

This Opinion is not a
Precedent of the TTAB

Mailed: January 5, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Bedgear LLC

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Serial Nos. 86315742 and 86315752¹

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Leo G. Lenna of Sorell Lenna & Schmidt LLP,
for Bedgear LLC

Jennifer Button, Trademark Examining Attorney, Law Office 105,
Susan Hayash, Managing Attorney.

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Before Mermelstein, Adlin and Lynch,
Administrative Trademark Judges.

Opinion by Lynch, Administrative Trademark Judge:

¹ Because the cases share common questions of fact and of law, and the relevant portions of the records are largely identical, the appeals are hereby consolidated. *See, e.g., In re Anderson*, 101 USPQ2d 1912, 1915 (TTAB 2012) (consolidating two appeals *sua sponte*). The TTABVUE and TSDR citations herein include in parentheses the serial number of the case to which the citation pertains.

I. Background

In Application Serial No. 86315752, Bedgear LLC (“Applicant”) seeks registration on the Principal Register of the proposed mark CFM in standard characters for “Mattress toppers that have been tested under a rating system for rating air permeability performance” in International Class 20 and “Home textile fabrics, namely, blankets, sheets, duvets, comforters, mattress protectors, namely, covers, mattress covers, pillow protectors, namely, cases, pillow covers, crib mattress protectors, namely, covers, crib mattress covers and crib sheets that have been tested under a rating system for rating air permeability performance” in International Class 24. In Application Serial No. 86315742, Applicant seeks registration on the Principal Register of the proposed mark CFM in standard characters for “Mattresses, mattress toppers, and pillows that have been tested under a rating system for rating air permeability performance” in International Class 20 and “Comforters that have been tested under a rating system for rating air permeability performance” in International Class 24.²

In both cases, the Trademark Examining Attorney refused registration of Applicant’s proposed mark under Section 2(e)(1), 15 U.S.C. § 1052(e)(1), as merely descriptive of the identified goods. The Examining Attorney also issued refusals in both cases on the ground that the proposed trademark fails to function as such,

² Application Serial Nos. 86315752 and 86315742 were filed on June 20, 2014, based on use of the proposed mark in commerce under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a).

because, as used on the specimens of record, CFM is merely informational matter pursuant to Trademark Act Sections 1, 2 and 45, 15 U.S.C. §§ 1051-1052, 1127.

After the Trademark Examining Attorney made the refusals final, Applicant requested reconsideration and appealed to this Board in each case. On remand, the Examining Attorney denied the requests for reconsideration. The appeals resumed and are fully briefed. We affirm the refusals to register.

II. Descriptiveness

Section 2(e)(1) of the Trademark Act precludes registration of a mark which, “when used on or in connection with the goods of the applicant is merely descriptive . . . of them.” 15 U.S.C. § 1052(e)(1). A term is merely descriptive within the meaning of Section 2(e)(1) “if it immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used.” *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (quoting *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)); *see also In re TriVita, Inc.*, 783 F.3d 872, 114 USPQ2d 1574, 1575 (Fed. Cir. 2015).

We consider whether someone familiar with the identified goods will understand the mark to convey information about them, rather than whether someone presented only with the mark could guess the products or activities listed in the description of goods or services. *DuoProSS Meditech Corp. v. Inviro Med. Devices Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012); *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978); *In re Remacle*, 66 USPQ2d

1222, 1224 (TTAB 2002). Descriptiveness must be assessed “in relation to the goods for which registration is sought, the context in which it is being used, and the possible significance that the term would have to the average purchaser of the goods because of the manner of its use or intended use.” *Bayer Aktiengesellschaft*, 82 USPQ2d at 1831 (citing *Abcor Dev.*, 200 USPQ at 218).

Applicant’s goods include mattresses, mattress toppers, comforters, and a variety of other home textile fabrics. Applicant initially stated in responses to information requirements that CFM “has no significance in relation to the applicant’s goods or in the relevant trade.”³ However, the record includes a dictionary entry for CFM indicating that it is an abbreviation for “cubic feet per minute.”⁴ Applicant later acknowledged that CFM is an acronym for “cubic feet per minute,” taking the position that it is a unit of measurement, “commonly used by manufacturers of blowers and compressors,” but “not commonly associated with bedding or bedding products.”⁵ According to Applicant, “the main function of the goods of the present application[s] does not involve the movement of air but instead the natural flow of air through the goods.”⁶ Applicant therefore claims its use is distinct as “a source of a rating system for bedding products.”⁷

³ February 20, 2015 Response to Office Action at 1 (SN 86315752 & 86315742).

⁴ May 13, 2015 Office Action at 2 (SN 86315752 & 86315742).

⁵ 7 TTABVUE 3 (Applicant’s Brief) (SN 86315752 & 86315742).

⁶ November 13, 2015 Response to Office Action at 3 (SN 86315752 & 86315742).

⁷ *Id.* at 2.

However, the Examining Attorney submitted evidence that others in the relevant industry *do* use CFM or “cubic feet per minute” to refer to a measurement of air permeability of fabrics. For example, the record includes the following:

- The website glossary of Pacific Coast Feather Company defines CFM: “Cubic feet per minute per square meter (CFM) is a measure of the air permeability of a fabric. The higher the CFM, the greater the volume of air passing through. While the industry standard for air permeability is a CFM rating less than 10, Pacific Coast® Barrier Weave™ fabric has a rating of less than 5 CFM.”⁸
- The website “Glossary of Mattress Terms” of **BACKtoBED**® defines Air Flow as “Amount of air expressed in cubic feet per minute that can be drawn through a foam sample.”⁹
- The website of Mattress To Go contains a “Glossary of Common Mattress Terms” that includes an entry for Air Flow as “Amount of air expressed in cubic feet per minute (cfm), that can be drawn through a 2” x 2” x 1” FPF sample at .5-inch water pressure differential. A cfm of 2.0 and above is considered good for flexible polyurethane foam.”¹⁰
- The webpage of a certifier of mattress retailers, Diamond Certified, includes a “Glossary of Terms for Customers of New Mattress Stores” with an entry stating “Air flow is a measure of how much air can pass through a foam layer. It is usually defined in cubic feet per minute.”¹¹
- A U.S. Patent Application, 20150296995 A1, for “[a] foam mattress in which a layer of latex or latex-like foam placed above a layer of memory foam is described,” in which various dependent claims include the limitation that the foam layer has a particular “airflow” of a certain amount of “cubic feet per minute.”¹² The specification further states “Airflow is a measure of the air permeability of a foam and is measured in cubic feet per minute (cfm).”¹³

⁸ May 13, 2015 Office Action at 11 (pcf.com) (SN 86315752 & 86315742).

⁹ December 4, 2015 Office Action at 2 (backtobed.com) (SN 86315752 & 86315742).

¹⁰ *Id.* at 11 (matt-to-go.com).

¹¹ *Id.* at 37, 41 (diamondcertified.org).

¹² *Id.* at 19, 21-25 (google.com/patents).

¹³ *Id.* at 28 (google.com/patents).

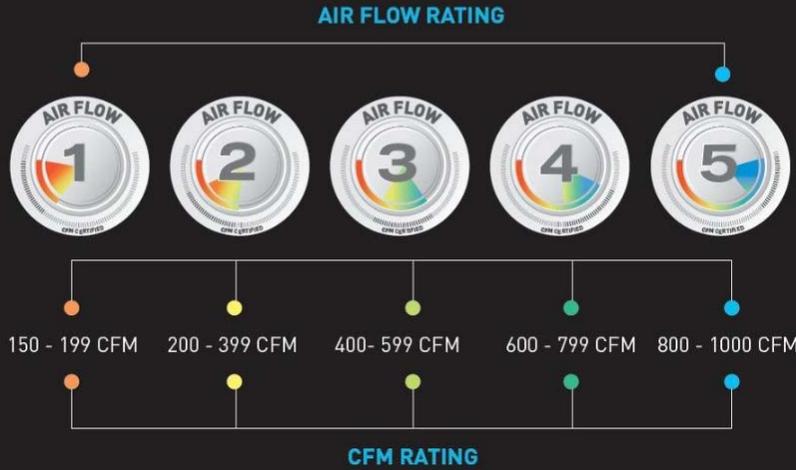
Applicant's own specimens and product information evidence reflect usage consistent with these third-party uses. Excerpts appear below,¹⁴ stating "What's CFM? CUBIC FEET PER MINUTE (CFM) IS A MEASUREMENT OF THE VELOCITY AT WHICH AIR FLOWS INTO OR OUT OF A SPACE. IT'S A UNIT OF AIR FLOW INDICATING HOW MUCH AIR CAN MOVE PER MINUTE." They demonstrate that the rating system referred to in Applicant's identifications consists of assigning a number between 1 and 5 based on the air flow range measured in CFM, or cubic feet per minute.



¹⁴ The excerpts come from the February 20, 2015 Response to Office Action at 2-4 in both application files.

WHAT'S YOUR RATING?

SELECT YOUR PERSONAL, PREFERRED LEVEL OF TEMPERATURE REGULATION

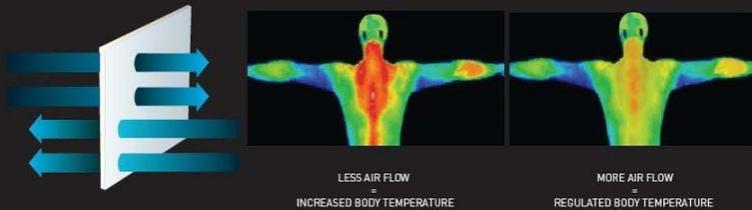


WHAT'S CFM?

CUBIC FEET PER MINUTE (CFM) IS A MEASUREMENT OF THE VELOCITY AT WHICH AIR FLOWS INTO OR OUT OF A SPACE. IT'S A UNIT OF AIR FLOW INDICATING HOW MUCH AIR CAN MOVE PER MINUTE.

WHY AIR FLOW?

AIR FLOW SIGNIFICANTLY INFLUENCES THE THERMAL COMFORT OF THE HUMAN BODY.



COMPARISON	SHEETS TYPE		CFM RATING
	OURS	Dri-Tec® Mesh Sheets Dri-Tec® Knit Sheets	736 ft ³ /min 407 ft ³ /min
THEIRS	Poly/Spandex Knit Sheets	125 ft ³ /min	
	300 TC 100% Cotton Sheets	48.0 ft ³ /min	
	600 TC 100% Cotton Sheets	27.2 ft ³ /min	



The third-party evidence and Applicant’s own specimens and product information convincingly refute its argument that the term CFM used on its goods “requires the consumer to use their imagination to identify this characteristic.”¹⁵ Rather than requiring consumer imagination, the evidence shows that consumers come across CFM as an established term in the industry to describe – in particular amounts – the permeability of mattresses and bedding products such as Applicant’s. Regardless, even if Applicant’s assertion were correct that its use CFM for these types of goods is novel or unusual, this does not justify registration where the significance of the term is merely descriptive. *In re Nat’l Shooting Sports Found., Inc.*, 219 USPQ 1018, 1020 (TTAB 1983).

Applicant contends that three other marks consisting of the term CFM have been registered for other goods or services “that evoke air flow,” and therefore its

¹⁵ 7 TTABVUE 3 (SN 86315752 & 86315742) (Applicant’s Brief).

CFM marks should also be registrable. Applicant merely listed third-party marks, registrations numbers and goods/services but failed to submit the registration records upon which it relies, as is required,¹⁶ but the Examining Attorney neither objected to the argument nor advised Applicant of the need to submit the records and thereby waived any objection to consideration of the listing. *See In re City of Houston*, 101 USPQ2d 1534, 1536 (TTAB 2012), *aff'd* 731 F.3d 1326, 108 USPQ2d 1226 (Fed. Cir. 2013) (“[T]he examining attorney’s failure to advise applicant of the insufficiency of the list of registrations when it was proffered during examination constituted a waiver of any objection to consideration of that list”). Nonetheless, we find the listing of three third-party registrations to have little probative value, in part because none include the same or similar goods as those in the applications at issue, and we do not find persuasive Applicant’s unsupported assertions that the goods and services are analogous. We consider descriptiveness in relation to the relevant goods. *DuoProSS Meditech* 103 USPQ2d at 1757. Regardless, each case must be decided on its own record, and we are not bound by the prior registrations. *See 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 PTO’s allowance of such prior registrations does not bind the board or this court.”).

¹⁶ “To make a third-party registration of record, a copy of the registration, either a copy of the paper Office record, or a copy taken from the electronic records of the Office, should be submitted during prosecution/examination of the application. Mere listings of registrations are not sufficient to make the registrations of record.” *In re Star Belly Stitcher*, 107 USPQ2d 2059, 2064 (TTAB 2013) (citations omitted).

In this case, the third-party evidence discussed above demonstrates that CFM has a well-recognized meaning in the relevant industry. Consumers would immediately understand CFM, when used in connection with Applicant's identified goods, to describe a key feature – the degree of air permeability of its goods. *See In re Analog Devices Inc.*, 6 USPQ2d 1808, 1810 (TTAB 1988), *aff'd without pub. op.*, 871 F.2d 1097, 10 USPQ2d 1879 (Fed. Cir. 1989) (if the mark is descriptive of any of the goods or services for which registration is sought, it is proper to refuse registration as to the entire class).

III. Informational

Next, we address the failure to function refusal. The descriptiveness and informational refusals are not mutually exclusive. *See In re AOP LLC*, 107 USPQ2d 1644 (TTAB 2013). Applicant submitted specimens of use with its initial applications, and later submitted substitute specimens, as well as product information required by the Examining Attorney. We consider whether consumers would perceive CFM as a mark.

Matter that is merely informational is not registrable as a mark. *See id.* (refusal of AOP affirmed where the specimens “present the term in an informational manner to inform consumers about a certification process rather than as a source identifier”); *In re T.S. Designs, Inc.*, 95 USPQ2d 1669 (TTAB 2010) (holding CLOTHING FACTS merely informational and not a source identifier based on likely consumer perception). The question, then, is whether consumers would view the applied-for mark as source-identifying, or rather as simply conveying

information. For this analysis, in addition to Applicant's specimens, we also consider the product information submitted by Applicant, as well as other evidence in the record. *See In re Eagle Crest, Inc.*, 96 USPQ2d 1227, 1230 (TTAB 2010) (affirming informational refusal where third-party evidence showed widespread use of the applied-for phrase and use on "applicant's specimens as well as its other materials would likely reinforce the perception" of the proposed mark as informational).

Considering the record as a whole, we find that consumers would perceive Applicant's use of CFM on the specimens as a unit of air flow measurement with a corresponding rating. They use CFM with numerical measurements, defined in Applicant's product information as "cubic feet per minute," specifically, "a measurement of the velocity at which air flows into and out of a space." A table in Applicant's product information comparing its bedsheets to competitors' sheets contains a "CFM RATING" column containing specific measurements expressed in "ft³/min." A graphic titled "Air Flow Rating" shows ranges of CFM measurements, such as "150-199 CFM" and "200-399 CFM" corresponding to a numerical rating of 1 to 5 shown in a circle design with "CFM Certified" underneath. On the third excerpt above, which Applicant described as its product packaging, a Bedgear "Temperature-Regulating" blanket appears in packaging that on the lower right contains a sticker with a similar circle design with a large 5 in the center and CFM at the top of the circle. As indicated on the product information, Applicant's use of CFM informs consumers that this blanket's air flow rating of 5 equates to 800-1000

CFM, or cubic feet per minute. The first excerpt above shows the same type of use of CFM on a mattress topper package. In the specimens of record in both cases, consumers would perceive CFM as a unit of measurement or rating of the permeability of the bedding products, rather than as a source indicator. The third-party evidence set out and discussed above demonstrates that the nature of Applicant's use is consistent with CFM as a measurement in the industry to express permeability.

Applicant's specimens present CFM in an informational manner to convey a measurement or rating of air flow through fabric, rather than as a source identifier. In short, it is likely to be perceived as informational.

Decision: The refusals to register Applicant's proposed mark CFM as merely descriptive and as merely informational are affirmed in both cases.