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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Interbake, LLC

Serial No. 78808715

Mary Dalton Baril of McGuireWoods for Interbake, LLC.

Mark Rademacher, Trademark Examining Attorney, Law Office
114 (K. Margaret Le, Managing Attorney).

Before Quinn, Cataldo and Bergsman, Administrative
Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

Interbake, LLC filed an intent-to-use application to
register the mark LEMONADES for "cookies."¹

The trademark examining attorney refused registration
under Section 2(e)(1) of the Trademark Act, 15 U.S.C.
§1052(e)(1), on the ground that applicant's mark, as
applied to applicant's goods, is merely descriptive
thereof.

¹ Application Serial No. 78808715, filed February 7, 2006.

When the refusal was made final, applicant appealed. Applicant and the examining attorney filed briefs.

Applicant analyzes the issue in terms of degree of imagination, competitors' need, and competitors' use. Applicant concedes that while LEMONADES is suggestive of the flavor of its cookies, the examining attorney incorrectly categorized "lemonade" as a flavor; and that the examining attorney's reliance on competitive need to use "lemonade" is misplaced given the long history of nonuse of the term as a mark for cookies. The essence of applicant's suggestiveness argument is as follows:

[W]hen a consumer hears or sees the mark "LEMONADES," even in the context of a box of cookies, the drink and not the flavor springs to mind. The consumer may then make the connection that the cookies might taste like lemonade. This multistep process, first thinking of the drink and only then thinking of the taste, demonstrates that "LEMONADES" is suggestive of a flavor for cookies, not descriptive of it.

(Brief, p. 5). Applicant submitted three dictionary definitions of "lemonade."

The examining attorney maintains that LEMONADES merely describes the flavor of applicant's cookies, that is, the cookies taste like lemonade. In support of the refusal, the examining attorney introduced excerpts of applicant's

website, dictionary definitions, an encyclopedia entry, and cookie recipes retrieved from the Internet.

At the outset we must consider two procedural matters. The first relates to the nature of the statutory refusal, and the second to evidence attached to applicant's brief.

In the first Office action, the examining attorney refused registration on the ground of mere descriptiveness. The examining attorney went on to indicate "[m]oreover, the proposed mark appears to be generic as applied to the goods and, therefore, incapable of functioning as a source-identifier for applicant's goods." The examining attorney stated, "the attached evidence shows that the proposed mark 'lemonades' is the common generic name for cookies made with lemonade." Applicant, in its response, confined its arguments to the issue of mere descriptiveness. In the final refusal, virtually the entire Office action addressed the mere descriptiveness refusal. However, the examining attorney concluded the Office action as follows: "As stated in the initial Office action, the mark also appears to be generic as applied to the goods and, therefore, incapable of functioning as a source-identifier for applicant's goods. Under these circumstances, neither an amendment to proceed under Trademark Act Section 2(f), nor an amendment to the Supplemental Register can be

recommended." [citations omitted]. Applicant, in its appeal brief, addressed both of the issues of mere descriptiveness and genericness. The examining attorney, in his brief, addressed only the issue of mere descriptiveness; no mention was made of genericness.

We view the only issue on appeal to be mere descriptiveness. To the extent that the final refusal may be read as encompassing a refusal grounded on genericness, we regard the refusal as being subsequently withdrawn given the examining attorney's silence on this issue in his brief.

The second preliminary matter concerns the late-filed evidence. Applicant submitted several exhibits for the first time with its brief. Applicant stated the following: "Applicant is aware that the TTAB rules do not normally allow a party to attach new evidence on appeal. However, the Examining Attorney changed his argument in the second Office action from stating that lemonade was an ingredient of Applicant's cookies to stating that lemonade was a flavor of Applicant's cookies, and so Applicant prays leave to submit evidence refuting the Examining Attorney's new argument." (Brief, pp. 4-5).

Trademark Rule 2.142(d) provides that the record in an application should be complete prior to the filing of the

appeal. Even assuming *arguendo* that applicant is submitting evidence in response to a new argument in the final refusal, applicant had an opportunity to file a request for reconsideration, accompanied by the new evidence, prior to the appeal. It is also possible to request remand of an application to submit additional evidence after appeal, if good cause can be shown. See TBMP §1207.02 (2d ed. rev. 2004). What is not acceptable is for an applicant simply to submit evidence with an appeal brief, at a point where the examining attorney has no opportunity to submit evidence in response. Applicant's submission of the evidence with its appeal brief is untimely. Accordingly, the exhibits accompanying applicant's appeal brief have not been considered in reaching our decision.²

At this point we should add that we have considered the evidence attached to the examining attorney's brief. Dictionary and thesaurus entries are subject to judicial notice. See *In re Styleclick.com*, 58 USPQ2d 1523, 1525 (TTAB 2001). Further, while the present listing is from an on-line resource, the thesaurus is available in a printed volume. See *In re Total Quality Group Inc.*, 51 USPQ2d

² We hasten to add, however, that even if the evidence were considered, it does not compel a different result in this appeal.

1474, 1476 (TTAB 1999). See also TBMP §1208.04 (2d ed. rev. 2004).

We now turn to the Section 2(e)(1) issue of whether or not LEMONADES is merely descriptive as applied to cookies. A term is deemed to be merely descriptive of goods or services, within the meaning of Section 2(e)(1), if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services. *In re Abcor Development*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). A term need not immediately convey an idea of each and every specific feature of the applicant's goods or services in order to be considered merely descriptive; rather, it is sufficient that the term describes one significant attribute, function or property of the goods or services. *In re H.U.D.D.L.E.*, 216 USPQ 358 (TTAB 1982); and *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 on or in connection with the 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 its use; that a term may have other meanings in different contexts is not

controlling. *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979). Contrary to the gist of some of applicant's arguments, it is settled that "[t]he question is not whether someone presented with only the mark could guess what the goods or services are. Rather, the question is whether someone who knows what the goods or services are will understand the mark to convey information about them." *In re Tower Tech Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002). The "average" or "ordinary" consumer is the class or classes of actual or prospective customers of applicant's goods or services. *In re Omaha National Corporation*, 819 F.2d 1117, 2 USPQ2d 1859 (Fed. Cir. 1987).

Applicant supplies cookies to the Girl Scouts of America for its annual cookie sale campaign. Among the cookies is a recent low-fat entry sold under the mark LEMONADES. On its website applicant describes its cookies as "savory slices of shortbread with a refreshingly tangy lemon icing." In another advertisement, applicant states "[s]avory shortbread slices with a refreshingly tangy lemon icing make any day feel like a sweet summer break."

The term "tangy" is defined as "having a taste characteristic of that produced by acids." (Roget's II: The New Thesaurus (3d ed. 2003)). The record includes the ingredient list for applicant's cookies that appears on the

box. The ingredients include natural and artificial flavors and citric acid. The term "lemon" is defined as "one of the citrus fruits." (The Columbia Encyclopedia (2004)).

Applicant submitted dictionary definitions of the term "lemonade." The definitions show the term defined as "a drink made of lemon juice, water and sugar" (The American Heritage Dictionary of the English Language (4th ed. 2000); and "a beverage of sweetened lemon juice mixed with water" (www.m-w.com).

The record further includes three recipes for "Lemonade Cookies." In each instance, frozen lemonade concentrate is an ingredient in the recipe. In two Internet excerpts, various blog entries and articles refer to applicant's cookies as having a "lemonade flavor."

Also of record is a printout of the results of a search of www.froogle.com (apparently a branch of the www.google.com search engine that searches only for products that are available for purchase). The search shows that while numerous lemon-flavored cookies are available in the marketplace, no manufacturer uses the term "lemonade" in connection with its cookies.

The record establishes that lemonade has been used as an ingredient in cookies, and that the term "lemonade" has

been used in connection with such cookies. Although applicant does not use lemonade as an ingredient in its cookies, the cookies are, in fact, lemon-flavored, and consumers have referred to "lemonade" as their flavor. In view of this evidence, we find that consumers would equate "lemonade" with the lemon flavor of applicant's cookies.

The language of the predecessor of our primary reviewing court in *In re Andes Candies Inc.*, 478 F.2d 1264, 178 USPQ 156 (CCPA 1973) is instructive in the present case. In that case, the court found CREME DE MENTHE to be merely descriptive of candy:

A mark is "merely descriptive" under Section 2(e)(1) if it merely describes a characteristic (flavor) of the goods (candy).

We think that the only possible reaction of purchasers, upon being presented with CREME DE MENTHE chocolate wafers, is the expectation that the wafers will have a mint taste something like that of crème de menthe liqueur. Surely, the purchasers would not expect to find a cherry or rum or butterscotch flavor in the candies. Whether or not the public is aware of the dictionary definition of "crème de menthe" made of record by the examiner [footnote omitted], the words clearly connote a mint flavored liqueur. Of course, the purchaser knows the product is a candy not a liqueur, but, as appellant admits, the average purchaser would "expect the candy to have a flavor similar" to that of crème de menthe liqueur.

Appellant argues that its mark only *suggests* a flavor similar to that of the liqueur. If that were so, registration would be proper. We think however that the mark *demands* that, and only that, flavor. Appellant's citations of cases requiring that the mark be the "common descriptive name" of the goods to merit the proscription of Sec. 2(e)(1) are inapt where, as here, the mark is the common descriptive name of a liqueur whose flavor the public expects when it sees the mark. That other candy makers may not have employed "crème de menthe" so widely as to make it a common flavor designation for candy is not material where appellant itself has so employed the mark. Whether or not the mark is misdescriptive in leading the public to expect the actual liqueur in the candy is not before us. It is sufficient to preclude registration that the mark merely describes the flavor characteristic. [emphasis in original]

Id. at 157.

Similarly, in the present case, consumers, upon encountering LEMONADES for cookies, expect that the cookies will have a lemon taste something like that of the beverage lemonade. Again, the issue of mere descriptiveness is analyzed in relation to the goods. Thus, the consumer knows that the product is a cookie and not a beverage, but the consumer would expect that the cookie has a flavor similar to that of the beverage lemonade.

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Accordingly, we conclude that LEMONADE merely describes the flavor of applicant's cookies. The term immediately describes, without conjecture or speculation, a significant characteristic or feature of the goods, namely, the lemonade-like flavor of the cookies.

As pointed out by the examining attorney, that applicant may be the first and only user of a merely descriptive term does not justify registration if the only significance conveyed by the term is merely descriptive. See *In re National Shooting Sports Foundation, Inc.*, 219 USPQ 1018 (TTAB 1983).

Decision: The refusal to register is affirmed.