Oral Hearing:
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U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Nett Designs, Inc.

Serial No. 74/677,635

Paul M. Craig, Jr., Esq. for Nett Designs, Inc.

Tom Wellington, Trademark Examining Attorney,[1] Law Office 104 (Sidney I. Moskowitz, Managing Attorney).

Before Simms, Seeherman and Hohein, Administrative Trademark Judges.

Opinion by Hohein, Administrative Trademark Judge:

Nett Designs, Inc. has filed an application to register the mark "LOAD LLAMA THE ULTIMATE BIKE RACK" and design, as shown below,

[1] Anthony R. Masiello, the Trademark Examining Attorney initially assigned to this case, left the Patent and Trademark Office ("PTO") prior to the oral hearing herein.

for "carrying racks for mounting on bicycles, accessories for bicycle racks, namely attachments for expanding the carrying capacity of a carrying rack for mounting on bicycles, and bungee cords sold together as a unit with such carrying racks".[2]

Registration has been finally refused under Section 6(a) of the Trademark Act, 15 U.S.C. §1056(a), on the basis of applicant's refusal to comply with a requirement for a disclaimer of the words "THE ULTIMATE BIKE RACK," which the Examining Attorney maintains comprise a unitary laudatory phrase which is merely descriptive of applicant's goods within the meaning of Section 2(e) of the Trademark Act, 15 U.S.C. §1052(e).

Applicant has appealed. Briefs have been filed and an oral hearing was held. We affirm the disclaimer requirement.

Applicant, while conceding in its brief that the phrase "THE ULTIMATE BIKE RACK" is suggestive of its goods, argues in particular that the word "ULTIMATE" would not be perceived by the purchasing public as a laudatorily descriptive term. Instead, applicant insists that "the word 'ULTIMATE' is merely suggestive because it requires the exercise of some imagination, thought or perception in order to reach a conclusion, if at all, as to the nature of ... applicant's goods". In support of such contention, applicant asserts, although a copy thereof was not furnished,

[2] Ser. No. 74/677,635, filed on May 19, 1995, which alleges dates of first use of September 21, 1994. The words "BIKE RACK" are disclaimed.

that Webster's New International Dictionary (2d ed.) sets forth the following definition of the word "ultimate":

> 1. Farthest; most remote in space or time; extreme; last; final; as, man's ultimate destiny. 2. Last in a train of progression or consequences; tended toward by all that proceeds; arrived at as the last result. 3. Incapable of further analysis, division, or separation; elemental; as an ultimate particle or constituent; specif. chem. elementary; as ultimate analysis. 4. Mech. Maximum; as ultimate strain, strength, etc. or that at the instant of breaking or rupture.

Relying also upon copies, which it submitted, of its advertising brochure and the United States patents granted to its president for its bicycle racks, applicant insists that (footnote omitted):

> The mark is used with bicycle racks or accessories to convert existing bicycle racks to be expandable so as to carry all sorts of items on the bicycle rack .... By the use of the term "ULTIMATE", applicant thus seeks to convey the meaning of a new product with capabilities not possible heretofore, i.e., with the use of unnamed novel beneficial characteristics on which patents have been granted, however, without giving any indication whatsoever what those characteristics are. Thus, the mark in issue is at best suggestive ....

As such, applicant maintains that not only is a disclaimer of the phrase "THE ULTIMATE BIKE RACK" in its mark not required, but that "[i]f the Examiner's position were correct, [then] the word 'ULTIMATE' should not be registrable in any form whatsoever."

Applicant points out, however, as further support for its contentions, that the Patent and Trademark Office has issued a number of registrations on the Principal Register for marks

which consist of or include the word "ULTIMATE". Copies of such registrations, which include such marks as "THE ULTIMATE RIDING EXPERIENCE" for "bicycles and structural parts thereof," "THE ULTIMATE DRIVING MACHINE" for "automobiles" and "ULTIMATE" for "roof-mounted bicycle racks for vehicles," have been made of record by applicant.[3] Applicant contends that the Examining Attorney, in arguing that a disclaimer is proper because this case involves use of "the term 'ULTIMATE' in the context of other language that is literally descriptive," while the third-party registrations use such term "as a pure adjective, either alone or with non-descriptive wording," is an "artificial distinction" and thus "is fatally flawed".

The Examining Attorney, on the other hand, urges that "the phrase THE ULTIMATE BIKE RACK is 'an unregistrable component' of the applicant's mark, within the meaning of Section 6 of the Trademark Act, because such term is merely descriptive, in a laudatory manner, with respect to the applicant's goods". Relying upon the definition of record from the Random House Unabridged Dictionary, (2d ed. 1993) at 2050, which lists the word "ultimate" as meaning, inter alia, "not to be improved upon or surpassed; greatest; unsurpassed: *the ultimate vacation spot; the ultimate stupidity*," the Examining Attorney argues that, inasmuch as such word modifies the generic name for applicant's

[3] Of the third-party registrations, we note that only the registration for the mark "THE ULTIMATE DRIVING MACHINE" for "automobiles" issued under the provisions of Section 2(f) of the Trademark Act, 15 U.S.C. §1052(f), and thus, absent a showing of acquired distinctiveness, could be viewed as merely descriptive.

goods, the literal meaning immediately conveyed by the phrase "THE ULTIMATE BIKE RACK" is that (footnote omitted):

> [A]pplicant's bike racks are the greatest bike racks available. To claim that one's goods are "greatest" and "unsurpassed" is equivalent to the claim that they are the best available goods, representing the superlative degree of quality. The Board has held that the word BEST is a merely laudatory epithet describing the claimed quality of a product and not entitled to trademark protection in the absence of compelling proof that it has acquired a 'secondary meaning' to the relevant public. *In re Wileswood, Inc.*, 201 USPQ 400 (TTAB 1978).

Thus, according to the Examining Attorney, "the slogan THE ULTIMATE BIKE RACK is a claim of superiority to which every maker of bicycle racks would like to aspire".

Moreover, the Examining Attorney points out that the fact that applicant's bicycle racks are of a patented design, with novel features and capabilities previously unavailable in such goods, does not mean that the word "ULTIMATE" in applicant's mark simply suggests the presence of certain advanced characteristics. Instead, the Examining Attorney maintains that when the word "ULTIMATE" is used in connection with any patented product, including applicant's goods, "the clear message conveyed is that the product is unsurpassed in technical quality, *i.e.*, that it is the best."

Finally, with respect to the third-party marks upon which applicant relies, the Examining Attorney insists that the registrations thereof are not inconsistent with the disclaimer required in this case because, not only is the word "ULTIMATE"

not used alone in applicant's mark, but more significantly (underlining in original):

> As has been shown, the applicant's slogan THE ULTIMATE BIKE RACK is literally a claim that the goods are of unsurpassed quality. None of the ... [third-party] marks can be read in this way, except THE ULTIMATE DRIVING MACHINE ... which, being descriptive, was registered under Section 2(f) of the Trademark Act. The other compound marks, when read literally, describe not the ... goods but something else .... These marks have an indirectness and a suggestiveness that is lacking in applicant's slogan; [by contrast,] interpretation of applicant's slogan requires no imagination. ....

It is well settled that a term or phrase is considered to be merely descriptive of goods or services, within the meaning of Section 2(e)(1) of the Trademark Act, if it immediately describes an ingredient, quality, characteristic or feature thereof or if it directly conveys information regarding the nature, function, purpose or use of the goods or services. See In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). It is not necessary that a term or phrase describe all of the properties or functions of the goods or services in order for it to be considered to be merely descriptive thereof; rather, it is sufficient if the term or phrase describes a significant attribute or aspect about them. Moreover, whether a term or phrase is merely descriptive is determined not in the abstract but in relation to the goods or services for which registration is sought, the context in which it is being used or is to be used in connection with those goods or services and the possible significance that the term or phrase would have to the

average purchaser of the goods or services because of the manner of its use. See In re Bright-Crest, Ltd., 204 USPQ 591, 593 (TTAB 1979).

Classified within the category of merely descriptive designations set forth above are those which Professor McCarthy refers to as "self-laudatory terms". As explained in 2 J. McCarthy, McCarthy on Trademarks & Unfair Competition §11.17 (4th ed. 1999) (footnotes omitted):

> Marks that are merely "laudatory" and descriptive of the alleged merit of a product are also regarded as being "descriptive." This includes such terms as ... PREFERRED, DELUXE, GOLD MEDAL, BLUE RIBBON, SUPER BUY, and the like.
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> Since each tangible product carries with it a "psychic load" of intangible consumer psychological expectations about the product, a mark could be "descriptive" of the product itself or those intangible expectations, or both. Self-laudatory or "puffing" marks are regarded as a condensed form of describing the character or quality of the goods. ....

In the present case, we agree with the Examining Attorney that the phrase "THE ULTIMATE BIKE RACK" is merely descriptive of the overall characteristics or quality of applicant's carrying racks for mounting on bicycles. Such phrase, therefore, must be disclaimed inasmuch as it immediately conveys, without speculation or conjecture, that applicant's goods are the greatest or unsurpassed, and hence the best of their kind, in the sense of the sophistication and usefulness of their features. We judicially notice,[4] in this regard, that The

[4] Judicial notice may properly be taken of dictionary definitions. See, e.g., Hancock v. American Steel & Wire Co. of New Jersey, 203

American Heritage Dictionary of the English Language (3rd ed. 1992) defines the word "ultimate" as an adjective meaning, inter alia, "**3.a.** Of the greatest possible size or significance; maximum: *Has the ultimate diamond been found?* **b.** Representing or exhibiting the greatest possible development or sophistication: *the ultimate bicycle*. **c.** Utmost; extreme: *the ultimate insult*." Similarly Webster's New World College Dictionary (3rd ed. 1997) lists such term as signifying, in relevant part, "**4** greatest or highest possible; maximum; utmost". Applicant's advertising brochure reflects such themes by emphasizing that the highly developed and sophisticated features of its goods provide a variety of advantages; that "The 'Load Llama™ The Ultimate Bike Rack™' allows users of bicycles to enjoy the ride without constant apprehension that carried-along objects may fall off the carrier"; and that, in essence, "this is *the* rack, a basket without the bulk" (*emphasis added*). Viewed in this context, consumers are bound to regard "THE ULTIMATE BIKE RACK" as a laudatorily descriptive phrase which touts the superiority of applicant's carrying racks for mounting on bicycles rather than simply suggesting, as urged by applicant, that such goods are the latest thing or development.

With respect to the distinction urged by the Examining Attorney between the propriety of the disclaimer requirement in this case and the allowance of various third-party registrations,

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F.2d 737, 97 USPQ 330, 332 (CCPA 1953) and 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).

we tend to agree with applicant that such position is, indeed, a somewhat "artificial distinction". Each case, however, must be decided on its own merits and, while uniform treatment under the Trademark Act is desirable, a merely descriptive phrase or term is not made registrable simply because other similar (or arguably so) marks appear on the register. See, e.g., In re Consolidated Cigar Co., 35 USPQ2d 1290, 1295 (TTAB 1995) and cases cited therein. Moreover, to the extent that the third-party registrations have any probative value herein, it would seem that the phrase "THE ULTIMATE BIKE RACK," when used in connection with applicant's goods, is most like the slogan "THE ULTIMATE DRIVING MACHINE" for "automobiles," which as a merely descriptive phrase was allowed to be registered only upon a showing of acquired distinctiveness. Such phrases convey forthwith, in a laudatory manner, that the products with which they are associated are of unsurpassed quality and features and that the respective goods, in short, are simply the greatest, best or most highly developed of their kind.

Decision: The requirement for a disclaimer under Section 6(a) is affirmed. Nevertheless, in accordance with Trademark Rule 2.142(g), this decision will be set aside and applicant's mark will be published for opposition if applicant, no later than thirty days from the mailing date hereof, amends

its present disclaimer to one which appropriately disclaims the phrase "THE ULTIMATE BIKE RACK".[5]

R. L. Simms

E. J. Seeherman

G. D. Hohein
Administrative Trademark Judges,
Trademark Trial and Appeal Board

[5] See In re Interco Inc., 29 USPQ2d 2037, 2039 (TTAB 1993). For the proper format for a disclaimer, attention is directed to TMEP §§1213.09(a)(i) and 1213.09(b).