

**THIS OPINION IS NOT A  
PRECEDENT OF  
THE T.T.A.B.**

Mailed: September 16, 2010

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re LE CHÂTEAU DE MA MERE, société anonyme

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Serial No. 79975049

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Tanya Miari of Ladas & Parry, LLP for LE CHÂTEAU DE MA MERE, société anonyme.

Zachary R. Bello, Trademark Examining Attorney, Law Office 111 (Craig Taylor, Managing Attorney).

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Before Seeherman, Walters and Wellington,  
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Applicant, LE CHÂTEAU DE MA MERE, société anonyme, a Belgian entity, has applied to extend protection of its international registration for the mark ROUGE TOMATE (in standard character form) for goods that include: beers, mineral and aerated waters and other non-alcoholic beverages, namely, soda pops, soft drinks, sports drinks, vegetable juices beverages, energy drinks, herbal juices; fruit drinks and fruit juices; syrups and other preparations for making non-alcoholic beverages, namely,

fruit juices" in International Class 32.<sup>1</sup> The application contains a statement that the mark is translated into English as, "tomato red."

The trademark examining attorney refused registration of the mark under Section 2(e)(1) of the Trademark Act on the ground that applicant's mark is merely descriptive of the goods identified in the application.<sup>2</sup> Specifically, he contends that "[t]he applicant's mark ROUGE TOMATE or RED TOMATO describes the feature, characteristics or ingredients of the identified good [sic]. Several vegetable drinks and juices are derived from red or ripened tomatoes. It is an ingredient of the proposed goods." Office ("final") Action, dated January 29, 2009.

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<sup>1</sup> Application Serial No. 79975049 was filed January 12, 2005, under Section 66(a), based upon an International registration with a priority date of December 7, 2004. The original application identified other classes of goods and services, but they were divided out of the application into a "child" application during the prosecution.

<sup>2</sup> The examining attorney asserts that the mark is descriptive of the following identified goods: "soft drinks; vegetable juice beverages; fruit drinks and fruit juices; [and] other preparations for making non-alcoholic beverages, namely, fruit juices." In response to applicant's request for reconsideration, he advised applicant that it could delete these specific goods from the identification in order to obviate the descriptiveness refusal. Applicant declined to do this. As explained later in this order, it is not necessary that applicant's mark be descriptive of all the goods identified in the application; rather, if the mark is descriptive of any of the goods for which registration is sought, it is proper to refuse registration as to the entire class.

Applicant appealed and filed a request for reconsideration. In response to the request for reconsideration, the examining attorney maintained the refusal. Subsequently, applicant and the examining attorney filed briefs on the issue under appeal.

It is well settled that a term is considered to be merely descriptive of goods and/or services, within the meaning of Section 2(e)(1) of the Trademark Act, if it immediately describes an ingredient, quality, characteristic or feature thereof or if it directly conveys information regarding the nature, function, purpose or use of the goods and/or services. See Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052. See also *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215 (CCPA 1978). It is not necessary that a term describe all of the properties or functions of the goods and/or services in order for it to be considered to be merely descriptive thereof; rather, it is sufficient if the term describes a significant attribute or feature about them. Whether a term is merely descriptive is determined not in the abstract, but in relation to the goods and/or services for which registration is sought. See *In re Bright-Crest, Ltd.*, 204 USPQ 591 (TTAB 1979). Thus, "[w]hether consumers could guess what the product is from consideration of the

mark alone is not the test." *In re American Greetings Corp.*, 226 USPQ 365 (TTAB 1985). Moreover, if the mark is descriptive of any of the goods or services for which registration is sought, it is proper to refuse registration as to the entire class. *In re Analog Devices Inc.*, 6 USPQ2d 1808 (TTAB 1988), *aff'd* without pub. op., 871 F.2d 1097, 10 USPQ2d 1879 (Fed. Cir. 1989).

The discord between the examining attorney and applicant essentially revolves around the proper interpretation of applicant's mark. According to applicant, the mark is properly translated from French into English as "tomato red," conveying a shade of red. Applicant explains that "typically, in the French language, a descriptive adjective, such as a color, is placed *after* the noun it modifies" and, likewise in this case, "tomate" (tomato) is the adjective and "rouge" (red) is the noun being modified. Brief, p. 8 (emphasis in original). In support, applicant relies on a certified translation statement attesting that<sup>3</sup>:

The French phrase ROUGE TOMATE is accurately translated into English as "tomato red" that is a phrase indicating a particular hue or shade of the color red.

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<sup>3</sup> Signed by Donald W. Hanley, CEO, Nelles Translations, and notarized on January 11, 2005. Submitted with applicant's February 14, 2006 response to an Office action.

The phrase ROUGE TOMATE would not be accurately translated as "red tomato" to mean either a tomato that is red, or as the name of any particular dish of food containing tomatoes.

A body of certified translators had collectively agreed to this opinion and one such comment succinctly captures their unanimous position -

"Rouge tomate" is a shade of red, "rouge" being a noun modified by the noun "tomate" used as an adjective; in "tomate rouge," the noun "tomate" is modified by the adjective "rouge." This is basic grammar.

Applicant contends that "the shade [of color] conveyed by the mark is one connected with passion, pleasure and joy - all of which are emotions applicant would like to conjure through use of the mark." Brief, p. 8. Applicant argues that the majority of the examining attorney's evidence references only tomatoes and tomato juice, and that there is no evidence to suggest that the relevant public would understand ROUGE TOMATE, defined as a color or shade of red, as being somehow descriptive of the identified goods. Finally, applicant argues that any doubt as to the descriptiveness of its mark should be resolved in favor of publication.

The examining attorney does not argue that applicant's stated translation of its mark, i.e., "tomato red," is necessarily incorrect; indeed, he accepted this translation in the application record. However, throughout his brief

and Office actions, he references the mark as being translated into English not only as "tomato red" but also as "red tomato." Essentially, his position is that, based on the doctrine of foreign equivalents, "the mark is TOMATO RED or RED TOMAMTO (sic) and it is an ingredient of tomato juice and other beverages. The connotation of warmness in other contexts will not change the fact that RED TOMAMTO (sic) is an ingredient of tomato juice." Brief, (unnumbered) p. 11-12. In response to applicant's argument that he is misunderstanding the translation, he counters that "[t]he translation is also easy since ordinary consumers are familiar with the terms ROUGE and TOMATE." He concludes that "RED TOMATO or TOMATO RED possesses the same commercial impression and consumers will realize that it is nothing but an ingredient of vegetable or fruit juices despite the applicant's transposition of the mark. In summation, neither the applicant's French translation nor its transposition of the mark will obviate the issue of descriptiveness as to the identified goods." Brief, (unnumbered) p. 11. In support, the examining attorney has submitted evidence demonstrating that tomatoes are used as an ingredient of fruit and vegetable juices.

Although we accept applicant's translation of its mark, we affirm the refusal to register the mark ROUGE

TOMATE for the identified goods. Applying the doctrine of foreign equivalents and relying on applicant's provided translation, ROUGE TOMATE would be understood by consumers knowledgeable of French as "tomato red," referencing a shade or hue of the color red. See *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1377 (Fed. Cir. 2005) ("[u]nder the doctrine of foreign equivalents, foreign words from common languages are translated into English to determine... similarity of connotation in order to ascertain confusing similarity with English word marks.") With this in mind and based on the undisputed evidence showing that tomatoes are used as ingredients in fruit and vegetable juice drinks, it stands to reason that the color of such drinks will likely and aptly be described as "tomato red." That is, consumers who understand French and encounter applicant's mark on vegetable and fruit juices will immediately understand the mark ROUGE TOMATE (or "tomato red") as describing the color of the identified juices. The fact that applicant may be the first or only user of a merely descriptive designation does not justify registration if the significance conveyed by the term is merely descriptive. See *In re National Shooting Sports Foundation, Inc.*, 219 USPQ 1018 (TTAB 1983). Moreover, it

is not necessary that the term be in common usage in a particular industry before it can be found merely descriptive. See *In re Sun Microsystems Inc.*, 59 USPQ2d 1084, 1087 (TTAB 2001).

We are not persuaded by applicant's argument that the mark (or the color "tomato red") is "meant to connote desirable images of health, vitality, and warmth..." and thus is merely suggestive. Brief, p. 10. Likewise, applicant's contention that "red" has possible other meanings, e.g., glowing, communist, etc., is not well-taken. As mentioned, our analysis in determining whether a mark is merely descriptive or not involves consideration of applicant's proposed mark in the context of the identified goods. And with respect to the identified goods in the subject application, in particular vegetable and fruit juices, the immediate connotation of applicant's mark, as perceived by consumers of such goods, is that the color "tomato red" describes the color of the juices.

We readily recognize that the Board's rationale for finding that applicant's mark is merely descriptive differs from that set forth in the examining attorney's Office actions and appeal brief. Nevertheless, it has long been held that the Board is not obliged or confined to adopt the reasoning of the examining attorney in affirming a



statutory refusal to registration. See TBMP § 1217 (citation to cases in footnote 246) (2d ed. rev. 2004) ("The Board need not find that the examining attorney's rationale was correct in order to affirm the refusal to register, but rather may rely on a different rationale..."). It is possible that the examining attorney's position may be valid, namely, that regardless of the proper translation the mark, consumers would understand applicant's mark as meaning "red tomato" (either because they are unaware of or are ignoring the French grammatical rules), thus describing an ingredient of applicant's vegetable and fruit juices. However, we need not reach the question of whether non-French-speaking consumers or those with even a rudimentary knowledge of French from grade school language classes would know that ROUGE means "red" and would understand TOMATE as TOMATO because TOMATE is so close to the English word, and therefore would regard ROUGE TOMATE as "red tomato," describing a principal ingredient of vegetable and fruit juices. Based on the translation proffered by applicant, the mark is merely descriptive of the identified goods.

In view of the above, we find that applicant's proposed mark, ROUGE TOMATE, is descriptive of the goods identified in the application. Specifically, the mark

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would be understood by French speakers as "tomato red," describing the color of the identified fruit and vegetable juices.

**Decision:** The refusal to register is affirmed.