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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Kinetic Energy Corporation

Serial No. 77738793

John J. Dresch of Dresch IP Law, PLLC for Kinetic Energy Corporation.

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Before Bucher, Taylor and Wolfson, Administrative Trademark Judges.

Opinion by Taylor, Administrative Trademark Judge:

Kinetic Energy Corporation has filed an application to register the mark SOLARWINDOW, in standard character format, on the Principal Register for goods ultimately identified as "Solar-powered electricity generators" in Class 7; "Apparatus for converting electronic radiation to electrical energy, namely, photovoltaic cladding panels; Apparatus for converting electronic radiation to electrical energy, namely, photovoltaic solar hybrid modules;

¹ A different examining attorney initially was responsible for the application.

Apparatus for converting electronic radiation to electrical energy, namely, photovoltaic solar modules; Photovoltaic cells; Photovoltaic cells also including a solar thermal collector sold as a unit; Photovoltaic cells and modules; Solar cells" in Class 9; and "Semi-finished plastic films and sheets to be used in solar or photovoltaic modules; Substrates primarily of ceramic, silicon and non-metals for electrical or thermal insulation of solar cells, photovoltaic cells, and solar collectors" in Class 17.²

The trademark examining attorney finally refused registration on the ground that applicant's mark SOLARWINDOW is merely descriptive of applicant's goods under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1). Applicant appealed and both applicant and the examining attorney filed briefs.

We affirm the refusal to register.

The test for determining whether a mark is merely descriptive is whether it immediately conveys information concerning a significant quality, characteristic, function, ingredient, attribute or feature of the product or service in connection with which it is used, or intended to be used. In re Engineering Systems Corp., 2 USPQ2d 1075 (TTAB

² Serial No. 77738793, filed May 16, 2009, and alleging a bona fide intention to use the mark in commerce.

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, significant ingredient, quality, characteristic, function, feature, purpose or use of the goods or services. In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987).

Further, it is well-established that the determination of mere descriptiveness must be made not in the abstract, 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 Development Corp., 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978).

Finally, while a combination of descriptive terms may be registrable if the composite creates a unitary mark with a separate, nondescriptive meaning, In re Colonial Stores, Inc., 394 F.2d 549, 157 USPQ 382 (CCPA 1968), the mere combination of descriptive words does not necessarily create a nondescriptive word or phrase. In re Associated Theatre Clubs Co., 9 USPQ2d 1660, 1662 (TTAB 1988). If each component retains its descriptive significance in relation to the goods or services, the combination results

in a composite that is itself descriptive. In re Oppedahl & Larson LLP, 373 F.3d 1171, 71 USPQ2d 1370 (Fed. Cir. 2004).

Applicant, in urging reversal of the refusal, maintains that its mark, when considered in its entirety and in relation to the goods³ for which registration is sought, is not merely descriptive of its goods, but instead, is at most suggestive of them. Its goods, applicant notes, are not "solar windows" and do not contain "solar windows" as an ingredient. Applicant further argues that the separate terms in its applied-for mark, "SOLAR" and "WINDOW" have multiple meanings, some of which are not descriptive for the identified goods. Last, applicant argues that its mark is used as a trademark (i.e., proper noun), not as the name of the goods or as an adjective to describe the merit, quality, or an attribute of the goods set forth in the application, and that its mark is followed by the "TM" symbol indicating such use.⁴

³ Throughout its brief, applicant references both goods and services. However, we note that only goods are recited in the identification.

⁴ Applicant also attempted to make evidence of record by inserting a hyperlink in its brief, which allows the reader to "click" on the link to reach an Internet site. To the extent that the linked information is not already of record, it is untimely. Further, the problem with this type of evidence is that there is no assurance that the content of the linked material is the same today as when it originally was viewed. As a result, even if timely, we

In support of its position, applicant has made of record various definitions of the words "solar" and "window," of which the following were highlighted in its brief.

[T]he term "solar" also is defined as, inter alia, as of, derived from, relating to, or caused by the sun, measured by the earth's course in relation to the sun <a solar year>; also relating to or reckoned by solar time; or produced by or operated by the action of the sun's light or heat <solar energy> b: utilizing the sun's rays especially to produce heat or electricity <a solar house>; also: of or relating to such utilization <solar design>.

The term "window" also is defined as, inter alia, an interval of time during which an activity can or must take place: a brief window of opportunity for a space mission; a window of vulnerability during which the air force was subject to attack; strips of foil dropped from an aircraft to confuse enemy radar; chaff; a range of electromagnetic frequencies that pass unobstructed through a planetary atmosphere; a rectangular area on the screen that displays its own file or message independently of the other areas of a screen; a launch window; or an area at the outer limits of the earth's atmosphere through which a spacecraft must pass in order to return safely.⁵

could give this changeable and potentially changed evidence no probative value. If applicant only intended to highlight the source of previously submitted evidence, the better practice is to include the relevant passages in the brief and cite to the record where the information can be found.

⁵ Applicant's br. p 5 citing to www.merriam-webster.com/dictionary, and retrieved December 28, 2009.

Applicant also submitted a copy of a brochure from the energy company, Konarka Technologies, Inc. (Konarka), presumably to show that the term "solar window" does not have any meaning within applicant's industry because that term is not used by Konarka in a descriptive manner.

The examining attorney conversely maintains that applicant's proposed mark "merely describes a characteristic, feature, function, purpose or use of the goods, namely that the goods can be used in conjunction with, to create, and/or be applied to 'windows' to gather and convert 'solar' energy." Br. unnumbered p. 3. The examining attorney particularly contends that "solar window(s)" is a commonly descriptive term for windows that use special technology, devices and equipment to convert solar energy into thermal or electrical energy. As such, she maintains, the wording of the applied-for mark, SOLARWINDOW, is commonly used descriptive wording for windows with solar energy/solar power generating capabilities as well as goods, such as solar cells and photovoltaic cells, panels, films and coatings, that are used to create a solar window that functions to absorb solar radiation and transform it into useable thermal or electric energy.

To support her position, the examining attorney made the following evidence of record:

1. Dictionary definitions, including:

i. "Solar power" is defined as:

"energy from the sun that is converted into thermal or electrical energy."⁶

ii. "Solar energy is defined as:

"energy derived from the sun in the form of solar radiation."⁷

iii. "Window" is defined as:

"an opening constructed in a wall or roof that functions to admit light or air to an enclosure and is often framed and spanned with glass mounted to permit opening and closing."⁸

2. Internet evidence

a. Copies of web pages from various websites that show that the term "solar window(s)" is a commonly used term to describe the class of goods being windows capable of collecting solar generated energy, all submitted with the Office Action issued June 29, 2009.

i. www.ecogeek.org - article titled "Transparent Solar Windows" about a transparent photovoltaic solar window that generates 80-250 watts of power;

ii. www.gizmodo.com - article titled "Solar Windows Generate Up to 70 Watts, Serious Debt," discussing windows equipped with solar power generating capabilities and stating that "[s]olar

⁶ www.freedictionary.org/?Query=Solar%20power.

⁷ Random House Unabridged Dictionary, 1997, at <http://dictionary.infoplease.com/solar-energy>.

⁸ American Heritage Dictionary of the English Language, Fourth Ed., 2000, at www.education.yahoo.com/reference/dictionary/entry/window.

windows have finally made their way to the consumer market, ...";

iii. www.solar-energy-for-home.com/solarwindows.html - article titled "Solar Windows For what are they good?," describing "Solar Transparent Windows Technologies" which employ thin films of solar cells between layers of glass to create solar power generating windows;

iv. www.gstriatum.com - article titled "The Future of Homes Powered by Solar Energy, Solar Windows," about windows embedded with transparent solar cells to generate solar energy power for use in commercial and residential buildings; and

v. www.news.cnet.com - article titled "Printed solar cells coming to windows, clothing," about the use of small solar plastic cells to generate energy, by the Solar Company Konarka, and stating that "[f]urther down the road, it plans to make solar windows and power-generating cloth."⁹

b. Additional web pages showing the term "solar window(s)" used descriptively, made of record with the Final Office action issued January 27, 2010.

i. www.ecomall.com - article titled "New Solar Window Generates Electricity," and discussing use of a transparent solar cell wedged between panes of glass and usable in place of regular glass windows to create energy; and

ii. www.energysavers.gov (a website hosted by the U.S. Department of Energy) - article titled "Passive Solar Window Design," discussing the use of differed coating on windows to maximize solar heat collection.¹⁰

⁹ The examining attorney also submitted an excerpt from the website, www.xsunx.com. However, we find that this submission has little probative value because it does not include the term "solar window."

¹⁰ The examining attorney also made of record web pages from the websites www.instructables.com and www.sre3.com/solutions, discussing solar window inserts and solar window film,

We find this evidence highly persuasive. Not only does each element have descriptive significance as shown by the dictionary definitions, but the record establishes that the combination "SOLAR WINDOW" is used in the solar energy industry to describe solar energy-generating and/or solar energy-converting technology used in connection with windows. The absence of a space between the terms "Solar" and "Window" does not eliminate the descriptive nature of the mark. See *In re Cox Enterprises Inc.*, 82 USPQ2d 1040, 1043 (TTAB 2007) ("THEATL is simply a compressed version of the descriptive term THE ATL without a space between the two words. Without the space, THEATL is still equivalent in sound and impression to THE ATL and is equally descriptive of applicant's goods.").

Contrary to applicant's contention, when the designation SOLARWINDOW is viewed in connection with the goods listed in the application, there is nothing in the mark which is incongruous, nor is there anything which would require the gathering of further information, in order for the merely descriptive significance thereof to be readily apparent to prospective purchasers of the goods.

respectively. We find these excerpts probative to the extent that they refer to window treatments that generate renewable energy.

See, for example, *In re Abcor Development Corp., Inc.*, 588 F.2d 811, 200 USPQ 215 (CCPA) (Rich, J., concurring) [GASBADGE described as a shortening of the name "gas monitoring badge"]; and *Cummins Engine Co., Inc. v. Continental Motors Corp.*, 359 F.2d 892, 149 USPQ 559 (CCPA 1966) [TUBODIESEL held generically descriptive of engines having exhaust driven turbine super-chargers]. That is, the combination of the words "solar" and "window" fails to create a new and distinct commercial impression.

Moreover, as evidenced by the promotional language on applicant's website, and in its filing with the Security and Exchange Commission (SEC filing), the purchasing public would perceive the designation SOLARWINDOW as descriptive of applicant's "solar-powered electricity generators; apparatus for converting electronic radiation to electrical energy, namely, photovoltaic cladding panels; apparatus for converting electronic radiation to electrical energy, namely, photovoltaic solar hybrid modules; apparatus for converting electronic radiation to electrical energy, namely, photovoltaic solar modules; photovoltaic cells; photovoltaic cells also including a solar thermal collector sold as a unit; photovoltaic cells and modules; solar cells; semi-finished plastic films and sheets to be used in solar or photovoltaic modules; substrates primarily of

ceramic, silicon and non-metals for electrical or thermal insulation of solar cells, photovoltaic cells, and solar collectors." The website reads, in part, (emphasis added):

The superior optical absorption properties of New Energy's ultra-small solar cells enables development of an ultra-thin film (only 1/1000th the thickness of a human hair, or 1/10th of a micrometer) that can be utilized to produce a transparent solar window. In photovoltaic applications such as see-through windows, where transparency is a primary concern, today's thin film solar cells simply cannot be utilized to produce a transparent solar window.¹¹

...

Among our current research and development activities is the development of a patent-pending SolarWindow™ technology that could adapt existing home and office glass windows into ones capable of generating electricity from solar energy without losing significant transparency or requiring major changes in manufacturing infrastructure.

The SEC filing reads in relevant part:

SolarWindow™ Technology

The Company is developing its SolarWindow™ Technology by coating glass surfaces with the world's smallest known solar cells to produce transparent glass windows capable of generating electricity for application in homes, offices and commercial buildings.¹²

When prospective consumers encounter the designation SOLARWINDOW in these contexts, the "TM" designation notwithstanding, it is clear that SOLARWINDOW would

¹¹ Office Action issued June 25, 2009.

¹² Applicant response dated December 28, 2009.

immediately inform these consumers that applicant's goods are used to convert existing windows or create windows that are capable of collecting and generating solar energy. Notably, applicant uses the term "solar window" on its website in a descriptive manner when it states that solar cells and films are used "to produce a transparent solar window."

We simply are not persuaded by applicant's arguments to the contrary. First, applicant's contention that its mark is not descriptive because its goods are not "solar windows" or contain "solar windows" as an ingredient is unavailing. As stated, in order to be found descriptive, the mark need only convey an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods, not the common name. See *In re Gyulay*, 3 USPQ2d at 1009.

We also are not persuaded by applicant's argument that the individual terms have multiple meanings, many of which are not descriptive of the identified goods. Again, as stated, descriptiveness is considered in relation to the relevant goods. The fact that the terms "solar" and "window" have other meanings in other contexts is simply not controlling on the question of descriptiveness

presently before us. See *In re Chopper Indus.*, 222 USPQ2d 258, 259; *Brightcrest*, 204 USPQ at 593.

Lastly, applicant contends that the applied-for mark SOLARWINDOW is not a common term or phrase in the industry. This argument, however, is undercut by the evidence of record. Moreover, even if applicant were the first and only user of the term SOLARWINDOW, it would not justify registration, here, where the significance conveyed by the term is merely descriptive. See e.g., *In re National Shooting Sports Foundation, Inc.*, 219 USPQ 1018 (TTAB 1983).

For the reasons discussed, we conclude that when applied to applicant's goods, the designation SOLARWINDOW immediately describes, without any kind of mental reasoning, a purpose and/or function of the identified "solar-powered electricity generators; apparatus for converting electronic radiation to electrical energy, namely, photovoltaic cladding panels; apparatus for converting electronic radiation to electrical energy, namely, photovoltaic solar hybrid modules; apparatus for converting electronic radiation to electrical energy, namely, photovoltaic solar modules; photovoltaic cells; photovoltaic cells also including a solar thermal collector sold as a unit; photovoltaic cells and modules; solar

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cells; semi-finished plastic films and sheets to be used in solar or photovoltaic modules; substrates primarily of ceramic, silicon and non-metals for electrical or thermal insulation of solar cells, photovoltaic cells, and solar collectors."

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