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Mailed:
17 March 2005

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Glaze Inc.

Serial No. 76565437

Myron Amer of Myron Amer, P.C. for Glaze Inc.

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108 (Dave Shallant, Managing Attorney).

Before Hairston, Bucher, and Drost, Administrative
Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

On December 3, 2003, Glaze Inc. (applicant) applied to register the mark SWISSCELL (in typed form) on the Principal Register (Serial No. 76565437) for goods ultimately identified as "batteries for lighting, battery chargers and surge protectors" in Class 9 based on applicant's assertion of a bona fide intention to use the mark in commerce.

The examining attorney (Brief at 2) has refused to register the mark on the ground that the mark "consists of

or comprises geographically deceptively misdescriptive matter under Section 2(e)(3) of the Trademark Act in relation to batteries for lighting." 15 U.S.C. § 1052(e)(3).¹

The examining attorney argues that "applicant concedes that its goods are not manufactured or produced in Switzerland. The general public is likely to believe that applicant's batteries come from this place because Switzerland is a country where batteries are designed or manufactured. Furthermore, this belief would materially influence consumers to purchase these goods because batteries manufactured in Switzerland have a reputation for high quality." Brief at 2-3 (citation to record omitted). In support of his position, the examining attorney submitted pages from five websites.

The first website pages are from www.73.com (Surplustraders.net) and they refer to a product identified as a lithium battery made by "Renata in Switzerland." The product description begins with the line "Swiss Manufactured Cells!" and includes the sentence, "These

¹ In his final Office action at 1, the examining attorney made it clear that "[i]n regard to the batteries for lighting only, the refusal ... is now made FINAL."

batteries are of Swiss manufacture and represent the highest standards..."

The second website (www.anytimewholesale.com) is the site of a wholesale supplier of "**Renata Watch Batteries**. Widely regarded as one of the highest quality watch batteries in the world, these Swiss manufactured batteries will bring instant name recognition and prestige to your business."

The third website page (www.buyershaven.com) contains the following sentence: "RENATA zinc air batteries for hearing instruments feature Swiss quality and consistently great performance."

The fourth website is the Renata site (www.renata.com) and it lists Renata products, e.g., watch, calculator, hearing aid, and lithium batteries, referred to in the previous websites. It includes the phrase "the swiss power source."

The last website (www.pageonetrading.com) discusses a battery for a car. "'Zebra' batteries made by MES-DEA in Switzerland, are more expensive than most lead-acid batteries, but have substantial advantages for hybrid vehicles."

In addition to these websites, the examining attorney has included definitions of the terms "Swiss" ("of or

relating to Switzerland or its people or culture" and "cell" ("a single unit for electrolysis or conversion of chemical energy, usually consisting of a container with electrodes and an electrolyte").

Applicant has put in seven dictionary definitions for Swiss Chard, Swiss Cheese, Swiss Franc, Swiss Guards, Swiss Muslin, Swiss Roll, and Swiss Steak, and argues that several of these definitions do not have geographical connotations. In addition, it maintains (Reply Brief at 2) that the examining attorney's "excerpts made of record are concerned with batteries, but not batteries FOR LIGHTING." Finally, "[c]onsidered in its entirety, the word SWISS is in combination with the word CELL, and applicant argues it is without geographic significance." Brief at 3.

The Trademark Act (15 U.S.C. § 1052(e)(3)) provides that:

No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it... (e) Consists of a mark which, ... (3) when used on or in connection with the goods of the applicant is primarily geographically deceptively misdescriptive of them.

The Federal Circuit has held that because of the

North American Free Trade Agreement (NAFTA),² the test for whether a term may properly be refused registration on the ground that it is primarily geographically deceptively misdescriptive has changed.

Prior to NAFTA, "this court required a geographically deceptively misdescriptive mark to have more than merely a primary geographic connotation. Specifically, the public must also associate the goods in question with the place identified by the mark - the goods-place association requirement. However, this court did not require a showing that the goods-place association was material to the consumer's decision before rejection under §1052(e)." In re California Innovations Inc., 329 F.3d 1334, 66 USPQ2d 1853, 1855 (Fed. Cir. 2003). With the NAFTA changes, the Federal Circuit held that the above test was no longer applicable.

Thus, due to the NAFTA changes in the Lanham Act, the PTO must deny registration under §1052(e)(3) if (1) the primary significance of the mark is a generally known geographic location, (2) the consuming public is likely to believe the place identified by the mark indicates the origin of the goods bearing the mark, when in fact the goods do not come from that place, and (3) the misrepresentation was a material factor in the consumer's decision.

² North American Free Trade Agreement, Dec. 17, 1992, art. 1712, 32 Int'l Leg. Mat. 605, 675-676 (1993), as implemented by the NAFTA Implementation Act in 1993, see NAFTA Implementation Act, Pub. L. No. 103-182, § 333, 107 Stat. 2057 (1993).

Id. at 1858.³ See also In re Les Halles de Paris J.V., 334 F.3d 1371, 67 USPQ2d 1539, 1541 (Fed. Cir. 2003) ("While California Innovations involved a mark to identify the source of goods, the analysis under Section 2(e)(3) applies to service marks as well").

Therefore, we analyze the facts of this case under the three factors set out above.

The first factor is whether the primary legal significance of the mark is a generally known geographic location. Applicant's mark is the term SWISSCELL (typed). "Swiss," as the dictionary definition indicates, is recognized as a term meaning "of or relating to Switzerland and its people or culture" and we have little trouble determining that it is a generally known geographic term. The other term "cell" is a highly descriptive or generic term for various types of batteries. See www.73.com ("7.2 volt strip packs ... **cell** packs made from NEC. Consist of seven **cells** in a row, in series;" "Ray-O-Vac BR2016 3V 70MAH Coin **Cells**;" "Lithium Coin **Cells**"). The addition of the highly descriptive word "cell" to the term "Swiss" does not take away from the

³ The Court held that whether marks are primarily geographically deceptively misdescriptive or deceptive (§§ 2(e)(3) and 2(a)) are determined under "identical legal standards." California Innovations, 66 USPQ2d at 1858.

obvious geographic descriptiveness of the word "Swiss."
See In re Save Venice New York, Inc., 259 F.3d 1346, 59 USPQ2d 1778 (Fed. Cir. 2001) (Composite mark consisting of the phrases "THE VENICE COLLECTION" and "SAVE VENICE INC." and an image of the winged Lion of St. Mark primarily geographically deceptively misdescriptive); In re Wada, 194 F.3d 1297, 52 USPQ2d 1539, 1542 (Fed. Cir. 1999) ("NEW YORK WAYS GALLERY is primarily geographically deceptively misdescriptive"). Therefore, we find that the primary significance of applicant's mark would be a generally known geographic location.

The second factor is whether the consuming public is likely to believe that the goods come from the place identified. In California Innovations, 66 USPQ2d at 1859, the Court held that:

A great deal of the evidence cited in this case relates to the fashion industry, which is highly prevalent in California due to Hollywood's influence on this industry. However, clothing and fashion have nothing to do with the products in question. At best, the record in this case shows some general connection between the state of California and backpacks and automobile organizers. However, because CA Innovations has limited its appeal to insulated bags and wraps, the above referenced evidence is immaterial.

In this case, there is one battery company identified as a Swiss company (Renata) on four different websites and there is an additional website that indicates that there

is a vehicle battery company (MES-DEA) in Switzerland. While the type of batteries offered by Renata does not seem to include batteries for lighting, there is at least some evidence that some batteries come from Switzerland.

We also take judicial notice⁴ of the fact that:

"Switzerland is a prosperous and stable modern market economy with low unemployment, a highly skilled labor force, and a per capita GDP larger than that of the big Western European economies." Central Intelligence Agency, The World Factbook, www.cia.gov/cia/publications/factbook.

Even when we view the evidence that perhaps two Swiss companies make different type of batteries and that Switzerland is a country with a prosperous and stable market economy, we hold that, as in California Innovations, 66 USPQ2d at 1859, this is tenuous evidence that purchasers would expect batteries for lighting to come from Switzerland.

The Government contends that the evidence shows some examples of a lunch bag, presumed to be insulated, and insulated backpacks. According to the government, the evidence supports a finding of a goods-place association between California and insulated bags and wraps. This court has reviewed the publications and listings supplied by the examining attorney. At best, the evidence of a

⁴ University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., 213 USPQ 594, 596 (TTAB 1982), aff'd, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

connection between California and insulated bags and wraps is tenuous.

The evidence of a goods or services/place relationship is certainly much weaker than what was present in our recent In re Consolidated Specialty Restaurants Inc. case. 71 USPQ2d 1921 (TTAB 2004). In that case, "the gazetteer and geographic dictionary entries, the USDA report, the evidence from the Internet and the excerpted stories retrieved from the Nexis database show that the state of Colorado is known for its steaks" and that "'Colorado Steaks' are featured food items in restaurants not only within the state of Colorado but outside the state as well." 71 USPQ2d at 1927. In contrast, here the evidence of a goods/place association consists of a single battery company (Renata) and another company that makes vehicle batteries. Under the stricter California Innovations standards, we are constrained to find that the examining attorney has not established the required goods/place association between Switzerland and batteries for lighting.

Finally, inasmuch as applicant's batteries for lighting do not come from Switzerland, we must consider whether this misrepresentation would be a material factor in the consumer's decision. The Federal Circuit has

discussed some of the evidence that would support a finding of materiality, relying on § 2(a) case law:

"[I]f there is evidence that goods like applicant's or goods related to applicant's are a principal product of the geographical area named by the mark, then the deception will most likely be found material and the mark, therefore, deceptive." [In re House of Windsor, Inc., 221 USPQ 53, 57 (TTAB 1983)]. "[I]f the place is noted for the particular goods, a mark for such goods which do not originate there is likely to be deceptive under §2(a) and not registrable under any circumstances." [In re Loew's Theatres, Inc., 769 F.2d 764, 226 USPQ 865, 868 n.6 (Fed. Cir. 1985)].

California Innovations, 66 USPQ2d at 1857.

In this case, the evidence falls far short of demonstrating that batteries are a principal product of Switzerland nor does the evidence show that Switzerland is noted for batteries for lighting. The few references in the retailers' advertisements to "Swiss quality" and "Swiss manufacture" in relation to the Renata batteries do not show that prospective purchasers' decisions would be materially influenced by the term "Swiss" when purchasing batteries for lighting.

In addition, the Federal Circuit has noted that to "raise an inference of deception or materiality for a service mark, the PTO must show some heightened association between the services and the relevant geographic denotation." Les Halles, 67 USPQ2d at 1542.

Considering this "heightened association" in the context of the involved goods, we do not see that the evidence here shows any heightened association. The evidence of record on the association between Switzerland and batteries of any kind is weak. It would hardly be surprising that a country produces batteries locally rather than simply importing all of its batteries.

The only other evidence that could indicate that the term "Swiss" may materially impact purchasing decisions is the nebulous references to "Swiss quality." There is simply insufficient evidence to hold that the term "Swiss" applied to virtually any product materially influences purchasers. Indeed, we add that the Second Circuit has held that "the phrase Swiss Army knife cannot fairly be read to say 'made in Switzerland' so as to be geographically descriptive." Forschner Group Inc. v. Arrow Trading Co. Inc., 30 F.3d 348, 31 USPQ2d 1614, 1619 (2d Cir. 1994).

Therefore, we conclude that the term SWISSCELL is not primarily geographically deceptively misdescriptive for batteries for lighting.

Decision: The examining attorney's refusal under Section 2(e)(3) is reversed.