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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **A. Lassonde Inc.**

Serial No. 75/231,610

Lawrence E. Abelman of Abelman Frayne & Schwab for
applicant.

Jason Turner, Trademark Examining Attorney, Law Office 108
(David Shallant, Managing Attorney).

Before Simms, Seeherman and Quinn, Administrative Trademark
Judges.

Opinion by Quinn, Administrative Trademark Judge:

An application has been filed by A. Lassonde Inc., a
Canadian corporation located in Quebec, Canada, to register
on the Supplemental Register the term shown below

for "fruit juices and fruit drinks."¹

¹ Application Serial No. 75/231,610, filed January 27, 1997,
alleging dates of first use of February 21, 1996.

The Trademark Examining Attorney has refused registration on the Supplemental Register under Section 23 of the Trademark Act on the ground that the term sought to be registered is generic and, thus, is incapable of identifying applicant's goods and distinguishing them from those of others.

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

Applicant argues, in urging that the refusal be reversed, that the applied-for mark appears in a distinct script and that the term does not constitute the common or usual name of applicant's goods. Applicant maintains that the specimens demonstrate that applicant not only intends to use FRUITÉ as a mark, but that it is capable of functioning as a source indicator. Although applicant acknowledges that the evidence of record shows that a fruit juice may be described as being "fruity" in flavor, there is no evidence that fruit juices or fruit drinks are referred to as a "fruity." Further, applicant asserts that there is no evidence showing that the average purchaser will understand that FRUITÉ means "fruity." Applicant contends that the facts that the term is neither an English

word nor the direct translation of the name of the goods contribute to capability.

The Examining Attorney contends that the proposed mark is generic. The Examining Attorney asserts that the French term "fruité" translates into the English word "fruity," a word which is commonly used in connection with fruit beverages. The Examining Attorney goes on to contend that the term "fruity" is a generic adjective for a type or category of beverage, namely, "fruity drinks." The Examining Attorney also asserts that the stylization of the proposed mark is not sufficiently distinctive so as to make it capable of registration. In support of the refusal, the Examining Attorney submitted dictionary listings for "fruité" and "fruity," as well as numerous excerpts retrieved from the NEXIS database showing uses of the term "fruity" in connection with beverages.

In order for a term to be registered on the Supplemental Register, it must be capable of serving as an indicator of source. Capability is determined by considering the meaning of the term as applied to the goods, the context in which the term is used on the specimens filed with the application, and the likely reaction thereto by average purchasers upon encountering

the term in the marketplace. In re Sambado & Son Inc., 45 USPQ2d 1312 (TTAB 1997).

A mark is a generic name if it refers to the class or category of goods on which it is used. H. Marvin Ginn Corp. v. International Association of Fire Chiefs, Inc., 782 F.2d 987, 228 USPQ 528 (Fed. Cir. 1986). The test for determining whether a mark is generic is its primary significance to the relevant public. Section 14(3) of the Act; Magic Wand Inc. v. RDB Inc., 940 F.2d 638, 19 USPQ2d 1551 (Fed. Cir. 1991); and H. Marvin Ginn Corp. v. International Association of Fire Chiefs, Inc., supra. The Patent and Trademark Office has the burden of establishing by clear evidence that a mark is generic and thus unregistrable. In re Merrill Lynch, Pierce, Fenner and Smith, Inc., 828 F.2d 1567, 4 USPQ2d 1141 (Fed. Cir. 1987). Evidence of the relevant public's understanding of a term may be obtained from any competent source, including testimony, surveys, dictionaries, trade journals, newspapers, and other publications. In re Northland Aluminum Products, Inc., 777 F.2d 1556, 227 USPQ 961 (Fed. Cir. 1985).

The French term "fruité" is translated into English as "fruity (of wine, olives)." *Cassell's French-English Dictionary* (1962). The term "fruity" is defined as "of,

containing, or relating to fruit." *Webster's New Riverside University Dictionary* (1994). Applicant does not dispute that the term "fruité" is the foreign equivalent of the English term "fruity."

Also of record are numerous excerpts showing uses of the term "fruity" in connection with beverages. Several articles show use of the term in connection with wine or alcoholic beverages. There are others, however, which show use in connection with nonalcoholic beverages. The following are representative of these latter excerpts:

Smoothies are fruity drinks, featuring flavors such as mango, papaya and cranberry.
Cincinnati Business Courier (February 12, 1999)

...a perfect match for its protein shakes, veggie and fruity drinks.
The News and Observer (March 15, 1998)

Overall, the taste reminded me of a watered-down fruity kid's drink.
Ventura County Star (November 18, 1998)

...the colorful, fruity juices made by a California company, Odwalla, that promoted its products as some of the nation's freshest and healthiest.
The New York Times (January 4, 1998)

...a fruity soft drink.
Business Week (December 29, 1987)

There is no question that the term FRUITÉ (or its English equivalent "fruity") is merely descriptive of fruit

Ser No. 75/231,610

juices and fruit drinks. See: Kellogg Co. v. Pack'em Enterprises, Inc., 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991), aff'g, 14 USPQ2d 1545 (TTAB 1990). However, although FRUITÉ is merely descriptive, based on the record before us we find that the term is not generic for such goods. In making this determination we are reminded of the Federal Circuit's observation that "whether a term is classified as 'generic' or as 'merely descriptive' is not easy to discern when the term sits at the fuzzy boundary between these classifications." In re Merrill Lynch, Pierce, Fenner, and Smith Inc., supra at 1141.

The type or category of goods at issue here is fruit juices and fruit drinks. Thus, the basic inquiry here is whether members of the relevant public (in this case, ordinary consumers) use or understand the term sought to be registered to refer to this type or category of goods.

"Fruity" is not a type or category of fruit beverage. Rather, "fruity" is a merely descriptive term, indeed a highly descriptive term, which is used in connection with a variety of beverages. As shown by the NEXIS articles, the term describes a quality found in many different beverages, ranging from mixed cocktails to wine to smoothies and so on. Although the term "fruity" may describe a quality or characteristic of applicant's beverages, it simply does not

Ser No. 75/231,610

name the type of beverage at issue, as would be the case with the term "fruit" (i.e., "fruit juice") See: In re Bush Brothers & Co., 884 F.2d 569, 12 USPQ2d 1058 (Fed. Cir. 1989); and In re Waverly Inc., 27 USPQ2d 1620 (TTAB 1993).

The case principally relied upon by the Examining Attorney, namely In re Sambado & Son Inc., supra, is clearly distinguishable from the present one. In that case, FRUTTA FRESCA and its equivalent "fresh fruit" was determined to be generic inasmuch as the term plainly names a category of fruit, namely fresh fruit. The type of clear evidence introduced in that case simply is not of record in this one.

Lastly, any doubts on this issue are resolved in favor of applicant. In re Volvo White Truck Corp., 16 USPQ2d 1417 (TTAB 1990).

Decision: The refusal to register is reversed.

R. L. Simms

E. J. Seeherman

T. J. Quinn
Administrative Trademark
Judge, Trademark Trial

Ser No. 75/231,610

and Appeal Board

Ser No. 75/231,610