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THE TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Link Snacks, Inc.

Serial No. 78566714

Scott W. Johnston of Merchant & Gould P.C. for Link Snacks, Inc.

Rebecca Smith, Trademark Examining Attorney, Law Office 110
(Chris A.F. Pedersen, Managing Attorney).

Before Zervas, Taylor, and Mermelstein, Administrative
Trademark Judges.

Opinion by Mermelstein, Administrative Trademark Judge:

This appeal involves the examining attorney's final requirement for an acceptable identification of goods. For the reasons set out below, we reverse.

The subject application was filed by Link Snacks, Inc. on February 14, 2005, seeking registration of the mark FEED YOUR WILD SIDE (in standard characters) for "meat snacks" in international class 29, and alleging a *bona fide* intent to use the mark in commerce on the identified goods. In her first office action, the original examining attorney made one requirement:

IDENTIFICATION OF GOODS

The identification of goods is unacceptable as indefinite because the

wording is overbroad and could include goods in other classes. TMEP section 1402.01. The applicant may adopt the following identification, if accurate. Meat snacks, namely, _____ [indicate specific goods]. International Class 29.

Applicant responded, declining to further specify its goods. Applicant pointed out that "meat snacks" is not an indefinite identification of goods, and that both applicant and others have previously been granted registrations containing the term in the identification of goods. The examining attorney then approved the application for publication. Nonetheless, the approval was subsequently withdrawn. A newly-assigned examining attorney explained that she had "been informed that the identification of goods is not acceptable as is and the Office cannot accept the current identification of goods."¹ Accordingly, the examining attorney reiterated and made final the earlier requirement for a more specific identification of goods, adding only that the term "meat snacks" could include goods properly classified in International Class 30. The examining attorney did not address the arguments applicant raised in its response to the first office action, nor did

¹ In her brief, the examining attorney notes that "the application was withdrawn from publication and was returned to [her] from the Administrator for Classification after [the Administrator's] review of the Official Gazette." Br. at 2.

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she introduce any evidence in support of the assertion that some of the applicant's goods could include goods outside of International Class 29.

Following the final refusal, applicant requested reconsideration of the final requirement, again arguing that "meat snacks" is the common commercial name of its goods, and that the USPTO has previously accepted the disputed term. Attached to applicant's request for reconsideration were a number of web pages demonstrating commercial use of the term "meat snacks," and copies of various trademark registrations and applications in which the goods include "meat snacks." Once again, the examining attorney maintained the refusal, denying the request for reconsideration. Again, the examining attorney did not address applicant's evidence or arguments, nor did she offer any evidence in support of the refusal.

This appeal followed.²

Preliminary Matter

Before turning to the merits of this appeal, we note that applicant filed with its appeal brief approximately 170

² We note that applicant's brief includes a request that, in the event that the examining attorney's requirement is upheld, the application be remanded to allow applicant an opportunity to submit an amendment. Brief at 2. For applicant's information, an application which has been decided on appeal will generally not be reopened, except to submit a disclaimer. Trademark Rule (cont'd)

pages of evidence. It appears that this information may be partially or wholly duplicative of the evidence attached to applicant's request for reconsideration.

The record in an appeal closes upon the filing of a notice of appeal and the "Board will ordinarily not consider additional evidence filed with the Board by the applicant or by the examiner after the appeal is filed." Trademark Rule 2.142(d); *See generally* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 1207 (2d ed. rev. 2004). We note that the examining attorney has not discussed this material in her brief. Accordingly, we have not considered the untimely evidence attached to applicant's brief on appeal.³

Discussion

Issue on Appeal

According to the examining attorney,

The identification of goods is unacceptable as indefinite because the wording is overbroad and could include goods in other classes. TMEP section

2.142(g). Because we reverse the requirement, applicant's request for remand is moot.

³ Because submission of these materials was improper, we have not undertaken the onerous task of comparing each of the items submitted on appeal with evidence which had been timely submitted during examination.

To the extent that the evidence attached to applicant's brief is the same as that previously submitted, it is already of record as part of the application file, and its submission was unnecessary. *See ITC Entertainment Group Ltd. v. Nintendo of America Inc.*, 45 USPQ2d 2021, 2022-23 (TTAB 1998) (submission of duplicative papers is a waste of time and resources, and is a burden upon the Board).

1402.01. The applicant must clarify the type of meat snack they provide by common commercial name since some of these goods could be classified in class 30. The applicant may wish to consult the on-line identification manual on the PTO homepage for acceptable common names of goods.

Final Office Action. We accordingly understand that the examining attorney rejected applicant's identification of its goods because, as stated, the goods could fall into more than one class, and that is the issue we address on appeal.⁴

Applicant's Prior Registrations

We first address applicant's argument that both it and its competitors have previously received trademark registrations for goods described as "meat snacks." With its request for reconsideration, applicant submitted a number of registrations and pending applications in which the term is used, and applicant has maintained its argument that the USPTO has historically accepted "meat snacks" as an acceptable identification of goods, and that this "policy" should be continued here. Although a number of

⁴ There is an unfortunate ambiguity in the word "indefinite" as sometimes used by the examining corps in discussing identifications of goods or services. The word can variously refer to clarity (whether the identification of goods can be understood), scope (whether a term is so broad as to not give fair notice of the goods upon which mark is used), or classification (whether the goods can be properly classified in one international class). While these concepts are related, the only explanation the examining attorney provided for the refusal in this case referred to the latter of these issues, and we thus
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applications⁵ and registrations have been submitted by applicant, we note that approximately ten of the registrations include the term "meat snacks" without significant further qualification.

Our primary reviewing court recently addressed the question of whether the USPTO's prior registration of marks using an allegedly indefinite (because it could identify goods in more than one class) term precludes the Office from later asserting that such language is unacceptable. *In re Omega SA*, ___ F.3d ___, ___ USPQ2d ___ (Fed. Cir. 2007) (precedential) (No. 06-1234; slip op. available at www.fedcir.gov). In *Omega*, the examining attorney required further definition of the term "chronographs" (the examining attorney suggested "chronographs for use as watches") on the ground that the term could include watches in International Class 14, as well as time recording instruments in International Class 9.

Omega agreed that "chronographs" could include goods in International Class 9. However, it declined to further narrow the term in its new application, arguing that the

consider that to be the ground for her final requirement.

⁵ Pending applications are of little or no probative value. As a general matter, a pending application is evidence of nothing more than its filing. See *Merritt Foods Co. v. Americana Submarine*, 209 USPQ 591, 594 (TTAB 1980). As applicant is aware from the history of this application, approval of an application for publication is no guarantee that the identification of goods

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USPTO's requirement was inconsistent with the Office's prior registration of several of Omega's other marks in which the goods were described as "chronographs."

Following affirmance of the refusal by the Trademark Trial and Appeal Board, applicant appealed to the United States Court of Appeals for the Federal Circuit, where it also argued that rejecting "chronographs," without further qualification would affect the validity or scope of its previous registrations. In affirming the Board's decision, the Court agreed with the Board that

the scope of the term "chronographs" is ambiguous for registration purposes, for it includes both watches and time recording devices. Omega states that the only chronographs with which it uses the mark are "watches." The PTO has discretion to determine whether and how a trademark registration should include a more particularized statement of the goods for which the mark is to be used; in the circumstances here the PTO did not abuse its discretion in determining that the term "chronographs" in the registration should be restricted to those "for use as watches." No basis for challenging this requirement has been shown. Although Omega expresses concern that this requirement may adversely affect its prior trademark registrations for "chronographs" that are not limited to "watches," the PTO has assured the court that the imposition of this requirement will not affect existing registrations.

cannot be questioned or that the application will register as is.

In re Omega SA, slip op. at 6.

Accordingly, the mere fact that applicant and others have previously been successful in registering applications in which "meat snacks" was accepted as the identification of goods does not preclude the USPTO from subsequently determining that more specificity is required. As was the case in *Omega*, we note that such a requirement does not in any way affect the validity or scope of any previous registration, and that the requirement for additional specificity in a later application is not a basis for cancellation of a previous registration using the term.

Meaning and Scope of "Meat Snacks"

Although *Omega* is relevant to the case at bar, it is not sufficient to dispose of the case before us. In *Omega*, the applicant agreed with the USPTO that the term "chronographs" could include goods in both International Class 9 and 14, but argued that the term was acceptable anyway because of its prior registrations.⁶ In this case,

⁶ The applicant in *Omega* also argued that the USPTO should view applicant's designation of International Class 14 as limiting the goods to that class. The international classification system is for administrative and searching purposes, but does not determine the scope of the registrant's rights. *Omega*, slip op. at 5, citing *Jean Patou, Inc. v. Theon, Inc.*, 9 F.3d 971, 975, 29 USPQ2d 1771 (Fed. Cir. 1993). Thus, the fact that applicant has classified its goods in International Class 29 does not limit the term "meat snacks" in this application to goods in that class. While clearly related, the identification and classification of goods and services are separate requirements, done for different

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applicant has not agreed that "meat snacks" includes any goods outside of International Class 29.

In reviewing the propriety of the final requirement at issue in this appeal, we must therefore determine whether the term "meat snacks" has a particular meaning, and if so, the scope of the term as used in the application. One meaning of the term could certainly include anything made (in whole or in part) of "meat" which could be eaten as a "snack." Although not clearly articulated, this appears to be the position taken by the examining attorney. See Ex. Br. at 2 ("'meat snacks' could also include ... sandwiches containing meat, meat pies, etc., which are in class 30."). Thus construed, "meat snacks" could include anything from chicken salad to beef burritos (International Class 29 and 30, respectively).

In the absence of further evidence, we might be inclined to agree with this position. However, applicant here has argued that the term "meat snacks" has a well-defined meaning in applicant's industry, and applicant submitted substantial evidence with its request for reconsideration supporting this point, as demonstrated by

purposes, and each must be correct in its own right. See *Jean Patou*, 29 USPQ2d at 1773 ("The benefits of a ... registration apply with respect to the goods named in the registration without regard to the class or classes named in the registration.")

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the following excerpts:⁷

**SARA LEE CORPORATION TO EXPAND MEAT
SNACKS BUSINESS WITH ADDITION OF TRAIL'S
BEST BRAND**

CHICAGO (October 15, 2001) - Sara Lee Corporation announced today that it has agreed to acquire the assets of FJS, Inc., a private holding company that owns Trail's Best Snacks, Inc., the fourth largest producer of meat snacks and beef jerky in the United States.

* * *

"Meat snacks sales have been increasing at a double-digit rate for the last eight years, and the acquisition of Trail's Best Snacks supports Sara Lee's strategy..."

"Sara Lee entered the meat snacks category earlier this year with the introduction of *Jimmy Dean* meat snacks in select markets, and our research clearly indicates that marrying the *Jimmy Dean* brand with great-tasting, high quality meat snacks is an excellent match."

www.saralee.com/newsroom/news_release_popup.aspx?id=70
(4/13/2006).

**Meat-snack maker selects Prescient
Applied Intelligence tech package**
WTN News - Published 07/27/05

* * *

Link Snacks sells a variety of beef jerky snacks under the Jack Link's brand and reports to be the fastest-growing

⁷ All of the evidence referred to was submitted by applicant in connection with its request for reconsideration of the examining attorney's final requirement.

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global meat snacks company.

<http://wistechnology.com/article.pho?id=2051> (4/13/2006).

About King B Meat Snacks

King B Jerky, now King B Inc., was established in 1968. The owner desired to bring back the flavor of the West in real steak jerky. * * *

Over the years, King B has adopted some new recipes that are considered sugar cured products. This is for the urban people who value [a] meat snack but desire a different flavor profile. The ethnic mix of people in the United States has resulted in a wide variety of flavors available in meat snacks. Teriyaki, Hot & Spicy, BBQ, Chile Hot, etc., have found a niche in the market place due to the demand of different cultures and peoples. The information age, as well as ease of travel, has influenced the meat snack market. Customers are demanding flavors that are familiar to them and their different cultures. With a world wide market, King B has created an extended offering of flavors and styles of quality meat snacks.

www.jerkysupply.com/about_king_b_meat_snacks.html

(4/13/2006).

Special Reports

<http://www.candybuyer.com/reports>
Meat Snacks

Beef sticks, jerky, sausage - meat snacks in every form are enjoying growth. Professional Candy Buyer investigates what buyers need to know to cash in on the profits.

The meat snack market has come a long way from its historic position as the snack of choice for truckers and outdoorsmen. Today's beef sticks, jerky and other cured meat products are

flourishing as they gain acceptance from mainstream consumers, including moms and kids.

* * *

Although new meat snack items continue to hit the marketplace, meat sticks and jerky maintain a strong hold on total sales.

* * *

In an attempt to broaden the consumer base of its products, New Glarus Foods offers Honey Ham sticks, says Gary Hess, regional sales manager. According to Hess, women prefer Honey Ham to beef sticks because of the product's mild flavoring and taste.

* * *

GoodMark recently launched Rough Cut, a brand made from whole muscle beef. * * * With Rough Cut, the company is positioned to grab a substantial share of the growing kippered beef steak component.

* * *

[J]erky is to [the] western area what pepperoni is to Cleveland. * * * [T]eriyaki flavor is popular in New England, while peppered, and hot and spicy flavors have strong appeal in the south and southwest. * * * Kippered beef steaks and beef and cheese, however, seem to have universal appeal...

www.retailmerchandising.net/candy/reports/meat.asp

(4/13/2006).

In addition to use of the term "meat snacks" by industry insiders, applicant's evidence also indicates use of the term on websites directed to the general public:

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Welcome to the official website of Wild Bill's Foods, Inc.

Based in Lancaster, PA, we produce the world famous Wild Bill's meat snacks. Visit Our Ranch to discover more about Wild Bill's mouth watering beef jerky. And if that works up an appetite, step into Wild Bill's General Store to order some of the best meat snacks in the world.

www.wildbillsfoods.com (4/13/06).

Ostrich Meat Snacks, 10 pack
Description: Ostrim Ostrich Sticks are a Healthy Alternative Meat Snack! Ostrim Ostrich Meat Snacks: - 95% Fat Free - 0% Saturated Fat - High Protein ...

[www\(\).shopping.com/xPC-Ostrich_Meat_Snacks_10_Pack](http://www().shopping.com/xPC-Ostrich_Meat_Snacks_10_Pack)

(4/13/2006) (comparing prices of Ostrich meat snacks from various retail outlets).

Natural Meat Snacks

Let'em eat cake, at someone else's house. For a great nutritional snack at your house, you've just got to taste some of these products.

Don't forget to look for our new Beef Jerky products, they taste great and are good for you!

SUB CATEGORIES

- These Sticks Were Made for Munchin'
- Best Jerky This Side of Heaven
- Browse The Entire Category

FEATURED ITEM

Shelton's Honey Turkey Jerky 4 Oz.
Made with Shelton's free-range, antibiotic-free turkey breast meat... This is our first sweet and soft jerky.

www.sheltons.com/cgi-bin/sheltons/results.html?mv_arg=snacks

(4/13/2006).

WELCOME TO BIG CHIEF MEAT SNACK

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When you bite into Big Chief Meat snacks, you taste the difference! Chewy, mouth watering, nutritional beef snacks burst with flavor from the first bite. Our jerky and beef sticks are carefully tended during the curing process to insure each portion maintains that delicious, mouth-watering, full bodied flavor that comes only from lean cut 100% Alberta beef.

www.bigchiefbeefjerky.com (4/13/2006).

The Outpost Mall
Proudly Endorses the Premium Quality
Exotic Meats [sic] Snack Sticks From:

Safari Snacks [graphic omitted]

Each of our 25 varieties of exotic and wild game snack sticks weigh approximately 2 ounces.

* * *

We offer traditional with a twist like *Bourbon Bison* and *Venison Bratwurst* to the more exotic tastes of game meats such as *Jalapeno Yak*, *Cajun Alligator*, *BBQ Boar* and *Elkwurst*. We also carry 6 varieties of gourmet fowl including *Pheasant with Cranberries* and *Ostrich with Dates*. We even carry the elusive but tasty *Jackalope*.

www.theoutpostmall.com/safari_snack_sticks.htm (4/13/2006).

Applicant's evidence convinces us that the term "meat snacks" is a known term in applicant's field - and is also known to consumers - as a designation for a variety of closely-related food items, including jerky (which can be made from a variety of meats), kippered beef, meat sticks, snack sausages, teriyaki sticks, beef and cheese sticks, and pickled sausages. Although the evidence of record does not

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include a precise definition of "meat snacks," it appears that the term is generally used consistently⁸ to refer to the listed items and variations thereof.

For the first time in her brief, the examining attorney hypothesized that the term "'meat snacks' could also include ... sandwiches containing meat, meat pies, etc., which are in class 30." Brief at 3. However, the examining attorney did not provide any evidence in support of the proposition that sandwiches, meat pies, or any other goods not properly classified in International Class 29 are included in "meat snacks," as the term is commonly used and understood.

While a term in an identification of goods and services should be read to have its ordinary meaning, See TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1402.01 (4th ed 2005); see also TMEP §§ 1402.05 (accuracy of identification), 1402.07(a) (scope of identification for amendment purposes), this determination cannot be made in a vacuum. Where a term

⁸ There were a few exceptions. Several web pages in the record included pigs' feet in the "meat snack" category, and one included "pickled eggs" under that heading. The web sites in question were third-party sites selling a variety of goods, and do not appear to be the web-sites of "meat snack" producers. It cannot be determined with certainty from the record evidence whether such items are included within the definition of "meat snacks," or whether their inclusion in the web evidence was simply the web equivalent of a grocer's placing similar or complementary products near each other on a shelf in a store. In any event, it appears that both pigs' feet and pickled eggs are properly classified in International Class 29, and the examining attorney has made no argument to the contrary.

has a generally-understood meaning, it is inappropriate to read an ambiguity into that meaning by ignoring how the term is actually used in commerce. Examples of this fairly obvious principle abound in our language. For instance, "baby doll pyjamas" are not costumes for dolls, and "mouse pads" are not accessories for a rodent. Like the term "meat snacks," "baby doll pyjamas" or "mouse pads" could be construed to include goods in more than one class, if we ignore how the term is actually used in commerce. Yet each item is listed in the U.S. Acceptable Identification of Goods and Services Manual⁹ as an acceptable identification of goods.

In this case, there is simply no record evidence that any good properly classified outside of International Class 29 is ever called a "meat snack." To the contrary, we find applicant's evidence adequate to establish that the term has a specific meaning, known both in applicant's industry and by the purchasing public, and that it refers only to goods that are properly classified in International Class 29. We note again that throughout the prosecution of the application, the examining attorney did not dispute or even discuss applicant's evidence, nor did she introduce any evidence to support her refusal.

⁹ Available at www.uspto.gov.

As noted above, the examining attorney indicated that "the application was withdrawn from publication and was returned to [her] from the Administrator for Classification after [the Administrator's] review of the Official Gazette."

Br. at 2. The examining attorney further notes that she

consulted with the current Administrator for Classification of goods and services and was instructed that the current Office policy regarding such language and classification requires further clarification of this particular wording. The decision as to the proper classification of goods or services is a purely administrative matter within the sole discretion of the United States Patent and Trademark Office. *In re Tee-Pak Inc.*, 164 USPQ 88 (TTAB 1969). Since the decision was made that correct classification could not be made because of the overbroad nature of the identification of goods, it was required that a clarification of what "meat snacks" are be obtained.

Brief at 4.¹⁰

As we see it - and as explained throughout examination by the examining attorney - the issue in this appeal is not a question of classification, over which the Board normally has no authority, see *In re Tee-Pak, Inc.*, 164 USPQ at 89, but one of identification. Applicant does not dispute that

¹⁰ It is not clear when the examining attorney spoke to the Administrator but it is worth noting that at the point when the application was withdrawn from publication, applicant had not yet submitted its evidence showing the use and meaning of "meat snacks" in the food industry and in the retail market.

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"meat pies" and "sandwiches" (to use the examining attorney's examples) are in International Class 30, rather than 29. Instead, the issue is whether such items are "meat snacks" at all.

We also note that the USPTO issues (and revises) guidelines from time to time on various issues applicable to the identification and classification of goods in trademark applications. See, e.g. TMEP § 1402 (4th ed. 2005); ID Manual Notices, <http://tess2.uspto.gov/netathtml/notices.html> (last visited Aug. 4, 2007). The examining attorney did not cite - and we are otherwise unaware of - any specific guidance that the USPTO has issued relevant to the particular goods at issue here. Were we considering an identification for which the USPTO had issued relevant guidelines, such as "computer programs," see TMEP § 1402.03(d), or "on-line services," ID Manual Notices, such guidance would be entitled to very great weight.

While it is proper to give the Trademark Examining Operation considerable latitude in determining the acceptability of language in identifications of goods and services, deference alone cannot overcome substantial, unrefuted, and convincing evidence such as that submitted by applicant in this case.

Decision: The examining attorney's final refusal is accordingly REVERSED.

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