

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Hearing:
October 7, 2008

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Kohr Brothers, Inc.

Serial Nos. 78954992 and 78954996

James Wray, Esq. for Kohr Brothers, Inc.

Chrisie Brightmire King, Trademark Examining Attorney, Law
Office 109 (Dan Vavonese, Managing Attorney).

Before Seeherman, Hairston and Drost, Administrative
Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

Applications have been filed by Kohr Brothers, Inc. to
register the marks KOHR BROS. ORIGINAL ORANGEADE SUPREME
and KOHR BROS ORIGINAL ORANGE CREME for "frozen custard
shakes" in International Class 3.¹

The trademark examining attorney has refused to

¹ Serial Nos. 78954992 and 78954996 respectively, both filed on
August 18, 2006, and based on an intent-to-use under Trademark
Act Section 1(b). In Serial No. 78954996 applicant has
disclaimed CREME apart from the mark as shown. Also, we note
that applicant amended the drawing in this application so that
the period after BROS has been deleted.

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register applicant's marks, absent submission of disclaimers of BROS. ORIGINAL ORANGEADE SUPREME and BROS ORIGINAL ORANGE CREME apart from the marks as shown. Trademark Act Section 6, 15 U.S.C. §1056.

Applicant, in each case, has appealed. Briefs have been filed and applicant's counsel and the trademark examining attorney appeared at an oral hearing. Because the issue in each case is the same, the appeals have been treated in a single opinion.

The examining attorney may require the applicant to disclaim an unregistrable component of a mark otherwise registrable. See Trademark Act Section 6, 15 U.S.C. §1056. Merely descriptive terms are unregistrable, and therefore are subject to disclaimer if the mark is otherwise registrable. Failure to comply with a disclaimer requirement is grounds for refusal of registration. See *In re Omaha National Corp.*, 819 F.2d 1117, 2 USPQ2d 1859 (Fed. Cir. 1987); and *In re Box Solutions Corp.*, 79 USPQ2d 1953 (TTAB 2006).

The examining attorney maintains that BROS. ORIGINAL ORANGEADE SUPREME and BROS ORIGINAL ORANGE CREME are merely descriptive of applicant's goods. It is the examining attorney's position that the individual terms which comprise BROS. ORIGINAL ORANGEADE SUPREME and BROS ORIGINAL

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ORANGE CREME have descriptive significance because BROS describes an entity type; ORIGINAL and SUPREME are laudatory terms; and ORANGEADE and ORANGE CREME describe the flavor and/or an ingredient of applicant's goods. When the individual terms are combined to form BROS. ORIGINAL ORANGEADE SUPREME and BROS ORIGINAL ORANGE CREME, the examining attorney argues that these combinations are equally descriptive and must therefore be disclaimed.

Applicant, in urging reversal of the refusal to register, argues that BROS is not an entity designation and need not be disclaimed. According to applicant, BROS "is a part of a trademark recognized since 1919 and part of Applicant's registered trademark and service mark, KOHR BROS." (Brief, p. 2). Further, applicant maintains that when the individual terms comprising ORIGINAL ORANGEADE SUPREME and ORIGINAL ORANGE CREME are considered together, the combinations are not descriptive, and no disclaimer thereof is required. According to applicant, ORIGINAL ORANGEADE SUPREME and ORIGINAL ORANGE CREME create new and unique commercial impressions due to their "alliteration and rhythmic sounds." (Brief, p. 3). Finally, applicant argues that KOHR BROS. ORIGINAL ORANGEADE SUPREME and KOHR BROS ORIGINAL ORANGE CREME are unitary marks which are

associated with applicant as a result of many years use in connection with desserts.

We consider first the question whether BROS./BROS must be disclaimed. TMEP §1213.03 provides that "[w]ords or abbreviations in a trade name designating the legal character of an entity (e.g., Corporation, Corp., Co., Inc., Ltd., etc.) must be disclaimed because an entity designation has no source-indicating capacity." In this case, the term BROS./BROS, the abbreviation of "brothers," merely indicates the apparent historical organizational business structure of applicant, and the term is similar to an entity designation. Moreover, just like an entity designation to which a party cannot obtain exclusive rights, the term BROS./BROS has no source-indicating capacity. We also note that the examining attorney has submitted copies of six third-party registrations and a registration owned by applicant for marks which include the term BROS./BROS wherein the term has been disclaimed. Under the circumstances, we find that the examining attorney's requirement for a disclaimer of BROS./BROS is not improper.

We consider next the question whether the combined terms ORIGINAL ORANGEADE SUPREME and ORIGINAL ORANGE CREME must be disclaimed. In this regard, we note that applicant

does not seriously dispute that each of the individual terms which make up these composite terms has descriptive significance. In any event, the examining attorney's evidence establishes that each of the individual terms has descriptive significance. Specifically, the examining attorney submitted copies of third-party registrations for marks which include the terms ORIGINAL, ORANGEADE or SUPREME wherein such terms are disclaimed; dictionary definitions of the words "original," "supreme," "orangeade," "orange," "creme," and "cream," and Internet excerpts which contain references to "orangeade."² This evidence establishes that ORIGINAL and SUPREME are laudatory terms, that ORANGEADE and ORANGE are beverage flavors/food ingredients, and that CREME is the fatty component of milk or froth at the top of a beverage.

While we have carefully considered applicant's arguments, we are not persuaded that combining the

² The dictionary definitions were taken from The American Heritage Dictionary of the English Language (4th ed. 2000) and the pertinent definitions are as follows:

original - "Preceding all others in time, first."

orange - "Tasting or smelling like oranges."

orangeade - "A beverage of orange juice, sugar, and water."

creme - "CREAM."

cream - "The yellowish fatty component of unhomogenized milk that tends to accumulate at the surface" and "To form foam or froth at the top."

supreme - "Greatest in importance, degree, significance, character or achievement."

individual terms into the composite terms ORIGINAL ORANGEADE SUPREME and ORIGINAL ORANGE CREME results in alliterations or rhythmic sounds such that the composite terms are more than the sum of their parts and/or are unitary phrases, such that ORIGINAL ORANGEADE SUPREME and ORIGINAL ORANGE CREME need not be disclaimed. Neither phrase has the necessary degree of alliteration inasmuch as SUPREME and CREME do not sound like ORIGINAL and ORANGEADE and ORIGINAL and ORANGE, respectively. Also, the individual words which make up the respective phrases are not rhythmically similar because such words do not have the same number of syllables, nor do they create a recognizable rhythmic pattern. Furthermore, there is nothing inventive or incongruous about these phrases. Purchasers would view ORIGINAL ORANGEADE SUPREME and ORIGINAL ORANGE CREME as describing characteristics of applicant's frozen custard shakes. Specifically, ORIGINAL ORANGEADE SUPREME conveys that applicant's goods are its first and best type of orangeade flavored frozen custard shakes; ORIGINAL ORANGE CREME conveys that applicant's goods are its first type of frothy orange flavored frozen custard shakes. Thus, purchasers would not view the phrases as unitary expressions such that ORIGINAL ORANGEADE SUPREME and ORIGINAL ORANGE CREME lose their descriptive significance

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as applied to applicant's goods, frozen custard shakes. Nor would purchasers view the entire marks KOHR BROS. ORIGINAL ORANGEADE SUPREME and KOHR BROS ORIGINAL ORANGE CREME as unitary expressions such that ORIGINAL ORANGEADE SUPREME and ORIGINAL ORANGE CREME lose their descriptive significance as applied to applicant's goods.

Applicant's argument that for many years it has used the marks sought to be registered goes to whether applicant's marks have acquired distinctiveness. Such argument is without merit in the absence of a claim of secondary meaning pursuant to Trademark Act Section 2(f).

In sum, we find that the term BROS./BROS has no source-indicating capacity, and ORIGINAL ORANGEADE SUPREME and ORIGINAL ORANGE CREME are merely descriptive of characteristics of applicant's frozen custard shakes.

Decision: The refusals to register applicant's marks in Serial Nos. 78954992 and 78954996 absent submission of disclaimers of BROS. ORIGINAL ORANGEADE SUPREME and BROS ORIGINAL ORANGE CREME are affirmed.

However, this decision shall be set aside if applicant, within thirty days of the mailing date of this decision, submits to the Board appropriate disclaimer statements.