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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Gyroz Inc.

Serial No. 85551984

Larry D. Harvey of Larry D. Harvey, P.C., for Gyroz Inc.

Brian P. Callaghan, Trademark Examining Attorney, Law Office 108 (Andrew Lawrence, Managing Attorney).

Before Cataldo, Wolfson, and Masiello, Administrative Trademark Judges.

Opinion by Wolfson, Administrative Trademark Judge:

Gyroz Inc. (“Applicant”) seeks registration on the Principal Register of the mark **Gyroz** (in standard characters) for “restaurant services, including sit-down service of food and take-out restaurant services,” in International Class 43.¹

The Trademark Examining Attorney has refused registration of Applicant’s mark under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), having determined that the applied-for mark merely describes a principal food item

¹ Application Serial No. 85551984 was filed on February 24, 2012, based on Applicant’s allegation of a bona fide intent to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

intended for sale at Applicant's restaurants and thus is merely descriptive of Applicant's restaurant services.

After the Examining Attorney made the refusal final, Applicant appealed to this Board. We affirm the refusal to register.

Evidentiary Issue

Before discussing the substantive refusal, we address an evidentiary issue. The Examining Attorney objects to our consideration of several trademark registrations and applications that were mentioned for the first time in Applicant's brief. Trademark Rule 2.142(d) states that the record in an application should be complete prior to the filing of an appeal. The references were part of Applicant's brief, and not properly made of record during examination.² Moreover, Applicant merely identified the marks by registration or application serial number and did not provide copies of paper USPTO records or an electronic equivalent of any application or registration. "[T]he mere submission of a listing from the TESS database is insufficient to make the referenced registrations of record. To make a third-party registration of record, a copy of the registration, either a copy of the paper USPTO record, or a copy taken from the electronic records of the Office, should be submitted." *In re Jump Designs LLC*, 80 USPQ2d 1370, 1372-73 (TTAB 2006), citing *In re Volvo Cars of North America Inc.*, 46 USPQ2d 1455, 1456 n. 2 (TTAB 1998)). Because Applicant's new evidence was not properly made of record

² In its response dated December 17, 2012, Applicant refers to a "Google search of term 'Gyroz.'" However, no evidence was attached to the response. Applicant did not otherwise submit any evidence during examination.

and, moreover, consists of incomplete information lacking in probative value, we have not considered it.³

Applicable Law

Trademark Act § 2(e)(1) prohibits registration of a mark which is merely descriptive of the applicant's goods or services. A term is deemed to be merely descriptive of goods or services, within the meaning of Section 2(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 Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012). *See also, In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987); *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828 (TTAB 2007); and *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 217-18 (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.

Applicant argues that GYROZ is not merely descriptive of restaurant services because the term "gyros" is a word with a foreign origin and gyros sandwiches have been available in the United States for only the last 30 or 40 years; the term "gyros" has multiple meanings and has been applied to helicopters and Internet games; and Applicant's mark is a "distinctive spelling" of "gyros," such that "phonetic

³ We hasten to add that even had we considered any of the third-party applications or registrations referenced in Applicant's brief, such would not have affected the outcome of this decision and its result would have been the same.

similarities do not necessarily even exist.”⁴ Applicant further contends that “thought or imagination is required because the mark GYROZ is applied to a restaurant and not to a food product.”⁵ The Examining Attorney argues that the word “gyros” is a common English word used to describe a particular type of sandwich; that restaurant consumers will immediately perceive the mark as a misspelling of “gyros” inasmuch as the substitution of the letter “z” for “s” is immaterial; and that GYROZ is merely descriptive of restaurants that sell gyro sandwiches.

For the reasons discussed more fully below, we find that GYROZ is merely descriptive of “restaurant services, including sit-down service of food and take-out restaurant services.”

The term “GYROS” is generic for a food item.

Gyros are meat-based food items consumed at restaurants. Specifically, a “gyro” is “a sandwich especially of lamb and beef, tomato, onion, and yogurt sauce on pita bread.”⁶ In the Oxford Dictionaries, the term “gyro” is defined as:

noun (plural gyros)

North American

a sandwich made with slices of spiced meat cooked on a spit, served with salad in pitta [sic] bread.⁷

Its origin is from “*gyros*,” which in modern Greek means “turn” or “turning” and suggests the turning of a spit on which lamb or beef is skewered for roasting.

⁴ Applicant’s Brief, p. 4, 4 TTABVue 7.

⁵ *Id.*

⁶ From Merriam-Webster m-w.com at <http://www.merriam-webster.com>, attached to first Office Action.

⁷ At <http://oxforddictionaries.com>, attached to Final Office Action.

“Gyros” as food items first made their appearance in the United States around 1971.⁸

Because the origin of the word “gyros” is foreign, Applicant argues that consumers would have to engage in a multi-step reasoning process to determine its meaning. The evidence shows otherwise. Additional dictionary definitions provided by the Examining Attorney demonstrate acceptance of the term as a commonly understood English word.⁹ The numerous excerpts from third-party websites of gyro restaurants with names that include the term and whose menus feature gyros also show that the meaning of “gyros” is well understood. For example,

King Gyros Greek Restaurant has “specialty gyros” and “Gyros By The Sack” (at <http://www.kinggyros.com>).

Central Gyros offers “value meals” and pictures “#1” as “gyros w/fries & drink” (at <http://www.centralgyros.com>).

Niko’s Gyros specializes in “gyros, traditional American favorites, and ice cream.” (at <http://www.nikosgyros.com>).

Gyros House serves “Cubed gyro (Beef or Lamb), Carved Chicken Gyro, Grilled Chicken Gyro” (at <http://www.gyros-house.com>).

Bo-Bo’s Fast Diner offers several types of gyro sandwiches on its menu under the banner “World’s Best Gyros”; examples include “Monster Gyros,” “Gyros Sandwich,” and “Gyros Plate.” (<http://www.bobosgyros.com>).

⁸ From Merriam-Webster m-w.com at <http://www.merriam-webster.com>, attached to first Office Action. The Examining Attorney also made of record an excerpt from Wikipedia, which suggests that gyros were first introduced in the United States via Chicago between 1965 and 1968. At <http://en.wikipedia.org>, attached to Final Office Action.

⁹ The online dictionary Yahoo!Education defines a “gyro” as “a sandwich made usually of sliced roasted lamb, onion, and tomato on pita bread.” At <http://education.yahoo.com>, attached to Final Office Action. And at Infoplease, a “gyro” is “meat, usually lamb, roasted on a vertical spit, then thickly sliced, topped with onions, and usually served in a sandwich of pita bread.” At <http://dictionary.infoplease.com>, attached to Final Office Action.

George's Pizza & Gyros offers "Colorado's Best Gyros & Gourmet Pizzas" (at <http://www.georgesloveland.com>).¹⁰

Finally, the third-party registrations made of record by the Examining Attorney, wherein "gyro" or "gyros" has been disclaimed apart from the mark, show that the terms were found in those cases to be merely descriptive or generic for restaurant services.¹¹ See *Inst. Nat'l des Appellations D'Origine v. Vintners Int'l Co.*, 958 F.2d 1574, 22 USPQ2d 1190, 1196 (Fed. Cir. 1992) (third party registrations show the sense in which a word is used in ordinary parlance and may show that a particular term has descriptive significance as applied to certain goods or services).

It is clear that the word "gyros" has entered the English lexicon and does not require translation. Accordingly, Applicant's prospective consumers would immediately recognize it as referring to a pita bread sandwich made with slices of spiced meat. The fact that the term may have other meanings in different contexts is irrelevant. 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 *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012) ("The question is not whether someone presented with only the mark could guess what the goods or services are. Rather, the question is whether someone who knows what the goods and services are will

¹⁰ Attached to first and Final Office Actions.


¹¹ For example, in the following registrations for restaurant services, the word "gyros" or "gyro" has been disclaimed: Reg. No. 3626167 for the mark KRONOS GYROS & CAFÉ; Reg. No. 3698406 for the mark LEFTERIS GYRO; Reg. No. 3884942 for the mark MICKEY'S GYROS; Reg. No. 4036002 for the mark GYROS & GOODIES; Reg. No. 4116043 for the mark MAMA GYRO; Reg. No. 4262564 for the mark G DOGS & GYROS; and Reg. No. 4221410 for the mark GYRO SHACK. Attached to Final Office Action.

understand the mark to convey information about them.”), *citing In re Tower Tech. Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002). *See also, In re The Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (“Whether a mark is descriptive cannot be determined in the abstract.”).

The term “gyros” is generic for a type of meat sandwich. We next consider whether “gyros” is merely descriptive of Applicant’s restaurant services.

The term “GYROS” is merely descriptive of Applicant’s restaurant services.

A mark that consists of the generic name of a food that is the specialty of the house or a principal attraction of a restaurant has been held merely descriptive of the restaurant services provided by the restaurant. *In re France Croissant, Ltd.*, 1 USPQ2d 1238 (TTAB 1986) (LE CROISSANT SHOP held merely descriptive of an eating establishment where croissants are the principal attraction, even though other items are available); *In re Le Sorbet, Inc.*, 228 USPQ 27 (TTAB 1985) (LE SORBET held merely descriptive for restaurant and carry-out services where sorbet is the principal attraction). We do not find persuasive Applicant’s assertion that the addition of the word “shop” in the mark LE CROISSANT SHOP or lack of unusual spelling in the mark LE SORBET distinguishes these cases from the case at hand. Because “gyros” is generic for a food item, it is considered merely descriptive when used to describe the type of restaurants that serve gyros as one of their primary menu items. *See In re Cordua Rests. LP*, 110 USPQ2d 1227 (TTAB 2014) (evidence that “churrascos” is generic term for cooked meat warrants finding that applied-for mark “CHURRASCOS” is generic for barbecued steaks and at least highly

descriptive, if not generic, for restaurant services); *Brewski Beer Co. v. Brewski Brothers Inc.*, 47 USPQ2d 1281, 1287 (TTAB 1998) (the words “beer” and “brewski” considered highly descriptive as applied to bar services). *Cf. In re Dial-A-Mattress Operating Corp.*, 57 USPQ2d 1807 (Fed. Cir. 2001) (proposed “1-888-M-A-T-R-E-S-S” mark is merely descriptive of applicant’s telephone shop-at-home mattress retail services); *In re Pencils, Inc.*, 9 USPQ2d 1410 (TTAB 1988) (Term “pencils,” when applied to applicant’s retail stationery and office supply services, is merely descriptive and must be disclaimed apart from design mark ).

Applicant has applied for “restaurant services, including sit-down service of food and take-out restaurant services” on the basis of its bona fide intent to use the mark in commerce. Applicant has not stated its intention regarding sales of gyros, and did not clarify during examination whether its restaurants would in fact sell gyros. In its brief, Applicant states that consumers would recognize that “the mark GYROZ as applied to restaurant services, at best, suggests the message that the sandwich at issue will be available for purchase” but argues that “the phrase ‘Gyroz’ does not refer to an item of food as there is no such offering of a food product with that name at the restaurant.”¹² Nothing in the record, however, precludes the likelihood that Applicant will principally sell gyros at its restaurant. Indeed, Applicant explicitly states that it makes no claim to the term “gyros,” stating that

¹² Applicant’s Brief, p. 8, 4 TTABVue 11.

its competitors would have “options that could be used instead of ‘gyroz,’ such as ‘gyros’ etc. to which no claim is made.”¹³

Accordingly, we find that the term “gyros” is merely descriptive for restaurants that sell gyros as a principal attraction and that Applicant is likely to sell gyros as a specialty item at its restaurants. For the reasons discussed below, we find further that “gyros” and “gyroz” create the same commercial impression.

The terms “GYROZ” and “GYROS” are legally indistinguishable.

Applicant argues that the mark GYROZ is distinguishable from the generic term “gyros” because of the substitution of the letter “z” for the letter “s.” We disagree. A slight misspelling does not convert an otherwise descriptive term into a suggestive one. *In re Quik-Print Copy Shops*, 616 F.2d 523, 205 USPQ 505, 507 n.9 (CCPA 1980) (no legally significant difference between “quik” and “quick”). *See also Fleetwood Co. v. Mende*, 298 F.2d 797, 132 USPQ 458, 460 (CCPA 1962) (“TINTZ [is] a phonetic spelling of ‘tints’”); *In re Hercules Fasteners, Inc.*, 203 F.2d 753, 97 USPQ 355 (C.C.P.A. 1953) (holding “FASTIE,” phonetic spelling of “fast tie,” merely descriptive of tube sealing machines); *In re Carlson*, 91 USPQ2d 1198 (TTAB 2009) (URBANHOUSING found to be perceived as the phonetic equivalent of the descriptive term URBAN HOUSING, and thus, merely descriptive of real estate

¹³ Applicant’s Brief, p. 10, 4 TTABVue 13. We note that Applicant raises an issue of competitor’s need, and argues that competitors have no need to use “gyroz” to describe their restaurant services. However, as shown below, “gyroz” and “gyros” are legally indistinguishable. Thus, it is irrelevant that competitors may not need to use “gyroz” in non-standard spelling *per se*, as they do need to use “gyros.” *See France Croissant*, 1 USPQ2d at 1239 (“Prospective customers would immediately know that croissants could be purchased at applicant’s establishments and we believe that competitors could very well have a competitive need to use this expression.”).

brokerage, real estate consultation and real estate listing services). In short, consumers will immediately recognize the term GYROZ as but a slight misspelling of the generic word “gyros” and they will likely pronounce “gyroz” the same as “gyros.” Even if Applicant’s mark is a novel presentation of “gyros,” it is the phonetic equivalent thereof and purchasers will perceive the different spelling as equally descriptive. *See, e.g., In re Styleclick.com Inc.*, 58 USPQ2d 1523, 1527 (TTAB 2001) (“That applicant may be the first or only entity using VIRTUAL FASHION is not dispositive.”); *In re Central Sprinkler Co.*, 49 USPQ2d 1194, 1199 (TTAB 1998) (“The fact that applicant may be the first or the only one using ATTIC in connection with sprinklers is not dispositive”; ATTIC found generic and merely descriptive for automatic sprinklers for fire protection).

Accordingly, we find “gyroz” and “gyros” to be legally indistinguishable.

Conclusion

We have carefully considered the entire record, including all arguments and the evidence submitted. We find that the mark **Gyroz** is merely descriptive of “restaurant services, including sit-down service of food and take-out restaurant services.”

Decision: The refusal to register Applicant’s mark **Gyroz** under Trademark Act § 2(e)(1) is affirmed.