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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Promark International, Inc.

Serial No. 76240587

Bert A. Collison and Gianfranco G. Mitrione of Duane Morris LLP for Promark International, Inc.

Brendan D. McCauley, Trademark Examining Attorney, Law Office 114 (Margaret Le, Managing Attorney).

Before Seeherman, Hohein and Bucher, Administrative Trademark Judges.

Opinion by Hohein, Administrative Trademark Judge:

Promark International, Inc. has filed an application to register the term "FAST FOOD FRIES" for "frozen potatoes."[1]

Registration has been finally refused under Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1), on the ground that, when used in connection with applicant's goods, the term "FAST FOOD FRIES" is merely descriptive thereof.

[1] Ser. No. 76240587, filed on April 16, 2001, which is based on an allegation of a date of first use anywhere and in commerce of January 31, 1999.

Applicant has appealed. Briefs have been filed, but an oral hearing was not requested. We affirm the refusal to register.

It is well settled that a term is considered to be merely descriptive of goods or services, within the meaning of Section 2(e)(1) of the Trademark Act, if it forthwith conveys information concerning any significant ingredient, quality, characteristic, feature, function, purpose, subject matter or use of the goods or services. See, e.g., In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987) and In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). It is not necessary that a term 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 describes a significant attribute or idea about them. Moreover, whether a term 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 intended to be used on or in connection with those goods or services and the possible significance that the term would have to the average purchaser of the goods or services because of the manner of such use. See In re Bright-Crest, Ltd., 204 USPQ 591, 593 (TTAB 1979). Thus, "[w]hether consumers could guess what the product [or service] is from consideration of the mark alone is not the test." In re American Greetings Corp., 226 USPQ 365, 366 (TTAB 1985).

Applicant contends that the term "FAST FOOD FRIES," when considered in its entirety, is suggestive rather than merely descriptive of its frozen potatoes, arguing in its main brief that such term fails to convey information which immediately "indicate[s] the purpose, function or use of the product." As to the "NEXIS" evidence made of record by the Examining Attorney, applicant asserts in its main brief that:

> The Examining Attorney attaches excerpts from a computerized database that reference the phrase "fast food fries." All of the excerpts cited by the Examining Attorney refer to "fast food fries" as a cooked food item sold in restaurants and not to applicant's goods. Applicant's goods are frozen french fried potatoes sold in a retail grocery store's frozen food section to be cooked by the purchaser in his or her home. Since applicant's product is sold frozen in a retail grocery store, it is doubtful that a purchaser would think this product was the same as or similar to the food item sold in a restaurant. Therefore, the mark FAST FOOD FRIES does not merely describe the cooked food item referenced in the computer database excerpts.

In addition, applicant urges in its main brief that "[d]espite the many independent definitions of the words 'fast,' 'food' and 'fries' in and of themselves," a "combination of descriptive words may result in an arbitrary unitary designation which may function as a trademark." Here, applicant argues, "even if the Examining Attorney considers the component word portions of Applicant's mark to be descriptive," the "repetition of the initial consonant sounds in the adjacent three words which comprise Applicant's mark creates a unitary whole entitled to protection as a non-descriptive mark." According to applicant, its "[u]se of the mark FAST FOOD FRIES does not sequester the

appropriate and apt term to describe a frozen side dish" inasmuch as "[i]t would not occur to anyone to describe Applicant's goods, or their intended use, as FAST FOOD FRIES" and thus a "competitor would not need the mark ... to describe the products listed in Applicant's application." Instead, applicant contends that a "consumer viewing the phrase would be required to use his or her imagination or thought to conclude that the phrase describes the products listed in Applicant's application." Any doubt in such regard, applicant insists, should be resolved in its favor, citing In re Gourmet Bakers, Inc., 173 USPQ 565 (TTAB 1972).

The Examining Attorney, on the other hand, principally maintains in his brief that "[w]hen viewed in relation to the applicant's goods, the applicant's mark describes a characteristic or purpose of the applicant's goods, namely, that the frozen potatoes are used to make FAST FOOD FRIES." Specifically, in support thereof, the Examining Attorney cites definitions which he made of record from Merriam-Webster's Collegiate Dictionary (10th ed. 1998) in which the adjective "fast-food" is defined in relevant part as meaning "of, relating to, or specializing in food that can be prepared and served quickly" and the noun "fry" and its plural "fries" are set forth in pertinent part as connoting "FRENCH FRY--usu. used in pl." While conceding that a "mark which combines descriptive terms may be registrable if the composite creates a unitary mark with a separate, nondescriptive meaning," the Examining Attorney concludes that "in light of the dictionary and common meaning of the wording FAST FOOD and FRIES," the "applicant's mark is merely

a combination of descriptive terms" which, when taken together, "indicate the exact purpose of the applicant's frozen potatoes." Applicant, the Examining Attorney notes, has not provided any argument "about the nature of any possible non-descriptive meaning for the wording in the mark."

Relying, in addition, on excerpts retrieved from his searches of the "NEXIS" database, the Examining Attorney contends that such evidence demonstrates that "the wording FAST FOOD FRIES [is used] to indicate a type of french fried potato, the end product of the applicant's goods." Representative examples of such excerpts are set forth below (emphasis added):

> "Although sales of frozen potatoes and **fast-food fries** continue to soar, consumption of fresh potatoes at home declined 12 percent in the last decade ...." -- Akron Beacon Journal, July 24, 2002;
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> "The real problem ... is that virtually all **fast-food fries** are made using hydrogenated vegetable oils, which contain trans-fatty acids." -- Los Angeles Times, July 22, 2002;
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> "The culinary gospel according to Kroc put beef tallow in the deep-fryer to create the tastiest of **fast-food fries**." -- Aberdeen American News, July 7, 2002 (article headlined: "McDonald's may get more lawsuits with those fries");
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> "Pommes frites ($6) were your basic **fast-food fries** served in a paper cone." -- Orlando Sentinel, March 31, 2002;
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> "Unlike **fast food fries**, these were made from freshly cut potatoes and cooked to a deep golden brown." -- Times Union (Albany, NY), February 14, 2002;
>
> "The Airfries contain less than one quarter the fat of normal **fast-food fries**." -- Restaurant Business, December 15, 2001;

> "After all, kids have grown up gobbling **fast-food fries**." -- Miami Herald, April 29, 2001;
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> "[Consumers] each eat about 130 pounds of potatoes per year. Only 9 percent of those are mashed, 6 percent as baked and 6 percent as chips. Lately, it all comes down to the less healthy **fast food fries**." -- Spokesman-Review (Spokane, WA), March 28, 2001;
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> "[T]hese frozen fries are excellent. That shouldn't really be a surprise considering the company that makes them--Lamb Weston--also makes some of our favorite **fast-food fries**, including McDonald's and Burger King." -- San Francisco Chronicle, September 20, 2000;
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> "Bojangles is offering its 'famous french fry seasoning' to consumers who want to try and create **fast-food fries** at home." -- Herald-Sun (Durham, NC), October 22, 1999;
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> "By far the greatest effort has gone into the potato that makes **fast-food fries**." -- Whole Earth, June 22, 1999; and
>
> "[T]he French fries were not the bigger, chunkier British style, but more like the slimmer, crisper American **fast-food fries**." -- Ventura County Star (Ventura County, CA), December 4, 1998.

Furthermore, as the Examining Attorney accurately observes in his brief, "the applicant's specimen of record supports the ... position that the applicant's mark merely describes the purpose for the applicant's frozen potatoes." In particular, the Examining Attorney points out that:

> Underneath the applicant's use of the mark on the packaging for the goods, the applicant uses the wording FRENCH FRIED POTATOES. The use of this wording ... reinforces the nature of the goods as frozen potatoes used to make fries, namely, fast food fries. The descriptive nature of the applicant's mark is

> [also] reinforced by the specimens of record[,] which feature a picture a picture of fries. Thus, contrary to the applicant's arguments, the applicant's mark describes the applicant's goods in a direct or immediate manner. The specimens of record are ... additional evidence of the descriptive nature of applicant's mark.

Moreover, with respect to applicant's contention that its "mark contains alliteration based on the initial F consonant sound" which serves to "create a unitary mark entitled to protection as a non-descriptive mark," the Examining Attorney asserts in his brief that such is not the case because, as shown by the evidence of record, "the wording in the mark has meaning as a type of fries." In consequence thereof, the Examining Attorney reasons that just because each of the words which form the phrase "FAST FOOD FRIES" begins with the same letter would not "cause purchasers to miss the merely descriptive significance of the terms" when combined. Thus, according to the Examining Attorney, a "consumer viewing the phrase would not be required to use his or her imagination or thought to conclude that the phrase describes the applicant's product," particularly "in light of the dictionary definitions of the wording FAST FOOD and FRIES and the common use of the phrase as evidence[d] by the excerpted articles of record."

Lastly, the Examining Attorney maintains in his brief that, inasmuch as "[t]he end purpose of the applicant's frozen potatoes," as confirmed by the packaging for its product, "is to make french fried potatoes or fries," it is plain that competitors of applicant would "need the mark FAST FOOD FRIES to describe frozen potatoes." Specifically, the Examining Attorney

points out that "the evidence of record ... indicates that this exact wording indicates a genre of fries" and thus "the ... mark FAST FOOD FRIES describes the purpose of the applicant's frozen potatoes, namely, [that] they are used to make fast food fries."

Upon consideration of the evidence and arguments presented, we agree with the Examining Attorney that, when considered in its entirety, the term "FAST FOOD FRIES" is merely descriptive of applicant's "frozen potatoes" because it immediately conveys, without speculation or conjecture, that the purpose or use of such goods is to make or prepare the product known as fast-food French fries. Clearly, applicant's "frozen potatoes" are goods which, when prepared for consumption by being cooked, encompass the style or category of French fried potatoes commonly referred to as fast-food fries. Nothing in the term "FAST FOOD FRIES" is therefore incongruous, ambiguous or suggestive, nor is there anything, including the alliteration in such term, which would require the exercise of imagination, cogitation or mental processing or necessitate the gathering of further information in order for the merely descriptive significance thereof to be readily apparent to purchasers and other consumers of applicant's goods. The fact, moreover, that actual and potential competitors of applicant remain free to describe their frozen potatoes as "FRENCH FRIED POTATOES," as applicant does on the packaging for its product, and likewise are entitled to refer to such goods by the individual words "fast-food" and/or "fries," does not mean that the term "FAST FOOD FRIES" is not merely descriptive of applicant's goods. See,

e.g., Roselux Chemical Co., Inc. v. Parsons Ammonia Co., Inc., 299 F.2d 855, 132 USPQ 627, 632 (CCPA 1962). Such term, rather, conveys forthwith that applicant's frozen potatoes are of the kind or type of French fries which are commonly known, to restaurant operators as well as to ordinary consumers, as fast-food fries.

Decision: The refusal under Section 2(e)(1) is affirmed.