

**THIS OPINION IS  
NOT A PRECEDENT  
OF THE TTAB**

Mailed: September 26, 2008

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re Progressive Group Alliance, LLC

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Serial No. 78900665

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Anthony R. Masiello of Holland & Knight LLP.

William T. Verhosek, Trademark Examining Attorney, Law  
Office 114 (K. Margaret Le, Managing Attorney).

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Before Grendel, Zervas and Taylor, Administrative Trademark  
Judges.

Opinion by Taylor, Administrative Trademark Judge:

Progressive Group Alliance LLC has filed an  
application to register the mark REFYNE, in standard  
character format, on the Principal Register for goods  
identified as "edible oil; shortening" in Class 29.<sup>1</sup>

The trademark examining attorney has issued a final  
refusal to register on the ground that applicant's mark  
REFYNE, when used in connection with the identified goods,

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<sup>1</sup> Serial No. 78900665 filed June 5, 2006, based on an allegation  
of a bona fide intention to use the mark in commerce.

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 and requested reconsideration of the final refusal. On March 27, 2008, the request for reconsideration was denied and, on April 2, 2008, this appeal was resumed. Both applicant and the examining attorney filed briefs. For the reasons discussed below, we affirm the refusal to register.

Before considering the merits of this case, we must address an evidentiary matter. The examining attorney objects to Exhibit D to applicant's request for reconsideration, i.e., a listing of 97 registrations (consisting of the registration numbers, the marks, and whether the registration is "Live" or "Dead") for marks incorporating the designation "refine," but not "refined," with or without other matter, obtained via the Trademark Electronic Search System (TESS) of the United States Patent and Trademark Office (USPTO). The examining attorney argues that mere submission of a list of registrations does not make such registrations part of the record and, accordingly, the registrations should not be considered.

Applicant, on the other hand, states that it did not seek to make the substance of the Exhibit D registrations of record. Rather, applicant maintains that it properly

made of record, under an affidavit of applicant's counsel, the results of particular searches performed on the TESS database. Applicant goes on to argue that:

the affidavit of counsel and the attached Exhibit D are competent to demonstrate that the search was performed and to show the output of the TESS system in response to the search.

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When this evidence is viewed together with the applicant's other evidence of TESS searches (to which the examiner has not objected)<sup>2</sup>, it can be seen that although the TESS system indicates the Trademark Office issued at least 97 registrations for marks incorporating the designation "refine" in a form other than "refined," it does not contain a single record of a registration containing a disclaimer of the word "refine."

(Reply Br., pp. 1-2).

The list of registrations (Exhibit D) is properly of record inasmuch as it was filed prior to the appeal in accordance with Trademark Rule 2.142(d), but the registrations are not of record because a mere listing of

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<sup>2</sup> The "other evidence" referred to by applicant are the search entry and results screens from applicant's counsel's search of the TESS database for marks containing a disclaimer of the designation "refine." Counsel stated in the accompanying affidavit that his search queries were "\*refine\*[bi] and refine[ds] and registration[on]," which retrieved no records; and "refine[ds]," which retrieved a single record of an expired application. Applicant made of record an electronic copy of that application, but it is of no probative value. See *Interpayment Services Ltd. v. Docters & Thiede*, 66 USPQ2d 1463 (TTAB 2003) (An application shows only that it has been filed.). In any event, in the absence of any detailed information regarding the marks searched, as discussed *infra*, the fact that these searches retrieved no results for registrations including a disclaimer is not probative.

registrations is an insufficient means of making them properly of record. In re Duofold Inc., 184 USPQ 638 (TTAB 1974). Further, a mere listing of third-party marks, without any accompanying indication of the goods and/or services associated therewith, and including expired registrations, has virtually no probative value. See TBMP § 1208.02 (2d ed. rev. 2004), and the authorities cited therein. See also, Action Temporary Services Inc. v. Labor Force Inc., 870 F.2d 1563, 10 USPQ2d 1307, 1309 (Fed. Cir. 1989) (“[A] cancelled registration does not provide constructive notice of anything”). In short, the fact that none of the registrations shown in the TESS listing contains a disclaimer is of no import because, in the absence of any indication of the goods and/or services covered by these registrations, there is no way to tell if the term “refine” is descriptive such that a disclaimer would have been required or if the registration issued pursuant to Section 2(f) of the Trademark Act.

We now consider the merits of this appeal. A term is deemed to be merely descriptive of goods or services, within the meaning of Trademark Act 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. 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 applicant's goods or services in order to be considered merely descriptive; it is enough that the term describes one significant attribute, function or property of the goods or services. See In re H.U.D.D.L.E., 216 USPQ 358 (TTAB 1982); 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 those goods or services, and the possible significance that the term would have to the average purchaser of 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 (TTAB 1979). It is settled that "the 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 examining attorney maintains that the term REFYNE is merely a novel spelling of the term "refine," which refers to a feature of the goods in that it "tells consumers that the goods are refined or free of impurities" and "describes the processing of the goods, in that the applicant and its competitors refine crude food and cooking oils into edible oils and shortening." (Br., at unnumbered p. 4). The examining attorney further contends that "the terms, refines, refined and refining ... are transitive verbs of refine. Whether the goods are refined or in the refining process or to wit, to refine the goods, the mere transition of the term for proper sentence structure does not make it any less descriptive." (Br., unnumbered p. 5). The examining attorney maintains, therefore, that the term REFYNE/REFINE, is merely descriptive of applicant's goods because it indicates that such goods are free of impurities.

In support of the refusal to register, the examining attorney has made of record several dictionary definitions for the word refine; the following three, in pertinent part, are representative (emphasis supplied):

**re-fine** (rî-fin) verb

**re·fined, re·fin·ing, re·fines** verb, transitive

1. To reduce to a pure state; purify.
2. To remove by purifying.

verb, intransitive

1. To become free of impurities.<sup>3</sup>

**re·fine** [ ]

transitive and intransitive verb

1. remove impurities: to produce a purer form of something by removing the impurities from it, or to become pure through such a process<sup>4</sup>

*transitive verb*

1 : to free (as metal, sugar, or oil) from impurities or unwanted material<sup>5</sup>

The examining attorney also relies on excerpts of articles from the NEXIS computerized database and from an Internet search of the Google search engine.

A sampling of the excerpted articles from the Internet discuss the process of refining oils:

PROCESS DESCRIPTION

refining oils & fats

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<sup>3</sup> The American Heritage Dictionary of the English Language, (3<sup>rd</sup> ed. 1992)

<sup>4</sup> Encarta World English Dictionary (North American Edition 2007), retrieved from <http://encarta.msn.com/dictionary>.

<sup>5</sup> Merriam-Webster's Online Dictionary.

Refining removes undesirable compounds such as gums, free fatty acids, pigments and undesirable flavor and odour compounds. In general, there are two ways to refine seed oils: physical refining and the more conventional chemical refining.

([www.hyforma.com/en/content/food-branches-processing-manufacturing/oil-margarine-sauces/oils-fats](http://www.hyforma.com/en/content/food-branches-processing-manufacturing/oil-margarine-sauces/oils-fats)).

Membrane technology for edible oil refining  
US Patent issued on May 10, 1994

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OBJECTS AND SUMMARY OF THE INVENTION

An object of the present invention is to refine domestic and edible oils to remove undesirable compounds therefrom including free fatty acids, phosphatides, particulate and the like.

([www.patentstorm.us/patnets/5310487-description](http://www.patentstorm.us/patnets/5310487-description)).

The following examples are from the NEXIS database (emphasis supplied by the examining attorney) and use the term "refine" or "refines" in relation to "edible oils" and/or "shortening":

News-Sun, Waukegan IL, April 3, 1996, pg A2, 469 words, Gurnee paves way for PQ at Anchor site, Marlene Hunt, Gurnee; IL; US; North Central, 9657476, XNWS BTL  
... used to clarify beer, **refine edible oils** and purify used cooking ...

Crains Chicago Business, December 20, 1993, Vol 16; No 51; Sec 1; pg 11, 416 words, Cost cuts, warehouse club link keep Oil-Dry's results purring, H Lee Murphy, Chicago; Il; US, 9413495, CCHI  
... bleaching products used to **refine edible oils** overseas. Sales in that ...

St. Louis Post-Dispatch (Missouri), January 31, 1990, WEDNESDAY, FIVE STAR Edition, BUSINESS; pg. 5B, 294 words, SOY-OIL PLANT MAY REOPEN

... formed Mississippi Valley Edible Oil Refining Corp. and plans to refine soybean oil for ...

Just-Food, November 2007, Pg. 42, 1400908511, 961 words, Branded foods in India- forecasts to 2015: 2008 edition: Oils and fats, Verma, Raghavendra  
... newspaper that adulteration in edible oils is rampant as refiners either incompletely refine imported palm oil, or ...

Agricultural Research, July 1, 1999, No. 7, Vol. 47; Pg. 23; ISSN: 0002-161X, 237 words, Byproduct Gets a New Life.  
... chemicals are used to extract and refine edible oils from the seeds of cotton, safflower, and ...

Chemistry and Industry, October 2, 1989, No. 19; Pg. 623; ISSN: 0009-3068, 4502 words, The French oils and fats industry: a success story; taken from speech delivered to SCI's Oils and Fats Group, Uzzan, Aldo, IAC 08090067  
... 1850 \* Bataille was the first to refine edible oil as it is done today, ...

Mining Annual Review, June, 1986, Countries; Central Africa; Pg. 410, 744 words, KENYA, By a Special Contributor  
... a montmorillonite clay to refine edible oils. It is also developing a ...

Time Magazine, September 23, 1985, U.S. Edition, WORLD; Cover Story; Pg. 55, 596 words, Flourishing Collectives  
... soft drinks, some refine edible oils. Many of them work in ...

Crain's Chicago Busin, April 18, 2005, FOCUS: PRIVATELY HELD COMPANIES; Pg. 50 154 words, Fryer fats keep Miniast growing  
... Chicago Packing Co., which refines animal fats into shortenings that are used in frying...

Omaha World Herald (Nebraska), November 2, 1999, Tuesday, SUNRISE EDITION, Pg. 16, 857

words, Close to Home Midlands Soybean Farmers May Get Boost From Plant, JOHN TAYLOR ... oil and a refinery that refines crude vegetable oils into shortenings and cooking oils. Bunge ...

Business First-Columbus, May 10, 1996, Vol 12; No 37; pg 22, 1162 words, Businesses call toxic release report misleading, Sara Selis, OH; US; North Central, 966-168, BFC BTL ... chemical threats: The company, which refines vegetable oils into food shortenings, released 622,296 pounds of ...

South Florida Business Journal, March 24, 1995, Vol 15; No 31; Sec A; pg 4, 304 words, Swedish firm opens Miami unit, Alison Turner, Miami; FL; US, 9542064, SFLA ... 35,000 people and processes and refines more than half of all the edible oil and margarine in the world ...

Memphis Business Journal, May 25, 1987, Vol 9; No 1; Sec 1; pg 18, 889 words, Kraft, Inc.'s Slimming Down Makes It Desirable Buy, Susan Thorp, Memphis; TN; US, 8710240, MJB ... addition, the company processes and refines oil and shortenings at its plant at ...

US Business Review, June 1, 2006, Pg. 147(2), 148463759, 1022 words, Custom approach: working closely with customers to create quality, customized products has resulted in long-term relationships and loyalty for Golden Brands., Aronovich, Hanna ... Ky., Golden Brands refines, processes and [sic] packages soybean, ... ... palm vegetable oil into shortening and shortening flakes to industrial baking, ...

Investors Chronicle, August 12, 1994, Pg. 54, 175 words, Mergers & Acquisitions/ Acatos & Hutchesonwas [sic] ... 335p. A&H refines and distributes 30 per cent of the edible oil consumed in the UK ...

Applicant, on the other hand, maintains that its mark is suggestive of its goods and that "the examiner improperly extended the scope of Section 2(e)(1) in order to refuse registration to applicant's mark merely because it is suggestive of other words, not included in the mark, that may have some relation to the goods." (Br., p. 1). Applicant particularly argues that "REFYNE" does not mean "refined," and "refine" does not mean "refined," although they arguably suggest the term; nor does the verb "refine" mean "the refining process or a condition of purity resulting from the refining process." (Br., p. 2). Accordingly to applicant, the examining attorney "has ignored the fact ... that the mark itself must be merely descriptive of the goods" (*id*); "that it is highly unlikely that any typical consumer of applicant would, upon seeing applicant's REFYNE brand goods in the marketplace, perform the multi-step mental reasoning [i.e., phonetically translate the mark, compare similar words and analyze the meaning of related words and then relate the word "refine"] to conclude that the mark is descriptive"; and that even if applicant's mark is taken to mean "refine," "the mark, as used on a container for oil or shortening, is too incongruous to be an appropriate descriptor for the goods. The word is a verb and, as such, is inappropriate for use

as an adjective; there is no such thing as 'refine oil.'" (Br., p. 6). That is, that "refine" is neither grammatically nor logically appropriate as a descriptor of applicant's goods.

Applicant also argues that the examining attorney's determination is not supported by the cited legal precedents and is inconsistent with prior practice of the USPTO. Finally, applicant contends that all doubt as to descriptiveness should be resolved in favor of applicant.

In support of its position, applicant has properly made of record copies of sixteen third-party registrations for marks that include the term REFINE without a disclaimer. Applicant has also submitted excerpts from several dictionaries to show that: (1) "refyne" is not a word in the English language; (2) that the substitution of the letter "y" for "i" in "refine" is unexpected, since the letter "y" is based on the Greek character upsilon and the word "refine" is derived from the Latin term for "final"; and (3) the prefix "re" suggest "again," "anew" "back" and "backward."

After carefully considering the arguments and the evidence submitted by both applicant and the examining attorney, even if such argument and evidence is not specifically referred to in this decision, we find that the

evidence submitted by the examining attorney clearly establishes that the term "refine" has descriptive significance when used in connection with edible oil and shortening. The term "refined" clearly would be perceived in the context of applicant's edible oil and shortening as merely describing attributes of applicant's goods, i.e., that they are free of impurities and/or have been through a refining process. Indeed, as noted by applicant, the word "refined" "can be deemed merely descriptive." (Reply br., p. 5). We find the word "refine" similarly descriptive of applicant's goods. "Refine" and "refined" are simply different conjugations of the same word. Contrary to applicant's assertion, using alleged "illogical" or "inappropriate" grammar does not make the term "refine" any less descriptive when used on or in connection with applicant's goods. Cf., *In re Dalquist, Inc.*, 192 USPQ 237, 238 (TTAB 1976) ("The past tense, 'phased', of the verb of which 'phase' is the present tense and 'phasing' is the present participle, would, we think, convey to purchasers of, and dealers in, high fidelity sound reproduction equipment the same meaning or connotation as the words 'phase' and 'phasing.'"). Simply stated, the term "refine" immediately conveys, without thought or imagination, to consumers of applicant's edible oil and shortening the same

significant attribute of those goods as does the term "refined," namely, that applicant's goods are free of impurities. As such, we find the term "refine" merely descriptive of applicant's goods.

Also, in finding that the term "refine" is merely descriptive, we have considered the third-party registrations of record for marks that include the term "refine" without a disclaimer. As pointed out by the examining attorney, these marks are for goods and services which are different from those involved herein.

In any case, we are bound to make the decision as to whether the designation REFYNE (REFINE) is merely descriptive of the identified goods based on the record before us. In re Nett Designs Inc., 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) ("Even if some prior registrations had some characteristics similar to [applicant's] application, the PTO's allowance of such prior registrations does not bind the board or this court."). As has often been stated, each case must be considered on its own record. We are not privy to the records of the third-party registration evidence. In this case, the record establishes that the term "refine" is merely descriptive of applicant's goods.

Applicant, citing *Borinquen Biscuit Corp. v. M.V. Trading Corp.*, 433 F.3d 112, 78 USPQ2d 1564 (1st Cir. 2006), argues that a consumer will not perceive the descriptive significance of a term due to a grammatical irregularity. However, the facts of *Borinquen Biscuit* are distinguishable from the facts of this case. In that case, an infringement action, the court stated that since the plaintiff/appellee's (appellee) pleaded RICA<sup>6</sup> trademark was registered, the mark enjoyed a presumption of inherent distinctiveness. Therefore, the putative infringer's burden was not simply to show that the mark describes a feature of the trademark holder's product, but rather to show that consumers regard the mark as merely descriptive of the product. The court opined that there was no such evidence, particularly because the first language of a typical consumer of the appellee's goods was Spanish, and because of a particular Spanish-language grammatical rule - the rule of concordance - strict relationships of gender and number between adjectives and nouns was required. The pleaded mark would have to have been plural (RICAS) if it were intended to serve as a grammatically correct descriptor. The court found no such grammatical

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<sup>6</sup> The mark RICA is Spanish and translates literally to "tasty" or "rich."

relationship and the appellee's mark was found unlikely to be viewed by the Spanish-speaking consumer as descriptive. In this case, the examining attorney's burden is simply to show that a single characteristic, feature or attribute of applicant's goods is merely descriptive, and there is no evidence of any rigid grammatical rule that would prevent consumers from viewing applicant's mark as merely descriptive of its goods.

Having found the term "refine" merely descriptive of applicant's goods, we now consider whether applicant's applied-for mark, REFYNE, would be perceived by relevant consumers as the term "refine."

Whether a novel spelling of a descriptive term is also merely descriptive depends on whether purchasers would perceive the different spelling as largely the equivalent of the descriptive term. As Professor McCarthy observes, a "slight misspelling of a word will not generally turn a descriptive word into a nondescriptive mark." 2 T.J. McCarthy, *McCarthy on Trademarks and Unfair Competition*, § 11.31 (4<sup>th</sup> ed. 2008). See also, for example, *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315 (1938) (NU-ENAMEL; NU held equivalent of "new"); *In re Hercules Fasteners, Inc.*, 203 F.2d 753, 97 USPQ 355 (CCPA 1953) (FASTIE, as phonetic spelling of "fast tie," connotes

that which unites or joins quickly, and hence the notation is descriptive of the function and character of tube sealing machines); In re Hubbard Milling Co., 6 USPQ2d 1239 (TTAB 1987) (MINERAL-LYX held generic for mineral licks for feeding livestock); and In re State Chemical Manufacturing Co., 225 USPQ 687 (TTAB 1985) (FOM equivalent to word "foam," is descriptive of foam rug shampoo). Herein, applicant's applied-for mark REFYNE is clearly a misspelling of "refine." It differs from "refine" by a single letter embedded in the middle of the mark. Thus, the terms are visually highly similar. Additionally, the terms are identical in sound; the "y" in the middle of "REFYNE" is virtually indistinguishable in sound from the "i" in the middle of "refine," when "REFYNE" and "refine" are spoken. Thus, prospective purchasers of edible oil and shortening would perceive the different spelling in applicant's mark as the equivalent term "refine," because the two terms are similar in appearance and identical in sound.

Further, we are not persuaded by applicant's argument that the designation REFYNE has no meaning, even though applicant seems to imply that the combination of "re" and "fyne," which applicant admits is not a word, suggest "doubly fine." As just explained, the term will obviously

be perceived by purchasers and potential purchasers of applicant's goods as a misspelling of "refine."

We similarly find unavailing applicant's argument that given the difference in the linguistic origins of the letter "y" (based on the Greek character upsilon) and the term "refine" (derived from the Latin term for "final"), the substitution of the letter "y" for the letter "i" "removes the applicant's REFYNE mark from any designation even remotely suggesting 'refine.'" (Reply br., p. 5). As discussed above, the single letter difference between the marks does little to obviate their similarity in appearance and sound. Moreover, there is nothing in the record to show that purchasers would be familiar with any differences in linguistic origin such that they would not perceive applicant's mark as simply a misspelling of the term "refine." That is, the only connotation of REFYNE would be as a misspelling of "refine."

We therefore conclude that applicant's proposed mark REFYNE is merely a slight misspelling of the term "refine," and when used in connection with applicant's identified goods, is merely descriptive thereof under Section 2(e)(1). The mark directly and immediately conveys, without the need for further reflection, that applicant's edible oil and shortening are free from impurities. While applicant

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correctly points out that any doubt as to descriptiveness should be resolved in applicant's favor, the record leaves us no doubt to be resolved.

**Decision:** The refusal to register is affirmed.