

THIS OPINION IS NOT A
PRECEDENT OF THE
TTAB

14 February 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Williams-Sonoma, Inc.

Serial No. 76542867

Anthony J. Malutta of Townsend and Townsend and Crew LLP
for Williams-Sonoma, Inc.

Russ Herman, Trademark Examining Attorney, Law Office 101
(Ronald R. Sussman, Managing Attorney).

Before Holtzman, Drost, and Kuhlke, Administrative
Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

On September 8, 2003, Williams-Sonoma, Inc.
(applicant) applied to register the term PEPPERMINT BARK
(in standard character form) on the Principal Register for
"candy" in Class 30. The application was based on
applicant's claim of dates of first use anywhere and in
commerce of October 19, 1999. Serial No. 76542867.

After several Office actions, applicant amended the application to disclaim the word "Peppermint"¹ and to request registration on the Supplemental Register.²

The examining attorney has now refused to register applicant's mark (Brief at 2) on the Supplemental Register on the ground that the "proposed mark is generic when used in connection with applicant's goods."³ 15 U.S.C. § 1091.

The examining attorney argues that: "Peppermint bark is a common candy product made from a few standard ingredients that can incorporate a number of slight variations... peppermint bark is basically a layer of white chocolate (sometimes on top of a layer of milk chocolate) with a sprinkling of crushed peppermint candy." Brief at 6. On the other hand, applicant maintains that the examining attorney has not met his burden of showing that the mark is generic and that "'PEPPERMINT BARK' creates a

¹ See Response received September 23, 2004 at 2.

² See Amendment to Supplemental Register received October 24, 2005.

³ While applicant argues that its "evidence of acquired distinctiveness mitigates against a finding that the mark is generic," applicant has made it clear that it "is not seeking registration under Section 2(f)." Reply Brief at 1. We, of course, can consider this evidence on the issue of genericness. *In re International Business Machines Corp.*, 81 USPQ2d 1677, 1684 n. 11 (TTAB 2006) ("However, because in determining whether a term is generic we must look to all the evidence of record, including evidence of acquired distinctiveness, we have considered the evidence for this purpose").

different commercial impression than the meaning suggested by the Examining Attorney. Even considered separately, neither "PEPPERMINT" nor "BARK" can be seen as merely descriptive - let alone generic - of Applicant's goods." Brief at 9.

Evidence

We begin by discussing the evidence that supports the examining attorney's and applicant's arguments. We will also address any potential problems with the evidence.

With his appeal brief, the examining attorney has attached a definition of the term "Bark" as "candy, usually of chocolate with large pieces of nuts, made in flat sheets." Dictionary.com Unabridged (v 1.1) based on the *Random House Unabridged Dictionary* (2006). More importantly, we add that an earlier *Random House Dictionary* contains the same definition of "Bark" - "candy, usually of chocolate with large pieces of nuts, made in flat sheets." *The Random House Dictionary of the English Language* (unabridged) (2d ed. 1987). We take judicial notice of, and rely on, this definition. *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co.*, 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983). Applicant included a definition of "peppermint" as "a pungent and aromatic mint (*Mentha piperita*) with dark

green lanceolate leaves and whorls of small pink flowers in spikes" and "candy flavored with peppermint." Amendment received May 6, 2005, attachment.

In an Office action dated June 6, 2005, the examining attorney included several recipes for candy identified as "peppermint bark:"

National Confectioners Association

Peppermint Bark

You will need:

- one pound vanilla-flavor candy coating or white chocolate cut up (or one bag white baking chips)
- $\frac{3}{4}$ cup crushed peppermints or mint-flavored candy canes

www.candyusa.org

To make a batch of peppermint bark you need:

9 Peppermint Canes

1 lb. of milk or dark chocolate

1 lb. of white chocolate

Approx. 1 Tbs. butter or margarine

Waxed paper

<http://kathyniemer.tripod.com>

The examining attorney also attached evidence from a website that discusses "Peppermint Bark."

www.giftsforprofessionals.com ("This yummy treat is a favorite for both young and old. No matter the season (or even the reason) this peppermint bark is a popular favorite for the candy lover who loves sweets and loves the decorative touch of peppermint").

With the Office actions dated November 4, 2004, November 29, 2005, and June 26, 2006, the examining

attorney attached numerous pages that consist of truncated search results from the NEXIS database (ellipses in original):

... recipes for Peppermint Bark Candy and Easy Fudge have only ...

... League of McAllen Peppermint Bark Candy 1 pound white ...

San Antonio Express-News, May 21, 2006

... at the view of the "peppermint bark candy" coming out of the refrigerator...

Herald-Sun (Durham, NC), December 23, 2005

... Employees make peppermint bark candy, one of King Leo's ...

San Diego Union-Tribune, January 22, 2004

...1 pound bark candy 1 pound salted...

The Post-Standard (Syracuse, NY), December 2, 1998

... a recipe for bark candy offer delicious possibilities ... Bark candy is what Judy Wilkerson of Edgemont ... rosemary." Froot Loop Bark Candy Makes about 75...

Baltimore Sun, April 15, 1998

... in white almond bark candy. I've still got the ...

Columbus Dispatch (Ohio), February 4, 1998

Because these results are extremely brief, we cannot give them much weight. *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1833 (Fed. Cir. 2007) ("Bayer asserts that the list of GOOGLE search result summaries is of lesser probative value than evidence that provides the context within which a term is used. We agree. Search engine results—which provide little context to discern how a term is actually used on the webpage that can be accessed

through the search result link may be insufficient to determine the nature of the use of a term or the relevance of the search results to registration considerations"). See also *In re Remacle*, 66 USPQ2d 1222, 1223 n.2 (TTAB 2002) ("The examining attorney's print-out of the results of an Internet search by the Yahoo search engine are of little probative value, largely because insufficient text is available to determine the nature of the information and, thus, its relevance"). While we cannot give these printouts much weight, they are at least limited evidence that "Bark" was used in association with candy prior to and after 1999.

However, with his appeal brief, the examining attorney attached approximately twenty full-text articles that appear to be some of the abbreviated articles provided with the November 29, 2005, Office action. The information at the beginning of the printout indicates that the stories were printed ten days before the examining attorney's brief was filed (June 4, 2007) and, therefore, they could not have been previously submitted (at least in this form). Furthermore, the NEXIS story numbers do not correspond to the story numbers in the 2005 Office action, e.g., 2007 Story No. 125 appears to correspond to 2005 Story No. 12). Normally, we do not consider new evidence on appeal. 37

CFR § 2.142(d). See also *In re First Draft Inc.*, 76 USPQ2d 1183, 1192 (TTAB 2005) ("Submission of the TARR printout with its appeal brief, however, is an untimely submission of this evidence"). However, in this case, applicant has not objected to these stories and has, in fact, discussed the evidence in its reply brief (p. 3 - Story No. 154). TBMP 1207.03 (2d ed. 2004); *In re Urbano*, 51 USPQ2d 1776, 1778 n.4 (TTAB 1999) ("While the Examining Attorney submitted this evidence with his brief, we have considered this evidence as of record as applicant did not object and considered this evidence on its merits in its reply brief"). Therefore, we will consider this evidence and we set out some of the relevant parts of a few stories below:⁴

[W]e're asking readers to share their favorite holiday-candy recipe. The possibilities are many, from sugar plums to divinity, from candied nuts to candy canes, from ribbon candy to peppermint bark. *Dayton Daily News (Ohio)*, October 19, 2005

She made the peppermint bark using just four ingredients: white chocolate, peppermint candy, red food coloring and peppermint flavoring. *Sunday Oregonian*, March 20, 2005

⁴ While the article is cumulative, applicant points out that at least one of the articles is from a foreign publication (Canada). The fact that an article is from a foreign source does not mean that it has no relevance. *Bayer*, 82 USPQ2d at 1835 ("Information originating on foreign websites or in foreign news publications that are accessible to the United States public may be relevant to discern United States consumer impression of a proposed mark").

Ivy's business depends on hikers, tourists and commuters who stop for coffee or her honeycomb, peppermint bark or French truffles.

Los Angeles Times, January 24, 2005

It's been three weeks since your New Year's resolutions should have kicked in, and you're still working your way thorough that box of peppermint bark in the freezer.

Phoenix New Times, January 20, 2005

A month ago, we weren't even sure we knew what peppermint bark was; now, you can't turn around without tripping over the choco-minty treat. This bark with a bite has turned up at, among others, Swiss Colony, Restoration Hardware, Crate & Barrel, Godiva, Trader Joe's, Linens 'n Things and Williams-Sonoma. There are slight variations on the theme, but it's basically a layer of white chocolate (sometimes on top of milk chocolate) and a sprinkling of crushed peppermint candy.

Boston Herald, December 22, 2004.

The examining attorney also points to applicant's use of the term "Peppermint Bark" in its own catalogs. Two of applicant's uses are set out below:



The first catalog excerpt indicates that: "This year we're offering creamy mint fondant covered with bittersweet chocolate; peppermint snaps, a spirited variation of the traditional peppermint stick, and peppermint bark - layers of dark and white chocolate topped with peppermint candy bits." The second excerpt refers to: "A year-end tradition for many of our customers, peppermint bark evokes the spirit of the holidays... Then the bark is topped with a snowfall of peppermint candy."

Applicant also owns two registrations. The first is for registration No. 2785972, which issued on November 25, 2003, for the following mark:

**PEPPERMINT
BARK**

for "candy." The registration contains a statement that "No claim is made to the exclusive right to use "Peppermint Bark" apart from the mark as shown.

The second registration (No. 2758725 issued September 2, 2003) is for the words PEPPERMINT BARK flanked by two dogs. It is also for candy and the registration disclaims the word "Peppermint."

 **PEPPERMINT BARK**

Applicant has submitted the declaration of Christine Amatruda, its Associate General Counsel. In that declaration, Ms. Amatruda makes the following points:

1. Applicant has been selling its PEPPERMINT BARK candy since October 1999.
2. It has sold millions of dollars of the product.
3. It has extensively promoted the PEPPERMINT BARK products in its holiday catalogs and on its website and in its stores.

In addition, Ms. Amatruda attached excerpts from two publications that mentioned applicant's product. The first is a *Newsweek* magazine in which a photo of applicant's product appeared with other holiday products. The description included the following sentence: "Holiday parties are starting, go gather some hostess gifts. How about peppermint bark (\$22.50; williams-sonoma.com)." The second is from *Money* magazine, which again features a picture of a box of applicant's product, with the following description:

Peppermint Bark
The perfect seasonal candy - a layer of dark chocolate is topped with a layer of white chocolate...

Applicant also points to several recipes that do not use the term "Peppermint Bark" to describe chocolate/peppermint candy, e.g., Easy White Chocolate Mint Candy, White Chocolate Mint Christmas Candy, Peppermint Chocolate Squares, White Christmas Candy, and Peppermint Brittle.

In addition, applicant submitted several registrations that the Office issued for different marks, which applicant argues are relevant to this application. See, e.g., No. 2946172 (PEPPERMINT BURSTS, "peppermint" disclaimed - candy); No. 2751398 (PEPPERMINT CHEWZ and design, "peppermint chewz" disclaimed) - candy); No. 2945581 (PEPPERMINT CREMES and design, "peppermint crèmes" disclaimed - candy); No. 2804152 (PEPPERMINT PASSION, "peppermint" disclaimed - ice cream); No. 1828450 (PEPPERMINT PONIES, "peppermint" disclaimed - candy); No. 2743752 (PEPPERMINT SNAPS, "peppermint" disclaimed - candy); No. 2587962 (BIRCH BARK, 2(f) - candy); No. 3121157 (CHIPPERS THE BARK WITH A BITE - candy); No. 2618337 (REINDEER BARK - candy); No. 3109102 (VANILLA ALMOND BARK, 2(f) - frozen confections); and No. 3039031 ("You Can't Bite A Better Bark" - candy).

Finally, applicant argues that it "has successfully enforced its PEPPERMINT BARK mark. In particular, a

district court has already considered whether Applicant's PEPPERMINT BARK mark is generic and denied a motion that the term is generic for Applicant's goods." Brief at 8. In that case, *Williams-Sonoma, Inc. v. West Coast Confections*, No. C-02-4176 EDL (N.D. Cal. January 7, 2004), the Court denied defendant's motion to dismiss on the ground that plaintiff/applicant had failed to state a claim of trademark infringement because the term PEPPERMINT BARK was generic. The Court (p.3) denied the motion and stated:

Defendant raises a serious issue as to whether "Peppermint Bark" is generic, and has offered some support for that view in the documents that it requested to be judicially noticed. Nonetheless, the question is not one that should be decided at the pleading stage. As Defendant conceded at the hearing, it could not locate a single case in which the issue of whether a mark was generic was decided on the pleadings. Accordingly, Defendant's Motion to Dismiss (Docket number 8) is denied.

Such a ruling is hardly evidence, that applicant has "successfully enforced" its mark.

Discussion

The Court of Appeals for the Federal Circuit has held that: "The critical issue in genericness cases is whether members of the relevant public primarily use or understand the term sought to be protected to refer to the genus of goods or services in question." *H. Marvin Ginn Corp. v.*

Int'l Association of Fire Chiefs, Inc., 782 F.2d 987, 228
USPQ 528, 530 (Fed. Cir. 1986).

Determining whether a mark is generic therefore involves a two-step inquiry: First, what is the genus of goods or services at issue? Second, is the term sought to be registered or retained on the register understood by the relevant public primarily to refer to that genus of goods or services?

Id.

We begin by looking to what the genus of applicant's goods is. The examining attorney has indicated that "applicant defines its class or genus of goods as 'Candy.' This description is sufficiently definite to serve as the identification of applicant's goods for purposes of analysis under the *Marvin Ginn* test." Brief at 4. While applicant's goods are included within the broad category of "candy," applicant's goods appear to be a specific type of candy, *i.e.*, a chocolate candy in thin sheets. Indeed, the evidence shows that the genus of the goods is not simply candy, so we will consider that applicant's goods fall into more than just this category and they include the category of chocolate covered candy in thin sheets. See *In re Central Sprinkler Co.*, 49 USPQ2d 1194 (Comm'r Pat. 1998) ("The broad general category of goods involved here is sprinklers for fire protection. However, a product may be in more than one category, and here applicant's goods also

fall within the narrower category of sprinklers for fire protection of attics. We find that the term "attic" would be understood by the relevant public as referring to that category of goods"). See also *In re A La Vieille Russie Inc.*, 60 USPQ2d 1895, 1897 (TTAB 2001):

In its application, applicant has identified its services as "dealership services in the field of fine art, antiques, furniture and jewelry." Based on the evidence of record, however, we find that this recitation of services is insufficiently definite to serve as the name of the genus of applicant's services, for purposes of our genericness analysis in this case. The evidence shows that "Russian art" is a distinct genre or type of art for which there is a defined commercial market, and that applicant, and others, are known and referred to generically as dealers in Russian art. Therefore, we find that the genus of services involved in this case is "art dealership services in the field of Russian art," rather than merely "art dealership services" or, as applicant has argued, merely "dealership services."

The second question we must address is whether applicant's term is understood by the relevant public to refer to that genus. *Marvin Ginn*, 228 USPQ at 530. "Evidence of the public's understanding of the term may be obtained from any competent source, such as purchaser testimony, consumer surveys, listings in dictionaries, trade journals, newspapers, and other publications." *In re Merrill Lynch, Fenner and Smith Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987). "The critical issue in genericness cases is whether members of the relevant public

primarily use or understand the term sought to be protected to refer to the genus of goods or services in question."

Marvin Ginn, 228 USPQ at 530.

Regarding the individual terms, the catalogs, including the examples we have mentioned earlier, clearly show that applicant's goods are made with peppermint ("topped with peppermint candy bits" (Holiday 2001 catalog) and "topped with a snowfall of peppermint candy" (Holiday 2002 catalog)). The other term "bark" is a term that is perhaps not as ubiquitous in the field of candy. However, the record shows that it is a term that has long been used to refer to a specific type of candy. The *Random House Dictionary* (1987) excerpt defines "bark" as - "candy, usually of chocolate with large pieces of nuts, made in flat sheets." The evidence also shows that applicant in its catalogs uses the term in this manner ("the bark is packed in a gift tin" (Christmas 1999 catalog), "the bark is topped with a snowfall of peppermint candy bits" (Holiday 2002 catalog), "[a]fter the bark hardens" (Christmas 1999 catalog), and "[t]o create our signature bark" (Christmas 1999 catalog)). We conclude that the term "bark" is a generic term for candy made in flat sheets and usually consisting of chocolate and nuts.

The next question is whether the combined term is similarly generic. Here, applicant's mark consists of the term PEPPERMINT BARK and applicant's goods are candy in flat sheets made of chocolate where chunks of peppermint are substituted for the more traditional nuts. Applicant's literature explains that its peppermint bark is a variation of traditional bark in which peppermint bits are substituted for nuts. See Holiday 2001 catalog ("We've put a new twist on chocolate bark") and Christmas 1999 catalog:

This delectable holiday treat is distinguished by crunchy morsels of King Leo Peppermint stick candy instead of the usual nuts... Created by Charlotte's Confections in an old candy factory near San Francisco, the bark is packed in a gift tin.

Furthermore, there is widespread use of the term PEPPERMINT BARK to name similar chocolate/peppermint products from other producers and from individuals or groups with their own recipes for "Peppermint Bark." We have already pointed to a *Boston Herald* article that refers to the recent popularity of "Peppermint Bark" and the fact that it is available at numerous establishments (Swiss Colony, Restoration Hardware, Crate & Barrel, Godiva, Trader Joe's, and Linens 'n Things). At least one candy producer makes "Peppermint Bark." See *Confectioner*, August 2005 ("Ghirardelli Peppermint Bark Limited Edition").

There are also numerous recipes and references to recipes for "Peppermint Bark": *Chattanooga Times Free Press*, December 29, 2004 ("Microwave Peppermint Bark"), *Star Press (Muncie, Indiana)* (winning recipe online: "Candies: Katie Frederick - Double Chocolate Peppermint Bark"), *Boston Herald*, December 22, 2004 ("PEPPERMINT BARK - 1 package (12 oz. white chocolate morsels, 24 hard peppermint candies"), and *Salt Lake Tribune*, December 22, 2004 ("Holiday Peppermint Bark - 2 cups white chocolate morsels, $\frac{3}{4}$ cup crushed mint-flavored candy canes, divided"). As we noted previously, the National Confectioners Association website (www.candyusa.org) as well as the Kathy Neimer website (<http://kathyniemer.tripod.com>) have "Peppermint Bark" recipes.

Under Federal Circuit precedent, the examining attorney has the burden of showing by clear evidence that a term is generic. *Merrill Lynch*, 4 USPQ2d at 1144. See also *In re Lens.com Inc.*, 83 USPQ2d 1444, 1446 (TTAB 2007). Under this standard, we find that the evidence shows that the examining attorney made out a prima facie case that the relevant public would understand that the term PEPPERMINT BARK is a generic term for a type of chocolate/peppermint candy.

We now turn to see whether applicant has rebutted the examining attorney's prima facie case of genericness. Applicant has submitted a declaration that it has sold its product for a number of years, that it has millions of dollars in sales, and that it has extensively promoted its product. When we view applicant's promotion of its product and even in the two magazine excerpts, it is not very effective evidence to support applicant's argument. Most of the entries seem to reinforce the generic use of the term that is similar to the uses in the NEXIS articles showing how others use the same term. Applicant argues that "[a]lthough the catalog references 'peppermint' in a generic fashion..., this is just one component of the mark and does not render the entire mark generic." Reply Brief at 5. However, as we have pointed out, the catalogs use "peppermint," "bark," and "peppermint bark" generically to refer to a version of bark candy in which peppermint bits are substituted for nuts. See *In re Candy Bouquet International Inc.*, 73 USPQ2d 1883, 1887 (TTAB 2004) ("[E]ven in some of the articles which refer to one of applicant's franchisees, the term 'candy bouquet' (all small letters, no capitalization) is also used generically to refer to a gift package of candy").

Also, applicant maintains that the *Newsweek* and *Money* magazine evidence show that the "purchasing public identifies Applicant as the source of PEPPERMINT BARK." Reply Brief at 2. The articles themselves are not as clear as applicant argues and in some ways support the examining attorney's position. The *Newsweek* magazine article actually seems to use the term generically ("How about peppermint bark"). The *Money* magazine merely has the term "Peppermint Bark" used at best equivocally as the lead line of a short paragraph.

The fact that applicant has sold millions of dollars of its product does not establish that its term is not generic. "[M]ere advertising or other evidence of supposed secondary meaning cannot convert something unregistrable by reason of its being the common descriptive name or generic name for the goods-the antithesis of a trademark-into a registrable mark." *Roux Laboratories, Inc. v. Clairol Inc.*, 427 F.2d 823, 166 USPQ 34, 39 (CCPA 1970). Particularly in this case, the evidence of use and sales does not even clearly indicate that applicant's term would be recognized as a trademark.

Applicant argues that there are other alternative names for its goods such as Easy White Chocolate Mint Candy, White Chocolate Mint Christmas Candy, Peppermint

Chocolate Squares, White Christmas Candy, and Peppermint Brittle. However, there is nothing unusual about a product or a service having more than one generic name. *Roselux Chemical Co. v. Parsons Ammonia Co.*, 299 F.2d 855, 132 USPQ 627, 632 (CCPA 1962) ("Consider, however, that the product commonly known as tooth paste is also commonly known as dentifrice and dental cream. A gravestone is also commonly known as a headstone, a tombstone and a monument"). See also *In re Recorded Books Inc.*, 42 USPQ2d 1275, 1281-82 (TTAB 1997) (footnote omitted):

In finding the designation "recorded books" to be generic for a category of products (namely, prerecorded audio cassette tapes featuring books), we concede that this designation is not the only generic term for the category. Some of the excerpts from printed publications show generic uses of "audio books", "talking books", "books on cassette tape", "book cassettes", "cassette books", "taped books", "cassettes", "spoken word recordings" and similar terms to name the same type of product. Indeed, a product may have more than one generic name. *In re National Shooting Sports Foundation Inc.*, 219 USPQ 1018, 1020 (TTAB 1983), citing *In re Sun Oil Company*, 426 F.2d 401, 165 USPQ 718, 719 (CCPA 1970) (J. Rich, concurring). As Judge Rich instructed in his concurring opinion, "[a]ll generic names for a product belong in the public domain." *Id.*

In addition, applicant's allegation of its use since 1999 does not convert a generic term into a non-generic term especially here where there is evidence that others make "Peppermint Bark" candy or use the term to refer to "Peppermint Bark" from other sources. *In re Helena*

Rubinstein, Inc., 410 F.2d 438, 161 USPQ 606, 609 (CCPA 1969). See also *In re Active Ankle Systems Inc.*, 83 USPQ2d 1532, 1538 (TTAB 2007) ("Even if applicant was the first and/or sole user of a generic term or phrase, as it claims, that does not entitle applicant to register such a term or phrase as a mark").

Another point that applicant makes is that there are other registrations that it argues are relevant to this case. Two of them are owned by applicant. The first registration, which is most supportive of applicant's argument, involves the words PEPPERMINT BARK flanked by a dog on either side. In that registration, applicant has disclaimed only the word "Peppermint." We note that the design feature includes two dogs with their mouths slightly open. This additional design feature creates an image of a dog barking that is different from the commercial impression of the mark in applicant's current application. Indeed, shortly after this registration issued, applicant's second registration, without the dog design, issued and that registration included a statement that: "No claim is made to the exclusive right to use 'Peppermint Bark' apart from the mark as shown." *Candy Bouquet*, 73 USPQ2d at 1889 ("The presumption of validity of a registered mark, including the presumption that the mark is distinctive,

does not extend to individual components of the registered mark, let alone disclaimed components of the mark").

Therefore, applicant's registrations that involve a mark with a different commercial impression and a mark with all the wording disclaimed do not support applicant's argument that its current mark is not generic.

Regarding the other registrations that applicant has made of record, they do not compel a conclusion that applicant's mark is not generic. Third-party registrations involving different marks are hardly significant evidence that applicant's mark is not generic. *In re Sunmarks Inc.*, 32 USPQ2d 1470, 1472 (TTAB 1994) ("The cases are legion holding that each application for registration of a mark for particular goods or services must be separately evaluated ... Section 20 of the Trademark Act...gives the Board the authority and duty to decide an appeal from an adverse final decision of the Examining Attorney. This duty may not be delegated by adoption of conclusions reached by Examining Attorneys on different records"). See also *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 Nett Designs' application, the PTO's allowance of such prior registrations does not bind the Board or this court").

We do briefly mention that several of the cited marks involve slogans or other unitary terms, e.g., No. 2587962 (BIRCH BARK); No. 3121157 (CHIPPERS THE BARK WITH A BITE) and No. 3039031 ("You Can't Bite A Better Bark"), which examining attorneys are instructed to consider as unitary. TMEP 1213.05(b) (5th ed. rev. September 2007) ("A registrable slogan is considered unitary and should not be broken up for purposes of requiring a disclaimer"). It is not clear why some of the registrations were submitted by applicant inasmuch as all the wording in the marks was disclaimed (No. 2751398, PEPPERMINT CHEWZ, and No. 2945581, PEPPERMINT CREMES). Other registrations involve marks with words that are so different that the only feature they have in common with the current application is the fact that they include the word "Peppermint." Still others are for goods that are not candy (frozen confections and ice cream). Therefore, even if we considered these registrations, they provide little, if any, support for the nongenericness of applicant's mark.

When we consider applicant's evidence, we find that it has not rebutted the examining attorney's prima facie case of genericness. The record shows that the term "Peppermint Bark" is used to refer to a particular type of candy. It is the generic name for a chocolate candy that is in thin

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sheets and topped with peppermint bits. Therefore, applicant's mark is not registrable on the Supplemental Register.

Decision: The refusal to register is affirmed.