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PRECEDENT OF THE TTAB

Mailed:
November 27, 2012

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re RYW Enterprises, LLC

Serial No. 85260850

Adam J. Bruno of Bay State IP, LLC for RYW Enterprises, LLC

Simon Teng, Trademark Examining Attorney, Law Office 105 (Thomas G. Howell,
Managing Attorney).

Before Rogers, Chief Administrative Trademark Judge, and Wellington and
Gorowitz, Administrative Trademark Judges.

Opinion by Gorowitz, Administrative Trademark Judge:

RYW Enterprises, LLC (applicant) filed an application to register the mark
CRAB RANGOON for “foods” in Class 30.¹

The examining attorney refused registration pursuant to Section 2(e)(1) of
the Trademark Act of 1946, 15 U.S.C. §1052(e)(1), on the ground that applicant’s
mark is merely descriptive.

¹ Application Serial No. 85260850, filed March 8, 2011.

The examining attorney also required amendment of the identification of goods on the ground that it was indefinite. During prosecution, applicant amended the identification of goods to “prepared deep-fried dumplings consisting primarily of crab, cheese and vegetables in a flour wrap” in Class 29. On August 1, 2011, applicant submitted an Amendment to Allege Use asserting use of the mark since January 1, 1981. The specimen submitted was identified as a copy of “a restaurant menu illustrating [the] trademark in use with goods for sale at [the] point of purchase.” Amendment to Allege Use dated August 1, 2011.

Both the amendment to the goods and the Amendment to Allege Use were accepted by the examining attorney in the Office action dated January 31, 2012. However, the refusal of registration under Section 2(e)(1) was made final by that Office action. Applicant has appealed the refusal.

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 Bayer AG, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007), citing In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987). 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. *Id.*, citing *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215 (CCPA 1978).

To determine whether a mark is merely descriptive within the meaning of Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1), the burden is on the United States Patent and Trademark Office to make a *prima facie* showing that the mark or word in question is merely descriptive from the vantage point of purchasers of an applicant's goods. See: *In re Stereotaxis Inc.*, 429 F.3d 1039, 77 USPQ2d 1087, 1090 (Fed. Cir. 2005), citing *In re Abcor Development*; see also, *In re Merrill Lynch, Pierce, Fenner, and Smith, Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1144 (Fed. Cir. 1987). As established below, the examining attorney introduced persuasive evidence and on the basis thereof, the Office has met this burden.

The evidence made of record in the Office action dated June 8, 2011 consisted of more than 20 definitions, articles, blogs and menus referencing “crab rangoon,” examples of which include:

1. Wikipedia entry for “Crab Rangoon,” which states that “Crab Rangoon has been on the menu of the “Polynesian-style restaurant Trader Vic’s in San Francisco since at least 1957”;
2. About.com entry on Chinese Food, which includes a recipe for Crab Rangoon and credits the creation of the dish to Trader Vic;
3. Food.com website, which includes recipes for Crab Rangoon and blogs regarding said recipes;
4. flickr from Yahoo, which includes a listing for a room service menu from “dana overnight” on which crab Rangoon is offered;
5. CulinaryCory.com website, which includes a recipe for crab Rangoon, information about the dish, and a blog on the same subject; and

6. MenuPages.com website, which includes menus from Asian-fusion restaurants in Brooklyn and Manhattan featuring Crab Rangoon. The restaurants on the site include: Red House, A+ Thai, Asian Bistro, Asian Fusion, Beijing Wok, China Garden and Lantern Thai.

In the final Office action, the examining attorney introduced approximately 15 additional articles from Lexis-Nexis, all of which included references to “Crab Rangoon.”

Applicant submitted the results pages from a GOOGLE search for “Rangoon,” which was conducted on July 14, 2011. These pages were submitted to establish that Rangoon is a geographical location in Myanmar (formerly Burma). The two pages of search results establish that Rangoon is a region in Myanmar, however, the results also included three websites referring to “Crab Rangoon” and one website relating to Rangoon Burmese Restaurant, located in Philadelphia, Pennsylvania.

Applicant also introduced an undated web article from “Chowhound.com,” entitled “Minneapolis – are there any crab Rangoons in this town?”² The term “crab rangoons” is used generically in this article to refer to a type of food.³

² The article states in part: “There seems to be an invisible line (maybe the Mississippi?) that separates crab rangoon from fried wonton country.

Crab rangoons are not about the crab.....

Can anyone tell me where to get classic crab rangoons around here?”

³ The Google search results and the Chowhound.com article were also attached to applicant’s Appeal Brief, which was unnecessary, since they had previously been made of record during prosecution. “The record in the application should be complete prior to the filing of an appeal. The Trademark Trial and Appeal Board will ordinarily not consider additional evidence filed with the Board...after the appeal is filed.” 37 CFR §2.142(d). The applicant is cautioned that no evidence should be affixed to an appeal brief filed with the

Other evidence introduced by applicant consisted of a search on the website “cooks.com” for “crab cheese puffs” (the search was conducted on July 18, 2011 and does not contain any reference to “Crab Rangoon”) and a copy of a takeout menu from Yangtze Szechuan Restaurant listing Crab Rangoons as one of the appetizers.⁴

While not making them of record, applicant refers to a number of third party registrations in its July 18, 2011 and January 30, 2012 responses to Office actions. The examining attorney advised applicant both in the July 29, 2011 Office action and the January 31, 2012 final Office action that third party registrations may not be made of record by merely listing them in response to an Office action.

“It is well-established that in order to make third-party registrations properly of record, ‘applicant should submit copies of the registrations themselves, or the electronic equivalent thereof’ from the USPTO’s electronic databases....” TBMP § 1207.03 referring to *In re City of Houston*, 101 USPQ2d 1534, 1536 n.5 (TTAB 2012) (quoting *In re Broadway Chicken Inc.*, 38 USPQ2d 1559, 1560 n.6 (TTAB 1996) (citing *In re Smith and Mehaffey*, 31 USPQ2d 1531 (TTAB 1994)), (evidentiary submissions “should be made prior to appeal or, if after appeal, pursuant to a

Board. Any such evidence is either untimely, or redundant because it was previously made of record.

⁴ This take-out menu was later submitted by the applicant as a specimen of use in its application. Interestingly, there is no indication on the menu that “Crab Rangoon” is a trademark. In fact, the goods referred to as “Crab Rangoons” are appetizers that are listed after “Boneless Spareribs, Chicken Gold Fingers, Chicken Teriyaki, and Beef Teriyaki”; and before “Fried Jumbo Shrimp, Fried Wontons, Cantonese Dumplings and Peking Dumplings,” all of which appear in the menu to be used as generic terms.

remand of the matter to the examining attorney for further examination. Trademark Rule 2.142(d).”).

Since the registrations referred to by the applicant are not of record, we did not consider any arguments related thereto. Moreover, while applicant argues in its brief that the refusal of its asserted mark is inconsistent with the registration of other marks, and cites to the Federal Circuit’s decision in *In re Nett Designs*, 236 F.3d 1339, 57 USPQ2d 1564 (Fed. Cir. 2001), as support for its position, applicant chooses to emphasize only a portion of that decision. We note that the instruction from the Federal Circuit is that “the PTO’s allowance of such prior registrations does not bind the Board or this court” and “the Board (and this court in its limited review) must assess each mark on the record of public perception submitted with the application.” *Id.* at 1566.

While applicant acknowledges that the refusal issued was a descriptiveness refusal pursuant to Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1) and that the examining attorney merely advised applicant that its mark could be considered generic, more than half of applicant’s Appeal Brief is devoted to refuting a genericness refusal. These arguments are not applicable to this decision and thus have not been considered.

Applicant argues that its mark is not merely descriptive because the “focal point of the mark, ‘rangoon’, is a non-English term with no connection to the goods of applicant’s mark ...” Appeal Brief at p. 4. To the contrary, the evidence supports a holding that “crab rangoon” is viewed as a single term for applicant’s goods (“deep-

fried dumplings consisting primarily of crab, cheese, and vegetables in a flour wrap”), and those of others. Thus, whatever significance “Rangoon” might have on its own, when used in conjunction with “crab,” the descriptive significance for prospective purchasers is clear.

Accordingly, we find the record to include substantial evidence that the term CRAB RANGOON is merely descriptive of deep-fried dumplings consisting primarily of crab, cheese, and vegetables in a flour wrap.

Decision: The refusal to register is affirmed.