

<p>THIS OPINION IS NOT A PRECEDENT OF THE T.T.A.B.</p>

Mailed:
April 25, 2007

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Schwan's IP LLC

Serial No. 78527306

Danielle I. Mattessich of Merchant & Gould P.C. for
Schwan's IP LLC.

Esther Belenker, Trademark Examining Attorney, Law Office
111 (Craig D. Taylor, Managing Attorney).

Before Bucher, Zervas and Bergsman, Administrative
Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Schwan's IP LLC filed an intent-to-use application for the mark FRESCH, in standard character format, for "frozen pizza; appetizers, namely, hand-held bread puffs and bread bowls primarily containing meat and/or vegetables and/or cheese, with or without tomato sauce; bruschetta; flatbread with or without dipping sauce," as amended.¹ Registration was refused on the ground that FRESCH is primarily merely a surname in accordance with Section 2(e)(4) of the Lanham

¹ Application Serial No. 78527306, filed December 6, 2004.

Act, 15 U.S.C. §1052(e)(4). When the refusal was made final, applicant filed a notice of appeal. The refusal has been fully briefed. We reverse.

In support of the refusal, the examining attorney submitted the following evidence:

1. A printout from one of the LexisNexis databases comprising a nationwide directory of names displaying 131 residential listings of Fresch as a surname;² and,
2. Excerpts from 104 stories deemed "representative" by the examining attorney where the term "Fresch" is used as a surname of 895 stories located in another LexisNexis database.

In responding to the surname refusal, applicant submitted the following evidence:

1. A web page showing that Fresch is a location in Austria;³
2. A web page showing that Fresch Hazel is a location in Belgium;⁴
3. A web page promoting Fresch Shower & Bath Soap;
4. A web page promoting Fresch Iranian caviar;
5. A web page promoting the Fresch collection of rugs;

² The printout contains 136 listings, but three listings appeared in duplicate and one in triplicate.

³ In order to demonstrate the minor geographical significance of this entry, the examining attorney countered with a web page about Fresch, Austria, listing its population as 26,233.

⁴ In order to demonstrate the minor geographical significance of this entry, the examining attorney countered with a web page about Fresch Hazel, Belgium, listing its population as 4,225.

6. A web page promoting Fresch Designs, a company specializing in website design for businesses (www.freschdesigns.com);
7. Copies of applicant's federal registrations: Registration Nos. 2,114,646; 2,173,137; 2,307,630; 2,949,357; 3,046,569; 3,027,271; and 3,006,663 for various FRESCHETTA trademarks for pizza and food products and related services;
8. A definition from the Mennonite Low German Dictionary listing "fresh" as the definition of "fresch";
9. A Wikipedia entry regarding the "Fresch" method of synchronization of movement and language for the promotion of LRS children;
10. Excerpts from the Cosmoworlds Europe Style Portal (www.cosmoworlds.com) and the Tendence Lifestyle website (http://tendence-lifestyle.messefrankfurt.com) regarding the August, 2006 "international lifestyle and consumer-goods fair" presenting new works from German and international designers. The event was held in Frankfurt, Germany. In that document, "Fresch" is described as a combination of the German word "frech" meaning bold, daring, or innovative, and the English word "fresh." Although these are references to a festival in Frankfurt, Germany, the website is accessible to U.S. citizens and it shows "Fresch" as a coined word; and,
11. Four (4) excerpts from publications retrieved from an unidentified database:⁵
 - A. Cabinet Maker (November 25, 2005) references the "Fresch" exhibition in Frankfurt, Germany;
 - B. BusinessWorld (March 31, 2005) references "two fresch scents";

⁵ The examining attorney did not object to these stories despite the fact that the database is not identified. Accordingly, we accept the stories for whatever probative value they may have.

- C. Apollo (March 1, 2005) references "fresch" in a quotation in Latin: "in regno Hispaniae degentem pictorem egregium in picture dicta vulgariter sobre lo fresch";
- D. Fairfield County Woman (December, 2001) references the website fresch.com.

Applicant also submitted the following evidence which has little probative value for the reasons stated below:

1. A web page from a German website in German with no English translation (www.weserserver.de). Because we are concerned with the meaning of the mark in the United States, a German website in German has no probative value in proving the meaning of the term to consumers in the United States. *In re Isabella Fiore LLC*, 75 USPQ2d 1564, 1568 (TTAB 2005);
2. A web page from a website promoting restaurants in Tenerife, one of the Canary Islands (www.canary-holiday.com). The web page describes one restaurant's fare as "fresch fisch, tapas." This web page, while substantially in English, uses the word "fresch" in a foreign language phrase to describe the food served in a restaurant located outside the United States. Because the reference is in a foreign language regarding food served in a restaurant outside of the United States, it has very little relevance, if any, in assessing how consumers in the United States perceive the term "Fresch";
3. A web page from a domain name registrar in Palau, an island nation in the Pacific (www.fresch.pw). Because the web page is from a foreign website and there is no evidence that internet users in the United States would access this website, this web page has no probative value in determining how United States consumers will perceive the word "Fresch";
4. A web page (<http://businessphilosophy.com>) with the following phrase: "We offer BG/MTNS Issue Fresch Cut With POF: Looking For Business

Partners Nantucket Campfire." This web page is essentially incomprehensible. Also, because "Cut" follows "Fresch," it appears that the author intended to use the phrase "fresh cut," and that "Fresch" is a typographical error;

5. An excerpt from an eBay advertisement posted from Brighton, West Sussex in the United Kingdom for "antique?pair of ice skates FRESCH!" Since someone from the United Kingdom submitted this eBay entry, it evidences the use by someone other than a person located in the United States. On the other hand, consumers in the United States access the eBay website and may encounter this listing. Giving applicant the benefit of the doubt, a United States consumer would likely perceive this use of FRESCH as a typographical error of the word "fresh"; and,
6. A copy of Registration No. 2,276,974 for the mark FRESCH for "mint candy, namely, breath mints." Each application for registration must be decided on its own merits based on the evidence of record. The Board may not delegate its authority and duty to decide a case to an examining attorney on a different record. Moreover, we are not privy to the record in the files of the registered mark. *AMF Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 177 USPQ 268, 269-270 (CCPA 1973); *In re Benthin Management, Inc.*, 37 USPQ2d 1332, 1333 (TTAB 1995); *In re Sunmarks Inc.*, 32 USPQ2d 1470, 1472 (TTAB 1994).

Finally, the examining attorney has asked us to take judicial notice of four (4) pages from online German-English dictionaries showing that there is no English translation for the word "Fresch," as well as a copy of a "report" from the Scientific and Technical Information

Center at the U.S. Patent and Trademark Office.⁶ These dictionary pages were submitted for the first time with the Examining Attorney's Brief. In its Reply Brief, applicant objected to the dictionary definitions because they were from online sources, and applicant did not have the opportunity to check the reliability of the evidence and offer rebuttal evidence. Applicant's objection is well taken.

As a general rule, the Board may take judicial notice of dictionary definitions. *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983). See also TBMP §704.12 (2nd ed. rev. 2004). However, when the definitions have been retrieved from online sources, there must be some evidence that the sources are readily verifiable, reliable, and available in print publications. For example, we will take judicial notice of information from the Encarta Dictionary even though it is not available in print format because it is a widely known reference that is readily available online and in a CD-Rom format. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1378 (TTAB 2006); *In re*

⁶ The Scientific and Technical Information Center at the Patent and Trademark Office sent the examining attorney an e-mail regarding the lack of a definition for the word "Fresch."

Total Quality Group Inc., 51 USPQ2d 1474, 1476 (TTAB 1999). While the information in the online dictionaries are readily available online and verifiable as evidenced by the URL on the printouts, there is no evidence regarding their availability in print or other acceptable alternatives, or their reliability. With regard to the "report" from the Scientific and Technical Information Center at the Patent and Trademark Office, this is not the type of evidence for which we may take judicial notice. Further, in both instances, applicant has not had an opportunity to rebut this evidence.

More troubling, however, is why the examining attorney waited until her appeal brief to submit this evidence. The Trademark Manual of Examining Procedure specifically identifies "dictionary definitions of the term and evidence from dictionaries showing no definition of the term" as evidence that may be relevant in determining trademark significance. TMEP §§1211.02(a) and 1211.02(b)(v). Accordingly, such evidence should be entered into the record when the examining attorney first refuses registration under Section 2(e)(4). Nevertheless, the examining attorney did not submit this evidence in her initial refusal, final refusal, or responses to two (2) requests for reconsideration.

Accordingly, we decline to take judicial notice of the four (4) pages from online German-English dictionaries and the "report" from the Scientific and Technical Information Center at the U.S. Patent and Trademark Office. We have given that information no consideration in reaching our decision.

We now turn to the merits of this case (*i.e.*, the propriety of the refusal to register FRESCH on the ground that it is primarily merely a surname). In analyzing the surname refusal, we must determine the impact FRESCH has on the purchasing public because "it is the impact or impression which should be evaluated in determining whether or not the primary significance of a word when applied to a product is a surname significance. If it is, *and it is only that*, then it is primarily merely a surname." *In re Giger*, 78 USPQ2d 1405, 1407 (TTAB 2006), *quoting*, *In re Harris-Intertype Corp.*, 518 F.2d 629, 186 USPQ 238, 239 (CCPA 1975), *quoting*, *Ex parte Rivera Watch Corp.*, 106 USPQ 145 (Comm'r 1955) (emphasis in the original).

Our case law sets out a number of factors to be used to determine if the term is primarily merely a surname:

1. Whether the surname is rare;
2. Whether anyone connected with the applicant has the term as a surname;

3. Whether the term has any other recognized meaning; and,
4. Whether the term has the "look and feel" of a surname.

In re Giger, supra; In re United Distillers, plc, 56 USPQ2d 1220, 1221 (TTAB 2000).

A. FRESCH is not a common surname.

The record shows some use of "Fresch" as a surname. There are only 131 residential listings nationwide for Fresch and 104 excerpts from "stories" from a LexisNexis database with "Fresch." Unlike the surname "Rogan," the subject of *In re Gregory*, the surname "Fresch" does not appear to be the name of a public personality that routinely appears in news reports so as to be broadly exposed to the general public. *In re Gregory*, 70 USPQ2d 1792, 1795 (TTAB 2004). Many of the 104 excerpts were simply obituaries or real estate transaction listings, and as such they do not demonstrate use of "Fresch" as a surname beyond that evidenced by the entries in the residential listings. Based on the record before us that shows some surname use of FRESCH, we find that it is not a common surname.

- B. FRESCH is not a surname for anyone connected with the applicant.

The evidence of record does not show that anyone connected with applicant has the surname FRESCH. However, the fact that "a proposed mark is not applicant's surname, or the surname of an officer or employee, does not tend to establish one way or the other whether the proposed mark would be perceived as a surname." *Id.*

- C. There is no probative evidence regarding the meaning or significance of FRESCH.

Words having significance other than as a surname are not "primarily merely a surname." *Fisher Radio Corp. v. Bird Electronic Corp.*, 162 USPQ 265 (TTAB 1969) (BIRD is not primarily merely a surname); *Ex parte Omaha Cold Storage Co.*, 111 USPQ 189 (Comm'r Pat. 1956) (DOUGLAS is not primarily merely a surname); *In re Monotype Corp. PLC*, 14 USPQ2d 1070 (TTAB 1989) (CALLISTO has no surname meaning from Greek mythology); *In re BDH, Inc.*, 26 USPQ2d 1556 (TTAB 1993) (GRAINGERS for crackers and chips is not a surname because it would be perceived as suggestive of the grain-based nature of the product). See also TMEP §1211.01(a).

This record is devoid of any probative evidence regarding any meaning for FRESCH. Fresch, Austria and Fresch Hazel, Belgium are too obscure to have any

significance in the United States. Given the handful of persons in the United States who speak Plautdietsch, we find the entry from the Mennonite Low German Dictionary has no probative value. Applicant's references to Fresch Shower & Bath Soap, Fresch Iranian caviar, the Fresch collection of rugs, and Fresch Designs are likely uses derived from surnames or misspellings of "fresh." In addition to any concerns we may have about the transient nature of such an entry and the general reliability of collaborative websites with permissive edits, the Wikipedia reference to the "Fresch" treatment for children having "LRS" is not only too obscure to have any significance in the United States, but there is no indication that this "method" is even practiced in the United States. On the other hand, as seen above, some of the entries suggest that "Fresch" could be a different spelling for "fresh" (e.g., the "fresch fisch" advertisement for the restaurant in the Canary Islands, the reference in the businessphilosophy.com web page stating that "We offer BG/MTNS Issue Fresch Cut With POF: Looking For Business Partners Nantucket Campfire," and the eBay advertisement for "antique?pair of ice skates FRESCH!").

D. FRESCH does not have the look or feel of a surname.

This is a subjective factor concerning whether FRESCH has the "structure and pronunciation" or "the look and sound" of a surname. *In re Benthin Management GmbH, supra* at 1333; *In re Sava Research Corp.*, 32 USPQ2d 1380, 1381 (TTAB 1994); *In re Industrie Pirelli*, 9 USPQ2d 1564, 1566 (TTAB 1988). As stated in *Industrie Pirelli*, "certain rare surnames look like surnames, and certain rare surnames do not and that 'Pirelli' falls into the former category, while 'Kodak' falls into the latter." *Id.*

In addition to the fact that "Fresch" is not a common surname, there is no evidence that "____sch" is a common or recognized structure or format for a surname (e.g., ____berg as in Steinberg, ____man as in Bergsman, ____lov as in Orlov, etc.). Because "Fresch" does not have the appearance of a surname, and because the word "fresh" describes a desirable quality of food or ingredients in food, consumers would be more likely to recognize "Fresch," when used in connection with the food items listed in applicant's identification of goods, as a stylization or variation of the word "fresh," rather than as a surname. In this respect, applicant has previously alluded to FRESCH as suggesting freshness in its Registration No. 3,046,569 for the mark FRESCHETTA THE FRESH TASTE SENSATION and

Design for similar food products. Therefore, we find that the primary significance of the word FRESCH when applied to food products will be perceived as suggesting a quality of the food items listed in applicant's identification of goods and/or their ingredients.

In reaching this finding, we are aware of the Board's holdings *In re Woolley's Petite Suites*, 18 USPQ2d 1810 (TTAB 1991) (WOOLLEY'S PETITE SUITES is primarily merely a surname for hotel and motel services) and *In re Pickett Hotel Company*, 229 USPQ 760 (PICKETT SUITE HOTEL for hotel, restaurant, and cocktail lounge services is primarily merely a surname). In those cases, we held that a term may be primarily merely a surname even if it is the phonetic equivalent of a word that has an ordinary meaning. However, in those cases, "Woolley" and "Pickett" were arbitrary terms when used in connection with hotel, motel, restaurant and cocktail lounge services. In this case, FRESCH is the phonetic equivalent of the descriptive word "Fresh," and that has a profound effect on the way that consumers will perceive the word FRESCH.

Finally, on the issue of whether a mark would be perceived as primarily merely a surname, we resolve any doubts we have in favor of the applicant and pass the application to publication with the knowledge that others

who have the same surname and use it or wish to use it for the same or similar goods may file a notice of opposition.

In re Benthin Management GmbH, supra at 1334.

Because FRESCH is not a common surname, when it is used in connection with the food items identified in applicant's identification of goods, it would be perceived as a stylization or variation of the word "fresh." Additionally, the word FRESCH does not have the clear look and sound of a surname. We therefore find that when FRESCH is used in connection with "frozen pizza; appetizers, namely, hand-held bread puffs and bread bowls primarily containing meat and/or vegetables and/or cheese, with or without tomato sauce; bruschetta; flatbread with or without dipping sauce" it would not be perceived as primarily merely a surname.

Decision: The refusal to register is reversed.