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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Jonathan Drew, Inc. dba Drew Estate

Serial No. 78979742

John W. Goldschmidt, Jr. of Dilworth Paxson LLP for Jonathan
Drew, Inc. dba Drew Estate.

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(Chris A.F. Pedersen, Managing Attorney).

Before Holtzman, Bergsman and Ritchie, Administrative Trademark
Judges.

Opinion by Holtzman, Administrative Trademark Judge:

Jonathan Drew, Inc. dba Drew Estate (applicant) filed an
application to register on the Principal Register the mark
INFUSED CIGARS in standard character form for goods ultimately
identified as "cigars" in Class 34.¹

¹ Serial No. 78979742 filed July 27, 2005 based on an allegation of a
bona fide intent to use the mark in commerce. The application includes
a claim of ownership of Registration No. 3080344 on the Principal
Register for the mark INFUSION for "cigars." An amendment to allege
use asserting a date of first use and first use in commerce of November
30, 2007 was filed on December 4, 2007 and accepted by the examining
attorney.

The trademark examining attorney refused registration on the ground that the mark is merely descriptive of the goods under Section 2(e)(1) of the Trademark Act. When applicant, in response to the refusal, filed an alternative amendment to the Supplemental Register, the examining attorney refused registration under Section 23 of the Act on the ground that the mark is generic for the goods and incapable of distinguishing applicant's goods from those of others.

The refusals were ultimately made final, and applicant appealed. Both applicant and the examining attorney have filed briefs.

We turn first to the question of genericness. The test for determining whether a mark is generic involves a two-step inquiry. First, what is the genus (category or class) of goods or services at issue? Second, is the term sought to be registered understood by the relevant public primarily to refer to that genus (category or class) of goods or services? See *In re Reed Elsevier Properties Inc.*, 482 F.3d 1376, 82 USPQ2d 1378, 1380 (Fed. Cir. 2007) (quoting *H. Marvin Ginn Corporation v. International Association of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986)).

The Office has the burden of proving the genericness of a term by "clear evidence" of the public's understanding thereof.

In re Merrill Lynch, Pierce, Fenner & Smith, Inc., 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987).

The genus or category of goods in this case is the wording used in the identification, "cigars." The relevant public for applicant's cigars includes cigar "aficionados" and enthusiasts as well as ordinary members of the general public.

We turn then to the meaning of INFUSED CIGARS to the relevant public. Evidence of the relevant public's understanding of a term may be obtained from any competent source including consumer surveys, dictionary definitions, newspapers and other publications. See Reed Elsevier Properties Inc., supra at 1380. Third-party websites are competent sources to show what the relevant public would understand a term to mean. Id. at 1381.

The examining attorney has submitted dictionary definitions of the word "infused" including the following:

1. To put into or introduce as if by pouring:
infused new vigor into the movement
2. To fill or cause to be filled with something:
infused them with a love of the land
3. To flavor or scent (a liquid) by steeping ingredients in it: "*He would infuse . . . vegetable oil with the pungent taste of scallions*" (Nina Simonds).
The American Heritage® Dictionary of the English Language (Fourth Edition 2009).
3. *intransitive verb* steep something in liquid: to soak tea or herbs in liquid to extract the flavor or another property, or be soaked in this way.
Encarta World English Dictionary (2007).

As suggested by one or more of the above definitions, the term "infused" as applied to cigars, refers to a cigars that are flavored, or have been treated or processed in some way to absorb a flavor. This meaning is consistent with the Lexis/Nexis and website evidence submitted by the examining attorney showing that cigars are "infused" with flavors considered complementary to the taste of the cigar, such as chocolate, vanilla, coffee, herbs and liqueurs. Some examples are as follows (emphasis added):

After choosing from hundreds of varieties, ranging from cigars **infused** with coffee and chocolate to traditional full-bodied cigars,...

The Arizona Republic (Phoenix) December 10, 2005

The store sells a variety of cigars, including liquor and fruit flavored ones. Prices range from \$1.69 cigars called Rolys to a \$30 cigar double **infused** with Louis XIII Cognac. "It tastes like the cognac when you smoke it," said Jim Gaynor, one of the store's owners...

The Miami Herald August 28, 2005

...can have two cigars that look the same but taste completely different. The consistency - how tightly they're wrapped. "A lot of these are **infused** with different herbs or liqueurs."

Charleston Gazette (West Virginia) October 24, 2006

Overstock.com
Your Online Outlet
NICA Vanilla Caramel and Cognac Mini Cigars Pack
Nica Dulce cigars are slightly **infused** with Vanilla Caramel...flavor from start to finish. ... If you enjoy flavored cigars, you will love this mini cigar.
Overstock.com

The evidence below shows that cigars that have been imbued with a flavor, whatever process is used, are typically referred

to as "flavored" or "infused cigars." Indeed, applicant admits that its goods are "flavored cigars." Brief at 4. The examining attorney has introduced numerous articles from the Lexis/Nexis database and printouts from retail and other commercial websites demonstrating the well recognized meaning of "infused cigars." The following excerpts are representative of the many examples of record (emphasis added).

A new trend with up and coming cigar smokers are **flavor-infused cigars**. We're not talking swisher sweet here. There are a number of these premium flavored cigars including the Acid line by Drew Estates.

Pensacola News Journal (Florida) December 22, 2006

...can have two cigars that look the same but taste completely different. The consistency - how tightly they're wrapped. "A lot of these are infused with different herbs or liqueurs. This one is called Java. This one is vanilla-infused." Kahlua, the liqueur maker, has a whole line of **infused cigars**.
Charleston Gazette (West Virginia) October 24, 2006

The storefront space seats 60; this includes the back room, dubbed a cigar parlor, where cigar smoking is encouraged and premium cigars are offered for sale. Harloff, the cigar lover, is also experimenting with **liqueur-infused cigars**.

Chicago Tribune December 22, 1995

Kevin Godbee, editor & publisher of Cigar-Review.com says, "The article is primarily about Drew Estate and their unique line of **infused cigars**."

M2 Presswire December 23, 2005

ROCKY'S CIGARS ONLINE

Discount Cigars

The famous coffee flavor of original Kahlua liqueur has been captured in a new cigar developed exclusively by Drew Estate, famous for his flavored **infused cigars**.

rockyscigars.com

CIGARS INTERNATIONAL

Keith's PICK - Java by Drew Estate

See, Drew Estate is the king of **infused cigars**, known for ACID, Kahlua, Natural, etc. ... He wanted an unconventional, subtly flavored cigar unlike anything else on the market, and Drew Estate was the only maker that could pull that off.

cigarsinternational.com

Winecottageshop.com

Your Local Full Service Gourmet Wine Shop and More... Cigar Enthusiasts stop in and check out the humidor for your favorite Summertime smokes. We have an excellent selection for the ladies too. CAO makes great **infused cigars**, and cigarillos for every price and pleasure.

winecottageshop.com

Nicky Blaine's cocktail lounge

Nicky's Cigar Menu

[category] "**Flavor Infused Cigars**" [listing, for example] Bliss, Wild Cherry, Peach Passion, CAO Karma Sutra, Baileys Irish Cream, Gurkha cigar infused with Louis XIII Cognac, Makers Mark Bourbon Infused, Chocolate Infused Cigar, Vanilla Infused Cigar.

nickyblaines.com

Watch City Cigar

Silverados

Tins of 10 little **menthol infused cigars**

watchcitycigar.com

PRONTO shopping gone social

Category - Cigars

Kahlua Cigars Kahlua Corona Box of 24

Kahlua is one of the very few premium **infused cigars**.

pronto.com

CIGAR KING

FLAVORED AND **INFUSED CIGARS**: [listing, for example] Acid; Ambrosia By Drew Estate; CAO Flavours; Gurkha Grand Reserve; Helix Remix Cafe Mocha; Rocky Patel Java; Lars Tatens Phat Cigars; Isla Del Sol; Makers Mark

cigarking.com

Busy Bee Lifestyle
Fabulous and Unique Christmas Gifts for Men
Maker's Mark
This holiday season the company has expanded its line
to include a "Maker's Mark Gourmet Lover's Box"
containing...**bourbon infused cigars** in personalized
boxes.
busybeelifestyle.com

SEÑOR JUAN'S TABACALERO
The Friendliest Store On The New Jersey Shore!
HAND ROLLED INFUSED ROBUSTO TORPEDO Churchill
Cuban **Infused Cigars** By Chico
Senorjuancigars.com

QUALITY IMPORTERS TRADING COMPANY
Cigars
El Duque Cognac (**Cognac Infused Cigars**)
Torano - Reserva Decadencia (**Port Wine Infused Cigar**)
His Majesty Reserve (infused with a full bottle of
Premium Cognac)
Gurkha Grand Reserve (infused with Premium Cognac)
Qualityimporters.com

Cigar.com - Cigars
If you enjoy flavored and **infused cigars**, try the
[Dominican Sweets]... Other great flavors to try are
the [Acid by Drew Estate]...
cigar.com

The evidence above demonstrates exposure of the term
"infused cigars" to the relevant consumers and their
understanding of the term as a reference to a particular type of
cigar. However, the record also includes many examples of
generic use of "infused cigars" in consumer blogs, discussion
groups and forums, providing direct evidence of consumers'
familiarity with the term and their understanding of the term's

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significance. Some examples are set forth below (emphasis added).

LUXIST

Carlos Torano Introduces Port-Infused Cigars
Cigar maker Carlos Torano has announced a new product that may well be my dream cigar. The Carlos Torano Reserva Decadencia is a **port-infused cigar**. ... The unique flavor of the port inspired him to create...the company's top-rated cigar...with the gold-medal winning port wine. ...
luxist.com

today's Cigar
contamination?

[from BD] Pure bunk, The flavors don't marry in any way. ... But if you have flavored or **infused cigars** keep those separate.
cigarstoday.com

Club Stogie - Home of the Lowland Gorillas

Re: Maker's Mark cigars?

[by worr lord] Does anyone have experience with these?

[by RGD] Not with the Marker's Mark - but have had two Erin Go Bragh - which is along the same lines as they are **infused cigars**. ...
Clubstogie.com

THE CIGAR ADDICT

ACID DEF SEA

It was July of 2005 when my good friend Marlon introduced me to Acid's line of **infused cigars**. It was the Def Sea that became my staple, my everyday kind of smoke. ...
thecigaraddict.com

Cigar Trends Forum

Cigar Recommendations

[by khest] I have had the Latin Golds when living in SA. They offer **infused cigars** (flavour cigars) so if you like Swisher Sweets try their vanilla flavour.
cigartrends.com

CigarPass > The Good Life > Cigar Reviews
Maker's Mark 650

[byBrickhouse] I don't smoke **infused cigars**, but this one has always had my interest...
cigarpass.com

TomsCigars.com
[Reviews]
Acid Remi Kuba Kuba
Although I don't regularly smoke flavored or **infused cigars** I thought it was time to try one of the most popular infused smokes.
tomscigars.com

STOGIE SR REVIEW
El Rey de los Habanos
[by RayD] I take the cello off of all of my cigars except for **infused cigars**. The **infused cigars** are kept in a separate humi, but I keep the cello on because I feel that they're more likely to pick up flavors than **non-infused cigars**.
stogiereview.com

Olivia
Cigar club
There are even a lot of nice **infused cigars** these days that are mild and have a true infused taste instead of just the tip being sweet.
olivia.com

PUFF.com Forums
General Cigar Discussion
[by mtg972] Not really much into flavored/**infused cigars**, but I know C1 sells 2 brands made by La Aurora. Slainte is made with single malt scotch and Erin Go Bragh, Irish whiskey. ... And TNT sells bundles of La Divas (cognac) 25/\$40.
puff.com

Mayorga Coffee Infused - Club Stogie Cigar Discussion Forum
Has anyone tried these Mayorga Coffee Infused cigars? ...I've tried **infused cigars** before and really don't care for them ...
clubstogie.com

Jack Daniels Cigars - Cigar community and forum
As far as I know, you can get **liquor-infused cigars** from makers mark, gurkha and oliveros...

cigarsmokers.com

It is clear from the Nexis articles and third-party commercial websites as well as consumer websites that "infused cigars" is a generic term, commonly used and understood to denote a type of cigar.

We find that the examining attorney has met her burden of establishing, prima facie, that the primary meaning of INFUSED CIGARS is generic for "cigars." Neither applicant's arguments nor its evidence rebuts this showing.

We do not question that applicant may be a "leading maker" or perhaps a "pioneer" of "infused cigars" or even that applicant coined the term. The problem is that none of these facts overcomes the generic meaning of "infused cigars" or makes this generic term registrable. See, e.g., *In re Active Ankle Systems Inc.*, 83 USPQ2d 1532, 1538 (TTAB 2007) ("Even if applicant was the first... user of a generic term or phrase,...that does not entitle applicant to register such a term or phrase as a mark."). While sellers may recognize applicant as a well known maker or blender of cigars and that applicant is a significant source for "infused cigars," they nevertheless use the term "infused cigars" to refer to a type of cigar, rather than to brand of cigar. The record is clear that they do not recognize "infused cigars" to indicate the source of those cigars only in applicant.

Applicant argues that many of the articles and/or websites are referring to applicant's products which as described by applicant include "Sauza Tequila Infused Cigar," "Acid's line of infused cigars" and "Kahlua infused cigars." Brief at 6. This argument is irrelevant because as explained above cigar retailers use the term "infused cigars" to refer to a type of cigar, rather than to brand of cigar. Moreover, the evidence shows that there are many other producers of "infused cigars" and that these producers similarly use "infused cigars" to denote a flavored cigar, for example, Maker's Mark Bourbon Infused Cigars, Black Star Farms Brandy Infused Cigars and Gurkha Royal Reserve Triple Cognac Infused Cigar. See, e.g., shopwiki.com; merchantcircle.com; thefind.com (excerpts not included). Also, the flavored cigars of other producers such as CAO, Chico, Helix and Cusano (Dominican Sweets) are advertised or promoted as "infused cigars." See, e.g., excerpts, supra, from winecottageshop.com; seniorjuancigars.com; cigarking.com; cigar.com. Applicant's own evidence shows clear generic usage of "infused cigars" even when referring to applicant's brands of cigars, as in the following article which discusses applicant's "Kahlua" cigars.

BestCigarPrices.com
Kahlua Cigars
Kahlua was an ideal choice for General Cigars when they decided to introduce a new **infused cigar** line. When one thinks of infused cigars, the name that

comes up is Drew Estate, and General went right to Jonathan Drew for their blend,. . . .for someone who wants to try something different, or someone who is a fan of **infused cigars**, Kahlua cigars are the perfect fit. . . .
Bestcigarprices.com

This is not a case of a "mixed" record as applicant contends. In this case, there is no evidence of use or recognition of "infused cigar" as a mark at least apart from applicant's composite marks such as Sauza Tequila Infused Cigars. Even in that case, "infused cigars" is used generically (*i.e.*, Sauza brand tequila infused cigars). Indeed, none of the evidence of record suggests in any way that the term "infused cigars" in itself acts as a source identifier indicating cigars originating solely from applicant.²

The term INFUSED CIGARS is incapable of distinguishing applicant's goods from the similar goods of others. Thus, the designation is not registrable on either the Principal Register or the Supplemental Register. Because applicant filed an "alternative amendment" to the Supplemental Register, we will now assume that INFUSED CIGARS is not generic and decide the question of whether the mark merely descriptive.

If INFUSED CIGARS is not generic, then the term is certainly descriptive of applicant's goods. The dictionary definitions,

² To the extent that applicant is making the argument, we point out that applicant's Registration No. 3080344 of a different mark for cigars has no bearing on the question of whether the mark in this case is registrable. See *In re Parkway Machine Corp.*, 52 USPQ2d 1628 (TTAB 1999).

Nexis articles, website printouts and applicant's own evidence shows that the term is highly descriptive of a significant feature or characteristic of applicant's cigars. Indeed, while maintaining that its mark is not generic, applicant expressly states that the mark "may be at a minimum descriptive." Req. for Recon., March 30, 2009. There is no doubt that consumers would immediately, and without the exercise of any imagination, understand the descriptive meaning of INFUSED CIGARS in relation to cigars.

Decision: The refusal to register under Section 23 of the Trademark Act on the ground that the mark is generic for the goods is affirmed; and the refusal to register on the ground that the mark is merely descriptive of the goods under Section 2(e)(1) of the Act also is affirmed.