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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Snowizard, Inc.

Serial No. 77524268

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(Craig D. Taylor, Managing Attorney).

Before Seeherman, Walters and Zervas, Administrative
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Snowizard, Inc. has appealed from the final refusal of the trademark examining attorney to register COOKIE DOUGH in standard character format for "food flavorings."¹ Registration has been refused pursuant to Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that applicant's mark is merely descriptive of its goods.

¹ Application Serial No. 77524268, filed July 16, 2008, asserting first use and first use in commerce as early as April 21, 2007.

Specifically, the examining attorney asserts that COOKIE DOUGH describes a feature or characteristic of the goods offered, namely, the particular flavor of the flavorings, and that it is a descriptive term of art in the relevant industry.

In support of the refusal, the examining attorney has submitted a Google search summary which includes the following entries:

Ben & Jerry's flavors-Wikipedia, the free encyclopedia
Chocolate Chip Cookie Dough, Vanilla Ice Cream with Gobs of Chocolate Chip...
en.wikipedia.org

Blue Bunny Family Flavors Chunky & Goopy Premium Premium [sic] Ice Cream...
Whoever thought raw cookie dough could be topped? Our scrumptious homespun cookie dough-flavored ice cream is overloaded with gobs of semi-sweet chocolate...
www.bluebunny.com

Dreyer's FUN FLAVOR Cookie Dough Ice Cream
This is a New and Exciting Fun Flavor, Frozen Dairy Dessert ...
www.dreyers.com

1200+ Fundraising Companies: Cookie Dough & Cookie Mix Fund...
Your customers will choose from 10 favorite gourmet cookie dough flavors and your group earns 50% profit on every sale!
www.fundraisingweb.org

MHP Probolic COOKIE DOUGH flavor-Bodybuilding.com Forums

MHP Probolic COOKIE DOUGH flavor
Product Reviews—Help Out!
forum.bodybuilding.com

Pop Tarts Gets AN Updated Flavor <i>
Kellogg's Chocolate Chip...

I like that it's different from the
normal fruit and Brown Sugar Cinnamon
flavors. I never get tired of the
chocolate chip cookie dough flavor and
feel that...
www.epinions.com

The examining attorney has also submitted a webpage,
www.benjerry.com, listing "Ben & Jerry's Top Ten Flavors"
which includes

1. Cherry Garcia® Ice Cream
2. Chocolate Chip Cookie Dough Ice
Cream
3. Chocolate Fudge Brownie™ Ice Cream
4. Chunky Monkey® Ice Cream
5. Half Baked™ Ice Cream
6. Phish Food® Ice Cream

We note that the listed flavors, *with the exception of
Cookie Dough*, have an "®" or "™" symbol.

In addition, the examining attorney has submitted
pages from applicant's website, www.snowizard.com, which
are headed "Flavor Description," under which are the
subheads "Flavor," "Color" and "Description." The flavors
include the following:

Almond, with the description "Smooth,
rich Almond flavor";

Apricot, with the description "Fresh,
RIPE Apricot taste";

Blue Coconut, with the description "Our great Coconut flavor colored blue"; and

Butterscotch, with the description "Rich Butterscotch flavor."

The description for Cookie Dough is "The delicious and playful taste of cookie dough just like Mom used to make, but without the mixing bowl. Made with real Ronald Reginald's Vanilla."

Applicant has, in response to the first Office action, referred to statements made in various websites, but did not submit the actual pages from the websites. Although applicant included links to the websites, the webpages themselves are not actually of record because the linked websites can be changed at any time. Anyone reviewing the file at any point must be able to know what information was in the file at the time a decision to refuse or approve an application is made. Further, the application file must be complete in and of itself, without reference to evidence residing elsewhere. Accordingly, we have not considered the content that may be contained in the websites to which applicant has merely provided the links. However, because the examining attorney did not advise applicant that merely including links to websites was unacceptable at a point when applicant could have properly made the material of record, we will consider statements from the websites that

are quoted in applicant's response. Cf. TBMP §1208.02. We have also considered the entire entry for "Cookie dough," which was referenced in applicant's response, because the examining attorney made it of record.

The material that applicant has referred to states that "cookie dough refers to a blend of cookie ingredients which has been mixed into a solid yet malleable form but has not yet been hardened by heat."

<http://en.wikipedia.org>. In its response, applicant characterizes Cookie Dough Creations' website, www.cookie dough creations.com, as offering edible cookie dough in "8 flavors." Citing <http://donna b.com>, applicant also says that

Donna B's Gourmet Cookies and Bakery
Boutique advertises the following
cookie dough flavors:

Chocolate Chip
Chocolate Chip Walnut
Sugar Cookie
Snickers Doodle
Oatmeal Raisin
Oatmeal Toffee
Fudge Cookie
Peanut Butter
Donna's Decadent
White Chip Macadamia Nut.

A term is deemed to be merely descriptive of goods or services, within the meaning of Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(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 Corp., 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); 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).

We find that the examining attorney has demonstrated that COOKIE DOUGH is merely descriptive of applicant's identified "food flavorings." The evidence of record shows that "cookie dough" is a term used to describe a flavor,

and therefore consumers will understand, when they see the mark used in connection with food flavorings, that this is the taste of the flavoring. As noted above, bluebunny.com describes its product as "scrumptious homespun cookie dough-flavored ice cream" and Dreyer's states that it has a new and exciting Fun Flavor, "FUN FLAVOR Cookie Dough Ice Cream." Moreover, applicant's own description of its "Cookie Dough" flavoring, "the delicious and playful taste of cookie dough," shows applicant's expectation that "cookie dough" would be understood as describing the flavor.

In concluding that applicant's mark is merely descriptive, we have considered applicant's argument that "cookie dough" is the raw batter that is baked to form cookies, but does not identify a particular flavor because cookies can have a wide variety of flavors. It points to the listing of "chocolate chip cookie dough" ice cream on the Ben & Jerry's website, and the eight cookie dough flavors listed on the Donna B's website (e.g., sugar cookie, snicker doodle, oatmeal raisin), arguing that one could not sell different flavors of raw dough if all dough had the same flavor.

A similar argument was raised and discussed in *In re Entenmann's Inc.*, 15 USPQ2d 1750 (TTAB 1990), aff'd in

opinion not for publication, Appeal No. 90-1495 (Fed. Cir. February 13, 1991). The application to register OATNUT for bread was refused on the ground that the mark was merely descriptive of two ingredients in the bread, namely, oats and hazelnuts. Applicant argued that OATNUT was not merely descriptive because the term OATNUT "does not tell purchasers which type of nut is used in the bread, for example, walnuts, almonds or pecans." Id. at 1751. The Board stated:

While it is true that in order to be held merely descriptive, a term must describe with some particularity a quality or ingredient of the product in question, it need not describe it exactly. *Cf. In re Analog Devices Inc.*, 6 USPQ2d 1808, 1810 (TTAB 1988), *aff'd* 10 USPQ2d 1879 (Fed.Cir. 1989) (unpublished) ("However, while we readily concede that the category of products which the term 'analog devices' names encompasses a wide range of products in a variety of fields, we do not believe this fact enables such a term to be exclusively appropriated by an entity for products, some of which fall within that category of goods. For example, while terms such as 'digital devices,' 'computer hardware,' 'computer software' and 'electronic devices,' just to name a few, may be broad and even nebulous terms, nevertheless, these terms may not be exclusively appropriated but must be left for all to use in their ordinary generic sense.").

We believe that the term OATNUT readily informs purchasers, with the required

degree of particularity, of two not inconsequential ingredients in applicant's bread. By way of analogy, the term "nut bread" does not inform purchasers of the particular type of nuts found in a particular loaf of nut bread. Nevertheless, the fact that the term "nut bread" does not inform purchasers of the precise type of nuts in the bread does not mean that the term "nut bread" is not descriptive of, and indeed generic for, bread.

See also *In re Patent & Trademark Services Inc.*, 49 USPQ2d 1537 (TTAB 1998), in which PATENT & TRADEMARK SERVICES, INC. was found merely descriptive for "legal representation in the area of Intellectual Property administered by representing others before the Patent and Trademark Office and the Copyright Office." The Board rejected applicant's argument that the phrase was so broad that applicant's mark would give no specific description of the types of services that applicant performed, stating that "the fact that the phrase does not specify exactly which patent and trademark services applicant offers does not mean that applicant is entitled to exclusively appropriate the phrase." *Id.* at 1539.

The same reasoning applies here. "Cookie dough" is used by third parties to describe the flavoring of their products. See the previously noted use of "cookie dough" by bluebunny.com and dreyers.com. And although the term

"chocolate chip cookie dough" used by Ben & Jerry's provides further information, it is not necessary that a term have that degree of specificity in order for it to be found merely descriptive.

As a final point, we note that in its brief applicant has explained that its COOKIE DOUGH product "is a flavored concentrate that is purchased by snowball vendors, or snowball vendor suppliers, to produce a ready-to-use flavored syrup" and that "applicant does not sell flavored concentrate to the general public." Brief, p. 3. Although applicant may in fact be limiting its sales to this class of customers, its identification of goods is not so restricted, and therefore we must determine the question of mere descriptiveness with respect to anyone who may purchase "food flavorings," including the public at large. However, even if the identification were restricted, the evidence shows that "cookie dough" would be understood by both the general public and those in the trade to describe a flavor. As such, COOKIE DOUGH is merely descriptive of food flavorings.

Decision: The refusal of registration is affirmed.