

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

Mailed:  
February 18, 2011  
Bucher

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Snowizard, Inc.

Serial No. 77472649

Kenneth L. Tolar for Snowizard, Inc.

Janice L. McMorrow, Trademark Examining Attorney, Law Office  
115 (John T. Lincoksi, Acting Managing Attorney).

Before Seeherman, Bucher and Zervas, Administrative Trademark  
Judges.

Opinion by Bucher, Administrative Trademark Judge:

Snowizard, Inc. seeks registration on the Principal  
Register of the mark **CAJUN RED HOT** (*in standard character  
format*) for goods identified as "flavoring concentrate for non-  
nutritional purposes, namely, flavoring concentrate for shaved  
ice confections" in International Class 30.<sup>1</sup>

The Trademark Examining Attorney refused registration on  
the ground that the term is merely descriptive under Section  
2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1),  
specifically that it immediately tells consumers that the

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<sup>1</sup> Application Serial No. 77472649 was filed on May 13, 2008 based upon claims of first use anywhere and first use in commerce at least as early as May 31, 1988.

flavor is spicy hot. After the Trademark Examining Attorney made the refusal final, applicant appealed to this Board.

At the same time as applicant filed this Notice of Appeal, it also filed with the Trademark Examining Attorney a Request for Reconsideration of the refusal to register in which, in the alternative, it amended its application to the Supplemental Register. The Trademark Examining Attorney has stated explicitly that she finds this proposed mark registrable on the Supplemental Register. Hence, based upon our analysis, *infra*, we find this proposed mark to be merely descriptive under Section 2(e)(1) of the Act, and affirm the refusal to register this application on the Principal Register, but a registration will issue in due course on the Supplemental Register.

In support of registrability, applicant argues that the term "Cajun" does not refer to a spicy flavor, but rather to the French settlers of Southwest Louisiana, and that traditional Cajun cooking represents a complex style of cuisine that differs generally from spicy food. Applicant argues that the evidence collected by the Trademark Examining Attorney merely shows other merchants and manufacturers, particularly in the New Orleans area, who market spices, marinades, etc., using the designation "Cajun." Applicant argues that a number of its flavoring concentrate competitors

have copied its mark, but there is nothing inherent in this combined terminology that members of the purchasing public will think conveys any information about the goods.

By contrast, the Trademark Examining Attorney takes the position that the terms "Cajun" and "Red Hot" are each merely descriptive - pointing out multiple trademark owners in the food product field who have admitted - by disclaiming exclusive rights to such terms - that "Cajun" and "Red Hot" are each descriptive of food products. Focusing specifically on the word "Cajun," the Trademark Examining Attorney contends that it refers to a cuisine popularized with the public as having dishes characterized by spicy flavors, as well as to a culture in southern Louisiana that is proximate to applicant's business. Finally, she contends that applicant's combining the terms "Cajun" and "Red Hot" into a composite term does not create a new and unique mark with a non-descriptive meaning.

A mark is merely descriptive, and therefore unregistrable pursuant to the provisions of Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), if it immediately conveys "knowledge of a quality, feature, function, or characteristic of the goods or services." *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007) [ASPIRINA is merely descriptive of analgesic product]. See also *In re MBNA America Bank N.A.*, 340 F.3d 1328, 67 USPQ2d 1778, 1780

(Fed. Cir. 2003) [MONTANA SERIES and PHILADELPHIA CARD are merely descriptive of applicant's "affinity" credit card services; a "mark is merely descriptive if the ultimate consumers immediately associate it with a quality or characteristic of the product or service"]; *In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) [THE ULTIMATE BIKE RACK is merely descriptive of bicycle racks]; *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987) [APPLE PIE is merely descriptive of a potpourri mixture]; and *In re Quik-Print Copy Shops, Inc.*, 616 F.2d 523, 205 USPQ 505, 507 (CCPA 1980). To be "merely descriptive," a term need only describe a single significant quality or property of the goods [or services]. *Gyulay*, 3 USPQ2d at 1009. Descriptiveness of a mark is not considered in the abstract, but in relation to the particular goods or services for which registration is sought. That is, when we analyze the evidence of record, we must keep in mind that the test is not whether prospective purchasers can guess what applicant's goods [or services] are after seeing only applicant's mark. *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978) [GASBADGE merely descriptive of a "gas monitoring badge"; "Appellant's abstract test is deficient - not only in denying consideration of evidence of the advertising materials directed to its goods, but in failing to require consideration

of its mark 'when applied to the goods' as required by statute."]. 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, 1316-1317 (TTAB 2002); and *In re Patent & Trademark Services Inc.*, 49 USPQ2d 1537, 1539 (TTAB 1998).

In addition to considering the applied-for mark in relation to the goods or services for which registration is sought, the proper test for descriptiveness also considers the context in which the mark is used and the significance that the mark is likely to have on the average purchaser encountering the goods or services in the marketplace. *In re Omaha National Corp.*, 819 F.2d 1117, 2 USPQ2d 1859 (Fed. Cir. 1987); *In re Pennzoil Products Co.*, 20 USPQ2d 1753 (TTAB 1991); and *In re Engineering Systems Corp.*, 2 USPQ2d 1075 (TTAB 1986).

A mark is suggestive, and therefore registrable on the Principal Register without a showing of acquired distinctiveness, if imagination, thought or perception is required to reach a conclusion on the nature of the goods or services. "Whether a given mark is suggestive or merely descriptive depends on whether the mark 'immediately conveys ... knowledge of the ingredients, qualities, or characteristics of the goods ... with which it is used,' or whether 'imagination,

thought, or perception is required to reach a conclusion on the nature of the goods.'" (citation omitted) *In re Gyulay*, 3 USPQ2d at 1009; *In re Home Builders Association of Greenville*, 18 USPQ2d 1313 (TTAB 1990); and *In re American Greetings Corp.*, 226 USPQ 365 (TTAB 1985).

Hence, the ultimate question before us is whether the term **CAJUN RED HOT** conveys information about a significant feature of applicant's goods with the immediacy and particularity required by the Trademark Act.

In partial support of her refusal, the Trademark Examining Attorney has submitted copies of third-party registrations for food items wherein the word "Cajun" has been disclaimed within a composite mark:

<b>CAJUN BLAST</b>	for "food additives for non-nutritional purposes for use as flavoring, ingredient or filler, namely, rouxes, basting sauces and extracts" in International Class 30; <sup>2</sup>
<b>N'ORLEANS CAJUN</b>	for "marinades; seasonings; spices" in International Class 30; <sup>3</sup> and
<b>CAJUN HEAT</b>	for "condiment, namely, pepper sauce; hot pepper powder; hot sauce; sauces" in International Class 30. <sup>4</sup>

<sup>2</sup> Registration No. 2760306 issued on September 2, 2003; Section 8 affidavit (six-year) accepted. No claim is made to the exclusive right to use the word "Cajun" apart from the mark as shown.

<sup>3</sup> Registration No. 3238512 issued on May 1, 2007. No claim is made to the exclusive right to use the word "Cajun" apart from the mark as shown.

She also provided Internet evidence about a distinctive type of cuisine having a similar style of herbs and spices:

### Cajun Food

Why not spice your next meal up the Cajun way with our vast selection of authentic Cajun spice mixes and rubs? ... <sup>5</sup>



True Cajun Red Hot



Cajun Creole Hot Nuts



Cajun Tipsy Chicken Seasoning



Cajun Power Sauce

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### HEADLINE: **Barbecues and Grilling: Cajun Grilling**

#### **Adding real Cajun flavor to your cookouts is easy**

... Of all the cooking traditions of the United States, Cajun has been the one to see the most evolution. From these one pot classics to Cajun fried turkey, blackened fish (and everything else), and the whole list of Cajun spices, sauces and seasonings.

**Cajun has come to mean heat with flavor.** By this I mean that the typical Cajun seasoning has a good source of heat from a variety of chilies and peppers and a whole load of flavors that rely on herbs and spices like Fennel seeds, cinnamon and cumin.

... <sup>7</sup>

Similarly, in support of her showing that the term "Red Hot" is descriptive, the Trademark Examining Attorney has submitted third-party registrations for food items where the

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<sup>4</sup> Registration No. 3407341 issued on April 1, 2008. No claim is made to the exclusive right to use the word "Cajun" apart from the mark as shown.

<sup>5</sup> <http://www.cajungrocer.com/food-c-1.html>

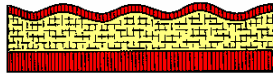
<sup>6</sup> <http://www.cajundepeaux.com/spices.html>

<sup>7</sup> <http://bbq.about.com/od/regionalandethniccooking/a/aa051599.htm>

term "Red Hot" has been disclaimed within a composite mark, or where the mark was registered under § 2(f) of the Act:



for "fried pork skins" in International Class 29;<sup>8</sup>



for "meat products; namely, sausage " in International Class 29;<sup>9</sup>

**SEE'S RED HOT  
SWAMP GOO**

for "candy" in International Class 30;<sup>10</sup>

**REDHOT**

for "food flavorings, marinades, sauces, seasonings, and spices for food or food products; condiments in the nature of hot sauces; coatings and seasonings for food, namely, seasoned coating for meat, fish and poultry" in International Class 30.<sup>11</sup>

<sup>8</sup> Registration No. 1226082 issued on February 1, 1983; renewed. No claim is made to the exclusive right to use the words "Red Hot" apart from the mark as shown.

<sup>9</sup> Registration No. 1803845 issued on November 9, 1993; renewed. No claim is made to the exclusive right to use the word "Red Hot" and "Sausage" apart from the mark as shown.

<sup>10</sup> Registration No. 2095637 issued on September 9, 1997; renewed. No claim is made to the exclusive right to use the words "Red Hot" apart from the mark as shown.

<sup>11</sup> Registration No. 2389514 issued under Section 2(f) of the Act on September 26, 2000; renewed.



She also provided evidence from the Internet where other manufacturers or merchants have used the term "Red Hot" as an obvious reference to food with a spicy, hot flavor:



Red Hot Cinnamon Flavor Candy Flavoring Oil 1 oz  
[Get Suckered Etc.](#)  
No customer reviews yet. [Be the first.](#)

Price: **\$5.45**

**In Stock.**  
Ships from and sold by [Get Suckered, etc.](#)



Lakeside Foods **Red Hot Pickled Eggs** 20ct. 36oz. Jar  
Other products by [Lakeside Foods Red Hot Pickled Eggs](#)  
No customer reviews yet. [Be the first.](#)

Price: **\$15.99**

**In Stock.**  
Ships from and sold by [Long Lake Specialty Foods.](#)



Cajun Red Hot Pepper Sauce (NEW)  
\$3.00

**Col. Pops Extreme Flavor  
Red Hot Cayenne Cheese Popcorn**

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The Trademark Examining Attorney also placed into the record pages from the website of a spice manufacturer that discusses, *inter alia*, the "**red-hot**" flavor profile of Saigon Cinnamon as a spice.<sup>13</sup>

Finally, the Examining Attorney submitted multiple examples where merchants and manufacturers used the term "Cajun Red Hot" in connection with a flavoring concentrate, a syrup, or a snow cone flavor sold from a store or cart:

<sup>12</sup> <http://www.amazon.com/gp/product/B0000DK8PM>;  
<http://www.amazon.com/gp/product/B0006ODXPE>;  
[http://www.colpops.com/group.php?categoryid=cheese&groupid=ch\\_red\\_hcpc](http://www.colpops.com/group.php?categoryid=cheese&groupid=ch_red_hcpc); and  
[http://gourmetgardens.com/cart/product\\_info.php?products\\_id=70](http://gourmetgardens.com/cart/product_info.php?products_id=70)

<sup>13</sup> <http://mccormick.com/>

# Sno-Bob's Sno Cone Stands

## CAJUN RED HOT

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615-351-6109

# Fleur de Lis FLAVORS

Nashville's home to New Orleans Style Snowballs

HOME HISTORY PRODUCTS FAQs EVENTS FLAVORS

### FLAVORS



15

Caramel - **Cajun Red Hot** - Chocolate - Cinnamon - Fuzzy Navel - Blue Hawaii - Mango - Pineapple



## BONNIE'S SNAK SHAK

*Your source for snoball supplies and equipment.*

### Cajun Red Hot

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<sup>14</sup> <http://www.sno-bobs.com/>

<sup>15</sup> <http://www.fdlflavors.com/flavors.html>, of Nashville, TN, as accessed by the Trademark Examining Attorney on October 15, 2009.

<sup>16</sup> <http://snoballsupplies.com/page2.html>, of Oklahoma City, OK, as accessed by the Trademark Examining Attorney on October 15, 2009.

<p><b>Kartwheels, Inc.</b></p>	<p><b>Cajun Red Hot</b> <sup>17</sup></p>
<p><b>hawaiianshavedice.com</b> Call 1-800-742-8334 or Order Online via Secure Server</p>	<p>• <b>Cajun Red Hot</b> Hot, Cinnamon flavor. Tastes like "Red Hot Candies." (red) <span style="float: right;">18</span></p>
	<p><b>ITALIAN ICE: Cajun Red Hot</b> <span style="float: right;">19</span></p>



**Southern Snow** ®      **FLAVOR CONCENTRATE**  
 2010      (504) 393-8967      (800) 393-8933      2010

CAJUN RED HOT

The following excerpt was taken from an article on the website of an undergraduate business program in Austin, TX:

<sup>17</sup> <http://www.kartwheelsinc.com/Shaved-ice.html>, of Llano, TX, as accessed by the Trademark Examining Attorney on October 14, 2009.

<sup>18</sup> <http://www.hawaiianshavedice.com/flavorlist.html>, of Newton Grove, NC, as accessed by the Trademark Examining Attorney on October 15, 2009.

<sup>19</sup> <http://www.happybellys.com/products.htm>, of Shreveport, LA, as accessed by the Trademark Examining Attorney on October 15, 2009.

<sup>20</sup> <http://snow-balls.com/flavors.htm>,

## Miranda Oropeza Leverages Entrepreneurial Education Outside of the Classroom

When Entrepreneurship major Miranda Oropeza was assigned to conduct a feasibility study on a potential business for one of her classes, she did more than complete the project — in 2005, she used it to launch **South Austin Sno**.

### Turning Classroom Smarts into Business Acumen

As founder of a business that sells “homegrown *sno-cones*,” Miranda credits a large part of her success to customer suggestions. Just by listening to their ideas, she now offers over 10,000 flavor combinations, everything from cherry to **Cajun red hot**.

She embraces the high level of customer interaction that her business provides. “Sno-cone lovers come in all ages, shapes and sizes,” says Miranda, “so I get to meet a lot of different people.” ...<sup>21</sup>

Finally, the Trademark Examining Attorney has also provided a number of stories from newspapers around the country using this term as a snow cone flavoring:

- *Baton Rouge, LA newspaper*

Smiley Anders, columnist, July 1, 2002

Only in Louisiana: Mason Jewell of New Roads invites flavored-ice lovers to “The Original New Roads Snowball Stand” on Main Street overlooking False River.

He says the stand is open from 11 a.m. to 8 p.m. and has lots of flavors.

But the one that caught my eye was “**Cajun Red Hot**.” My guess is equal parts Tabasco and Steen’s Cane Syrup ... What’s your?..<sup>22</sup>

- *Dallas, TX newspaper:*

HEADLINE: COLD CAPITALISM: Rival snow cone stands battle for share of market at Ellis County intersection

... Besides standard fare such as raspberry, cherry and strawberry, beyond even less traditional concoctions such as amaretto and mai tai, [Gus Shedid] offers icy confections called **Cajun Red Hot**, Ninja Turtle and Dinosaur ...<sup>23</sup>

- *Lancaster, PA newspaper:*

HEADLINE: At new mall cart, tasty snow in the forecast

After surviving the winter from you-know-where, would you pay for a handful of snow?

...

And while you can have your cherry or even plain old vanilla, the old-fashioned Snoball can take on a newfangled twist, with such flavors as amaretto, white chocolate, piña colada, wine cooler, cotton candy, bubble gum, kiwi, and for the experimenting type, **Cajun red hot**.<sup>24</sup>

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<sup>21</sup> <http://www.gotostedwards.com/x679.xml>, from St. Edwards University in Austin, TX, as accessed by the Trademark Examining Attorney on October 15, 2009.

<sup>22</sup> The Advocate (Baton Rouge, LA.)

<sup>23</sup> The Dallas Morning News, June 16, 1997.

<sup>24</sup> Lancaster (PA) New Era, April 10, 1994.

Based on all of the evidence in the record, we agree with the position of the Trademark Examining Attorney that "Cajun Red Hot," used for a flavoring, immediately tells consumers that the flavoring has a Cajun profile of spices that make it spicy-hot. We understand applicant's argument that traditional Cajun cuisine may not have been particularly hot, but whatever Cajun cuisine might have meant originally, today the term "Cajun" as used for food is understood as describing something that is spicy. As was stated in one of the articles quoted above:

Cajun has come to mean heat with flavor. By this I mean that the typical Cajun seasoning has a good source of heat from a variety of chilies and peppers and a whole load of flavors that rely on herbs and spices like Fennel seeds, cinnamon and cumin ... .

Manufacturers and merchants of a variety of food items have chosen this exact combination of terms, "Cajun Red Hot," to indicate that their products are spicy hot. In particular, there is substantial evidence that third-party vendors in Louisiana, Texas, Tennessee and North Carolina, as seen above, use this term to name a snow cone flavoring.

These third-party uses support our view that the term "Cajun Red Hot" is merely descriptive. Applicant dismisses any competitor's uses by asserting that they are "unlawful use," although it is not clear what applicant has done to counteract this usage. In any event, the fact that third

parties consistently use this term to describe a flavoring is an indication that manufacturers and retail merchants as well as the ultimate snow cone consumers around the country view "Cajun Red Hot" as a descriptive term for this particular flavoring. In determining descriptiveness, tribunals often look to whether competitors actually use the identical term and/or need to use the disputed term to compete within an established product line. See 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION, §§ 11.68 and 11.69, 4<sup>th</sup> Edition (2010).

Applicant also argues that **CAJUN RED HOT** is registrable on the Principal Register because it conveys a double entendre, citing to the well-known example of the term **SUGAR & SPICE** having been found inherently distinctive for bakery products. See *In re Colonial Stores Inc.*, 394 F.2d 549, 157 USPQ 382, 384 (CCPA 1968).<sup>25</sup> However, applicant has not explained what non-descriptive meaning consumers would ascribe to its mark, and a non-descriptive meaning is not readily apparent to us. Therefore, we find that the term "Cajun Red Hot" does not consist of a clever or incongruous combination and conveys no double entendre.

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<sup>25</sup> In this oft-cited decision of the predecessor to our principal reviewing court, the Court found this matter clearly functioned as a trademark because "sugar and spice" is a well-known phrase taken from a nursery rhyme. The composite mark is inherently distinctive as applied to bakery products - even ones containing these two ingredients - precisely because this combination from the nursery rhyme is familiar to anyone seeing or hearing this mark.

Rather, we find that the Trademark Examining Attorney has demonstrated that the term, "Cajun Red Hot," when viewed as a whole, immediately conveys information about the flavor of the goods. Hence, we conclude that applicant's applied-for mark is merely descriptive of its identified flavoring concentrate.

***Genericness***

The question of whether this term is capable of functioning as a source identifier is not before us. The Trademark Examining Attorney has already determined that this term is registrable on the Supplemental Register. Hence, this mark will not be published for opposition, but will proceed to issuance on the Supplemental Register.

*Decision:* In view of the above findings, the refusal to register on the Principal Register is hereby affirmed. However, the registration will issue on the Supplemental Register in due course.