products, none of the establishments appear to sell products with the terms SHOPPE and/or SALON on their products or as a mark. While use of the term "SALON SHOPPE" by competitors would be strong evidence that the mark is merely descriptive, it is not a prerequisite for finding that a term is merely descriptive. The fact that applicant may be the only entity using the term THE SALON SHOPPE does not justify registration where, as here, the

term unquestionably conveys a merely descriptive meaning and would be perceived as such by the relevant public. See *In re National Shooting Sports Foundation, Inc.*, 219 USPQ 1018 (TTAB 1983). Purchasers of applicant's cosmetics and personal care products would, without any guesswork or the exercise of any imagination, immediately recognize THE SALON SHOPPE as applied to those goods as signifying that they are "salon products" or "salon quality products," emanating from a retail establishment.⁴

Decision: The refusal to register under Section 2(e)(1) of the Trademark Act is affirmed.

⁴ Applicant argues that the examining attorney "should describe what aspect of Applicant's mark can be disclaimed in order to make the mark registrable...." Brief at 14. The examining attorney refused to consider this request, correctly pointing out that a disclaimer is appropriate only where the composite mark includes distinctive matter that makes the mark registrable, and that, in this case, there is no registrable matter in the mark. See Section 6 of the Trademark Act; *In re Dena Corp. v. Belvedere International Inc.*, 950 F.2d 1555, 21 USPQ2d 1047 (Fed. Cir. 1991); and *In re JT Tobacconists*, 59 USPQ2d 1080 (TTAB 2001).