

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF
THE TTAB

Mailed: June 4, 2003

Paper No. 15
ejs

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Sean S. Drudy

Serial No. 78/075,491

Stephen J. Horace of Lathrop & Gage, L.C. for Sean S. Drudy.

Aretha C. Masterson, Trademark Examining Attorney, Law Office 112 (Janice O'Lear, Managing Attorney).

Before Simms, Seeherman and Chapman, Administrative Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Sean S. Drudy has appealed from the final refusal of the Trademark Examining Attorney to register BEEFALOS as a service mark for a "public bar and restaurant, serving food and drinks."¹ The application as originally filed was based on an asserted bona fide intent to use the mark in

¹ Application Serial No. 78/075,491, filed July 24, 2001.

commerce; on February 15, 2002 applicant filed an amendment to allege use, which was accepted on March 13, 2002, in which applicant asserted first use of the mark on October 1, 1997, and first use in commerce on July 24, 2001.

Registration has been refused pursuant to Section 2(e)(1) of the Trademark Act, 15 U.S.C. 1052(e)(1), on the ground that applicant's mark is merely descriptive of his identified services.² Specifically, the Examining Attorney contends that "beefalo" is a type of meat, and that the mark BEEFALOS describes food that can be served in applicant's restaurant.

Applicant and the Examining Attorney have filed briefs.³ Applicant did not request an oral hearing.

² During the course of prosecution applicant, who was appearing pro se at the time, filed a response in which he stated that "I've been using the mark 'BEEFALOS' since 10-1-97 at street fairs, carnivals, car shows, etc. My name is [sic--was] very well known for my services while I was operating on a mobile basis, from my food to my t-shirts." The Examining Attorney did not view this statement as an attempt to register the mark pursuant to Section 2(f) of the Act, and applicant, in his subsequent filings, i.e., his request for reconsideration and appeal brief, during which time he was represented by counsel, never referred to a Section 2(f) claim. We do not consider applicant to have raised, or to have attempted to raise, a claim that his mark has acquired distinctiveness. It should also be noted that, as shown by the claimed dates of use in the amendment to allege use, applicant's use of his mark while operating on a mobile basis was not use in commerce, and Section 2(f) of the Act provides for the registration of marks which have become distinctive of an applicant's goods or services in commerce.

³ In her appeal brief the Examining Attorney has quoted a number of dictionary definitions, and asked that the Board take judicial

A mark is merely descriptive if it immediately conveys knowledge of the ingredients, qualities, or characteristics of the goods or services with which it is used. **In re Gyulay**, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987). As applicant points out, the determination of whether a mark is merely descriptive must be made not in the abstract, but in relation to the goods or services for which registration is sought, the context in which it is used, and the significance that it is likely to have to the average purchaser of such goods or services. See **In re Engineering Systems Corp.**, 2 USPQ2d 1075 (TTAB 1986).

The question before us is whether consumers would understand, upon seeing the mark BEEFALOS on a bar and restaurant, that BEEFALOS refers to a menu item that can be served in such a restaurant. The Examining Attorney asserts that they would, and in support of this position

notice of them. The Board may take judicial notice of dictionary definitions, see **University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.**, 213 USPQ 594 (TTAB 1982), aff'd, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), and we have done so with respect to the definitions in Merriam Webster's Collegiate Dictionary and The Random House Dictionary, discussed infra. However, many of the sources quoted by the Examining Attorney appear to come from on-line dictionaries or encyclopedias. Because of concerns about the reliability and availability of such sources, the Board will not take judicial notice of such material. See **In re Total Quality Group Inc.**, 51 USPQ2d 1474, 1476 (TTAB 1999), in which we specifically stated that "in future cases, when Examining Attorneys intend to rely on Internet evidence that otherwise would normally be subject to judicial notice (such as dictionary definitions), such evidence must be submitted prior to appeal."

has submitted a dictionary definition for "beefalo" as meaning "a hybrid that results from a cross between the American buffalo, or bison, and beef cattle and is typically buffalo and bovine. Beefalo yields leaner beef than conventional breeds of cattle."⁴

In addition, we take judicial notice of the following dictionary definitions:

1. A hybrid animal that is 3/8 to 3/32 buffalo, the remaining genetic component being domestic cow, bred for disease resistance and for meat with low fat content.
2. The meat of such an animal.⁵

Any of a breed of beef cattle developed in the U.S. that is genetically 3/8 No. American bison and 5/8 domestic bovine.⁶

Applicant, on the other hand, asserts that consumers would not be aware of this meaning, and would be unaware of the existence of beefalo. Applicant contends that to the average patron BEEFALOS is likely to be perceived as a fanciful creature mascot for his establishment, or as the nickname of the owner, or a coined term that suggests a Western motif restaurant where one can find red meat on the

⁴ The American Heritage Dictionary of the English Language, 3d ed. © 1992.

⁵ The Random House Dictionary of the English Language, 2d ed. unabridged, © 1987. The Examining Attorney did not ask the Board to take judicial notice of this listing; rather, we have taken such notice sua sponte.

⁶ Merriam Webster's Collegiate Dictionary, 10th ed.

menu, or a possible menu item. Applicant also asserts that the mark combines the words "beef" and "buffalos" to create a unique unitary term.

Having reviewed the evidence of record, we find that the Examining Attorney has met the Office's burden of demonstrating that BEEFALOS is a merely descriptive term. Although applicant has suggested a variety of fanciful interpretations for the mark BEEFALOS, countering those speculative suggestions is the clear evidence that "beefalo" has a recognized meaning as being both a type of animal and the meat from such an animal. This meaning appears in a variety of standard dictionaries, so we cannot accept applicant's assertion that this is a technical term that would not be familiar to restaurant customers. Moreover, as the Examining Attorney notes, even applicant has acknowledged that, among the various ways in which applicant has suggested the mark BEEFALOS can be perceived, one is as a menu item.

Applicant also argues that because the mark is BEEFALOS, with an "s", it is "likely to be perceived as a plural or possessive, suggesting to the average consumer either a herd of fanciful 'beefalo' creatures or that the proprietor is nicknamed 'Beefalo.'" We are not persuaded by these arguments. Although the animal/animals are

referred to as "beefalo" rather than "beefalos," the addition of the "s" does not change the real animals into imaginary ones, any more than the addition of an "s" would make "deers" imaginary creatures. In other words, the addition of the "s" does not change the merely descriptive nature of the term; whether BEEFALO or BEEFALOS, consumers would still perceive the mark as describing meat served in the restaurant. Nor do we think consumers would view BEEFALOS to refer to the nickname of the proprietor. Aside from the fact that BEEFALO is not generally understood to be a name or nickname, there is no apostrophe in the mark to indicate that it is in the possessive form, and therefore there is even less likelihood that consumers would view it in this manner.

Applicant also argues that the mark is a double entendre. However, because there is no evidence that BEEFALOS would have the meaning of a mascot, an imaginary animal, or any of the other ideas that applicant has suggested, consumers would not view the mark as having any meaning other than the dictionary one, that of the animal. Further, when this term is used in connection with bar and restaurant services, consumers would immediately understand it to refer to a meat item served in the restaurant.

Applicant has asserted that his mark is no more descriptive than other marks which have been registered "without evidence of acquired distinctiveness." Brief, p. 4. The only third-party registration properly made of record is one for HOGS & HEIFERS SALOON for, inter alia, saloon services. Aside from the fact that the registrability of other marks is not before us in this appeal, we observe that this mark is distinguishable from the present mark. One does not order "heifer" or "hog" in a restaurant or saloon. However, as the Random House dictionary definition shows, the term "beefalo" is, in fact, the appropriate term to use to order meat from a beefalo. The other third-party registrations were merely indicated by mark and registration number in applicant's request for reconsideration. The submission of a list of registrations is insufficient to make them of record. **In re Duofold Inc.**, 184 USPQ 638 (TTAB 1978). In any event, it is noted that in most of these registrations the term which describes the food item served in the restaurant has been disclaimed, which is evidence of the descriptive nature of the word. See, for example, "pizza" in PIZZA HUT, "fried chicken" in KENTUCKY FRIED CHICKEN and "corned beef" in CORNED BEEF & CO.⁷

⁷ These registrations all issued prior to the Office's adoption

Because BEEFALOS would be immediately understood by consumers to refer to the animal and meat from the animal, and because beefalo meat is an item that may be served in a restaurant, we find that BEEFALOS is merely descriptive of a feature of applicant's identified services.⁸

Decision: The refusal of registration is affirmed.

of the policy that an applicant could disclaim even inherently distinctive matter.

⁸ Applicant has stated that his restaurant does not serve beefalo meat. However, because this is a food item that can be served in a restaurant and bar, and because the menu for his restaurant (which currently features bison meat) can be changed at any time, the mark is merely descriptive, rather than deceptively misdescriptive, of the services.