

**THIS OPINION IS
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OF THE TTAB**

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Perdue Holdings, Inc.

Serial No. 78704019

Jacqueline Levasseur Patt of Venable LLP for Perdue Holdings, Inc.¹

Judith Helfman, Trademark Examining Attorney, Law Office 114 (K. Margaret Le, Managing Attorney).

Before Hairston, Taylor and Ritchie de Larena,
Administrative Trademark Judges.

Opinion by Taylor, Administrative Trademark Judge:

Perdue Holdings Inc. has filed an application to register the mark SNACK-ATIZERS, in standard character format, on the Principal Register for goods ultimately identified as "poultry; fully cooked chicken and turkey snack items" in Class 29.²

¹ Counsel was substituted after the main brief was filed. Before then, applicant was represented by Sherry H. Flax of Saul Ewing LLP.

² Serial No. 78704019, filed August 31, 2005, based on an allegation of a bona fide intention to use the mark in commerce.

The trademark examining attorney has issued a final refusal to register on the ground that applicant's mark SNACK-ATIZERS, when used in connection with the identified goods, is merely descriptive under Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1). After the refusal was made final, applicant appealed. Both applicant and the examining attorney filed briefs. Applicant also filed a reply brief and requested remand so that the examining attorney could consider additional evidence submitted with the appeal brief. The examining attorney then filed a supplemental brief and applicant filed a supplemental reply brief. For the reasons discussed below, we affirm the refusal to register.

Before considering the merits of this case, we must address several evidentiary matters. We first address applicant's objection to the definition of "Snacketizer" from the online LANGMAKER DICTIONARY OF NEOLOGISMS³ submitted by the examining attorney in her Office Action dated December 12, 2006. Citing *In re Total Quality Group Inc.*, 51 USPQ2d 1474 (TTAB 1999), "Applicant objects to the use of this "dictionary" because it [sic] not available in print, not verifiable, and not reliable." (Reply brief at p. 2). As

³ See www.langmaker.com.

regards its reliability, applicant contends that "even Langmaker itself professes: 'Please don't mistake this site for being an accurate dictionary, by design, it's not, but it is rather a place to celebrate word coinings.'"

(*Id.*). Applicant further contends that the types of words found on the Langmaker site are fanciful and inventive, and the fact that the "invented" word "snacketizer" appears on a website filled with non-sensical words should actually favor a finding of non-descriptiveness.

The examining attorney, on the other hand, contends that:

The Federal Circuit provided guidance earlier this year on the issue of reliability of online definitions for purposes of determining descriptiveness in *In re Bayer Aktiengesellschaft*, [488 F.3d 960, 82 USPQ2d 2828 (Fed. Cir. 2007)], stating that "Internet evidence is generally admissible and may be considered for purposes of evaluating a trademark," and more specifically, "[d]efinitions available from an online resource that are readily available and as such capable of being verified are useful to determine consumer perception." 488 F.3d at 966, 82 U.S.P.Q.2d at 1833 (emphasis added). In that case, the applicant objected to the submission of four online translation website [sic], ... In affirming the Board's ruling of descriptiveness, the Federal Circuit held that online dictionaries and translations contributed to the substantial evidence of record and were useful to determine current consumer perception. *Id.* at 965, 82 U.S.P.Q.2d at 1833.

Applying the determination reached in *In re Bayer Aktiengesellschaft* to the instant case, the definition obtained from the LANGMAKER DICTIONARY OF NEOLOGISMS website constitutes one reference in the record that contributes to the overall determination that the current consumer perception and understanding of the term SNACKETIZER is that of light fare foods.

(Supplemental Appeal Brief at p. 3).

Applicant, in reply, argues that *Bayer Aktiengesellschaft* is inapposite because there is no other similar supporting definition of record which corroborates the langmaker.com definition.

We are not persuaded by applicant's arguments. In *Total Quality*, the examining attorney requested with his appeal brief that the Board take judicial notice of definitions from online dictionaries that were not otherwise available in print. That applicant objected to the introduction of this evidence as untimely. The Board found that the online dictionaries were improper subject matter for judicial notice because of doubts regarding the availability and reliability of those online definitions. The Board stated that "[t]he evidence ... should have been made of record prior to the filing of the appeal, in which case applicant would have had the opportunity to check the reliability of the evidence and/or offer rebuttal evidence." *Total Quality* 51 USPQ2d at 1476. Here, the

examining attorney made the definition of record during the prosecution of the involved application and applicant had ample opportunity to rebut or otherwise call into question this evidence. We thus find it timely.

Insofar as the probative value is concerned, this evidence is similar to evidence taken from Wikipedia, the online collaborative encyclopedia. In view of the fact that the LANGMAKER DICTIONARY OF NEOLOGISMS is not intended to be an "accurate" dictionary but rather a place to "celebrate word coinings," the definition therefrom will be accorded limited weight in our overall descriptiveness analysis and will merely serve to corroborate the other evidence of record. *Cf.*, In re IP Carrier Consulting Group, 84 USPQ2d 1028, 1032-33 (TTAB 2007).

Applicant also objected to the evidence submitted by the examining attorney with her Supplemental Brief as untimely. The evidence consists, in part, of a nutrition facts label for Garfield's boneless buffalo wings snackatizer, a menu item served at the restaurant chain, Garfield's owned by Eateries, Inc., obtained from the third-party source dietfacts.com. This objection is overruled inasmuch as the Board indicated in its November 28, 2007 order, remanding the application to the examining attorney for consideration of additional evidence, that

with her supplemental brief, "[t]he Examining Attorney may submit additional evidence in response to the evidence submitted by applicant."

The Board also stated in that order that "applicant may not submit any further evidence with its reply brief." However, applicant seeks to make of record with its supplemental reply brief rebuttal evidence. Citing to TBMP Section 1201.01,⁴ applicant states that the examining attorney provided a third-party reference listing of nutritional information regarding a menu item served at a national restaurant chain (Garfield's owned by Eateries, Inc.), and it "has attached" to its reply pages from the restaurant's actual website, as opposed to a third-party reference, showing the current menu. (Supplemental Reply Brief at pp. 2-3, n. 1). Because the current menu is not the "complete article" from which the nutrition facts information was excerpted, it has not been considered in reaching our decision herein. We hasten to add that even

⁴ The relevant TBMP section is now 1207.01 and states, in relevant part, "if the applicant or the examining attorney submits excerpts from articles, the nonoffering party may submit the complete article, even if such submission is made after the appeal is filed ... because the party submitting the excerpt of the article had the opportunity to review the entire article, if the article is submitted with an appeal brief the Board need not remand the application, and may instead consider the article as part of the record."

if we had considered it, it would not compel a different result in this case.

Turning now to the merits of this appeal, the test for determining whether a mark is merely descriptive is whether the involved term immediately conveys information concerning a quality, characteristic, function, ingredient, attribute or feature of the product or services in connection with which it is used, or intended to be used. 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 (CCPA 1978). A term need not immediately convey an idea of each and every specific feature of the goods or services in order to be considered merely descriptive; it is enough that the term describes one significant attribute, feature or property of the goods or services. *In re MBAssociates*, 180 USPQ 338 (TTAB 1973).

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 intended to be used, and the possible significance that the term would have to the average purchaser of the goods or services because of the manner of its use. *In re Recovery, Inc.*, 196 USPQ 830 (TTAB 1977).

Moreover, "[a]ny competent source suffices to show the relevant purchasing public's understanding of a contested term or phrase." In re Nett Designs, 236 F.3d 1339, 1341, 57 USPQ2d 1564 (Fed. Cir. 2001).

Applicant contends that the examining attorney provided no evidence that a consumer who encounters the mark SNACK-ATIZERS will immediately understand that its goods are fully-cooked poultry products. Applicant particularly argues that "[w]hile SNACK-ATIZERS may suggest [sic] of a quick meal, it does not suggest poultry as a quick meal. The examining attorney has not demonstrated that consumers would immediately -- or otherwise -- associate the mark with a particular type of goods even though it may be suggestive of a possible use of the goods." (Brief at p. 1). Applicant also argues that "SNACK-ATIZER [] constitutes a term created by Applicant for use in commerce and is not an English language word. Applicant urges furthermore that it necessitates an element of thought in order to determine the nature of Applicant's goods, which consist of fully-cooked chicken and turkey meat" (Brief at unnumbered p. 2), and that "all doubt should be resolved in favor of approving the mark for publication." (Reply brief at p. 5) (emphasis in original).

Applicant, in particular, contends that:

... SNACK-ATIZER could indicate a number of meanings and does not convey any immediate or precise significance with respect to Applicant's poultry products. Based on the Examining Attorney's cited uses of the same or similar marks, virtually any food product could be a "snack-atizer." Applicant's goods are neither merely a snack nor an appetizer, but rather a much broader poultry product that is easy to consume in a casual setting because it is prepared. Thus, SNACK-ATIZER may be suggestive of a characteristic or quality of the goods, but it is not descriptive of the nature of the goods. A consumer cannot, without more, understand that SNACK-ATIZER refers to a fully cooked poultry product.

(Supplemental Reply Brief at p. 3).

The examining attorney maintains that "the term SNACK-ATIZERS, is merely descriptive of Applicant's identified goods, to wit, 'fully cooked chicken and turkey snack items,' because the term immediately conveys, without speculation or conjecture, that the goods are a style of light fare foods that are commonly known, referenced and listed as SNACK-ATIZERS in the field of food services."

(Brief at p. 11). She further contends that "substantial" evidence of record demonstrates that the proposed mark and its phonetic equivalents are commonly used to identify "appetizers or a quick bite." (Brief at unnumbered p. 5).

In support of the refusal, the examining attorney submitted a variety of evidence from the Internet including

definitions, online restaurant and catering menus, article excerpts, a magazine article and recipes which she maintains demonstrates the descriptive nature of the term, SNACK-ATIZERS (or its phonetic equivalents "snackatizers" and "snacketizers").

The evidence of record includes, among other things, the following:

1. A definition taken from the online dictionary LANGMAKER DICTIONARY OF NEOLOGISMS: "Snacketizer" is defined as "[a] light snack that can serve both or either of the purposes of a snack or an appetizer."⁵

2. Use of the term Snackatizers (or its phonetic equivalents) as a menu category in catering and restaurant menus and advertising. The menus from the following restaurants include Snackatizers as a menu category: American Tap Room (VA), Capital Flavors Catering (DC metro area), Jeff Machado, Giovanni's (PA), Neptune Diner (NY) and Vacco's (IO). The menus from these restaurants include Snacketizers as a menu category: Garfield's (multistate), Daiquiri Deck (FL), In & Out Pizza, and Fresno's Southwest Restaurant and Bar (NY and PA). And, the menu from the Straw Hat Pizza (CA & NV) includes a SNACK-A-TIZER as a

⁵ www.langmaker.com/db/eng-snacketizer.htm.

menu item. By way of examples, the AMERICAN TAP ROOM features American Combo, Buffalo or BBQ Wings, Shrooms, Grilled Quesadillas; Fried Calamari, Mountain High Cheese Fries, Chicken Tenders or Buffalo Style, Super Nachos, Crab Bowl, Peel-N-Eat Shrimp, Annapolis Crab Bread, Fried Mozzarella and Pot Stickers as Snackatizers; and DACQUARI DECK features Calamari Rings, Citrus Grilled Shrimp Skewers, Crispy Chicken Fingers, Smothered Potato Wedges, Maryland Crab Cakes, Buffalo Shrimp, Bahama Conch Fritters, Gator Bites Buffalo-Style Chicken Wings, Half-Pound Peel-and-Eat Shrimp, Shark Bites, Crab Stuffed Mushrooms, Deck Platter, Creole Shrimp and Crab Dip, Key West Grouper Bites and Cheese Sticks as Snacketizers.

The advertising copy for the following restaurants reference "snackatizers" as menu items: Pub Oyster Bar (MI), advertises "late night snackatizers"; and Fresno's (PA and NY), advertises that it has the "Largest Selection of Snackatizers in Town!."

3. Use of the term "snackatizer" in restaurant reviews and other newspaper or magazine articles or online blogs:

GARFIELD'S FUN PLACE AFTER SHOPPING by Trent Rowe

First courses - Snacketizers - are appetizers or a quick bite. Some, like nachos, nine-

layer dip or potato skins make a light meal.

Ledger (Lakeland, Florida) (April 19, 1996)

Headline: Mike Sullivan writes about movies he hasn't seen

Are there enough people in the world who have, at some point, strapped on their flair and pushed combo snackatizer platter at happy chain restaurants to make this inside joke work?

The News Journal
(Wilmington, Delaware) (October 5, 2005)

Garfield's the Oklahoma City-based casual chain, features "Snacketizers" at the beginning of its menu, with such shareables as ...

"The name is more of an indication of what the category is for us," says Marilyn Ruggles, the company's vice president of marketing. They're snacks, light meals, or something for a table of two or more to share."

Big Flavor, Small Plates by Joan Lang
Flavor the Menu (Fall 2003)

Trail Head

And the rest of us packed in some 40-50 hot dogs, rolls, condiments, 2 gallons of milk for hot cocoa, peppers and onions to sauté for the dogs, chili, and a variety of snackatizers.

MaineToday.com OUTDOORS (November 16, 2005)

4. A nutrition facts label for Garfield's "boneless buffalo wings snacketizer,"⁶ and describing them as "lightly breaded chicken breast pieces."

5. A recipe for MOCK FRITO BEAN DIP reads as follows:⁷

1 can bean with bacon soup
½ c. salsa or picante sauce (mild, medium, or hot, your choice)

Mix well in microwavable dish. Mash beans with fork. Heat thoroughly. Dip Fritos or Doritos. It's a different snackatizer.

Based on the evidence noted above, we conclude that the term SNACK-ATIZERS is merely descriptive of applicant's goods, in that it directly informs consumers of applicant's fully cooked chicken and turkey snack items of a significant characteristic or attribute thereof, namely that they are food items that may be served as snacks or light fare.

Applicant raised several arguments against the examining attorney's position that its mark is merely descriptive and we address each one in turn. First, applicant contends that the term "Snacketizer," is neither a word, nor a correctly spelled one. We presume by this that applicant challenges the merely descriptive

⁶ www.DietFacts.com/htnk/nutrition-facts/garfields-boneless-buffalo-wings-snacketizer-lightly-fired-breaded-chicken-breast-pieces-dres40592.htm.

⁷ www.cooks.com/rec/.

implications of the examining attorney's assertion that the terms "Snackatizer" and "Snacketizer" are the phonetic equivalents of its applied-for designation SNACK-ATIZER. Notably, the examining attorney based her refusal on the descriptiveness of both the terms "Snackatizer" and "Snacketizer," and much of the supporting evidence shows the term spelled with an "a" instead of an "e" and, in one case, the term even includes hyphens. Even though the terms "Snackatizer" and "Snacketizer" do not appear in conventional dictionaries, they are phonetically equivalent to the designation SNACK-ATIZER and, for the reasons previously stated, that formative is merely descriptive. Cf., *In re Omaha Nat'l Corp.*, 819 F.2d 1117, 1118, 2 USPQ2d 1859, 1860 (Fed. Cir. 1987) (affirming refusal to register "FirstTier," a phonetic equivalent of "first tier" as merely descriptive of banking services); and *In re Hercules Fasteners, Inc.*, 203 F.2d 753, 757, 97 USPQ 355, 358 (CCPA 1953) (affirming disclaimer requirement of "FASTIE," as phonetic equivalent of "fast tie," as descriptive of the function and character of the applied for goods).

Applicant also argues that "whereas 'snack' alone may arguably be descriptive and 'appetizer' alone may be as well, SNACK-ATIZER, which represents the combination of 'Snack' and a truncated, intentionally misspelled version

of 'Appetizer', is neither generic nor merely descriptive. The resulting term SNACK-ATIZER constitutes a term created by Applicant." (Brief at p. 2). We must point out, however, that even if applicant coined the term, and there is nothing in the record to support that assertion, as the examining attorney correctly noted, "[a] term that was once arbitrary or suggestive may lose its distinguishing or origin denoting characteristics through use in a descriptive sense over a period of time, and come to be regarded by the purchasing public as nothing more than a descriptive designation." See *In re Digital Research, Inc.*, 4 USPQ2d 1242, 1243 (TTAB1987); *In Re Int'l Spike, Inc.*, 190 USPQ 505, 507 (TTAB 1976). Herein, the evidence demonstrates that the public now regards the term "Snackatizer" as describing a snack or light meal.

Next, applicant argues that the examining attorney has produced no evidence that anyone offering the same type of product as applicant, i.e., poultry snack items, has ever used the term SNACK-ATIZERS to describe any feature or function of the goods, and that this lack of evidence raises doubts regarding the descriptiveness of that term. (Supplemental Reply Brief at p. 3). Applicant particularly argues that the nutritional facts label for boneless buffalo wings snacketizer does not evidence use of the term

"snacketizer" in connection with applicant's product, but rather a menu item. (Supplemental Reply Brief at p. 3). Applicant also argues that the Examining Attorney's reliance on restaurant menus to establish descriptiveness for applicant's mark is unfounded as those uses refer to a group of diverse food items served to customers in a restaurant setting whereas Applicant's mark identifies fully cooked poultry products sold frozen to food service professionals or grocery stores.

As regards the asserted lack of evidence showing SNACK-ATIZER used in connection with fully-cooked poultry products sold in grocery stores, such evidence is not necessary. The question before us is whether the designation SNACK-ATIZER immediately conveys information concerning a characteristic, function, ingredient, attribute or feature of applicant's identified poultry snacks. In this case, the evidence clearly shows that potential purchasers of applicant's poultry snacks would understand the term SNACK-ATIZER, a term used in the field of foods and related services, to immediately convey that the goods are snacks, appetizers and similar light fare. Furthermore, it is not uncommon to find popular restaurant appetizers and entrees for sale in the frozen food section of grocery stores. Accordingly, that fact that applicant

intends to sell its goods to food service professionals or grocery stores does not diminish the relevance of the evidence discussed herein nor our finding that the term SNACK-ATIZER is merely descriptive of applicant's poultry snack items. Put simply, the term SNACK-ATIZER merely describes the nature of applicant's goods, namely, that they are small and may be served as light fare.

Last, applicant similarly argues that the since none of the Internet references to restaurant reviews and restaurant menus show use of the term "snacketizers" or formatives thereof in connection with applicant's poultry snack items, "the Examining Attorney is taking a leap of imagination that a term, such as Applicant's SNACK-ATIZERS, which might be descriptive of menu items, is, ipso facto, descriptive of poultry food item." (Reply Brief at. p. 3). In support of this contention, applicant introduced copies of third-party registrations from the TESS database of the United States Patent and Trademark Office apparently to show that other terms have registered that may be descriptive of restaurant menu items. The registrations are for the marks SWEET ENDINGS (Registration No. 2230830), SHAREABLE STARTERS (Registration No. 3041714 - STARTERS disclaimed) and SWEET STARTERS (Registration No. 2496431). We find these registrations have no probative value in this

matter as we are not privy to the records of those prior proceedings and are bound to make a decision based on the record before us. See *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564 (Fed. Cir. 2001); *AMF Inc. v. American Leisure Products, Inc.*, 177 USPQ 268, 269 (CCPA 1973); *In re International Taste, Inc.*, 53 USPQ2d 1604 (TTAB 2000); and *In re Sunmarks Inc.*, 32 USPQ2d 1470 (TTAB 1994).

On this record, we conclude that when applied to applicant's goods, the designation SNACK-ATIZERS immediately describes, without any kind of mental reasoning, speculation or conjecture, a characteristic of the goods, namely that applicant's poultry; fully cooked chicken and turkey snack items are snacks or light meals.

Decision: The refusal to register under Section 2(e)(1) of the Trademark Act is affirmed.