

**This Opinion is Not a
Precedent of the TTAB**

Oral Hearing: April 24, 2019

Mailed: July 18, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Ocean Technology, Inc.

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Serial No. 87405151

Stephen G. Janoski of Butzel Long,
for Ocean Technology, Inc.

Cameron McBride, Trademark Examining Attorney, Law Office 106,
Mary Sparrow, Managing Attorney.

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Before Ritchie, Greenbaum and Lynch,
Administrative Trademark Judges.

Opinion by Greenbaum, Administrative Trademark Judge:

Ocean Technology, Inc. (“Applicant”) seeks registration on the Principal Register of the proposed mark 100% REAL CALLINECTES CRAB FROM NORTH AMERICA in the stylized format displayed below for goods ultimately identified as “crabmeat” in International Class 29.¹

¹ Application Serial No. 87405151 was filed on April 10, 2017, based upon Applicant’s allegation of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b) of the Trademark Act. On January 10, 2018, Applicant filed an Amendment to Allege Use based on a claim of first use anywhere and use in commerce since at least as early as May 31, 2017, and amended the application to the Supplemental Register to obviate a descriptiveness refusal under Section 2(e)(1) of the



The application includes the following description of the mark: “The mark consists of the stylized wording ‘100% REAL CALLINECTES CRAB’ appearing in and superimposed on a circular design above the stylized wording ‘FROM NORTH AMERICA.’” Color is not claimed as a feature of the mark.

The Trademark Examining Attorney has refused registration of Applicant’s proposed mark under Sections 1, 2 and 45 of the Trademark Act, 15 U.S.C. §§ 1051, 1052 and 1127, on the ground that it is merely informational,² and Trademark Rule 2.61(b), 37 C.F.R. § 2.61(b), on the ground that Applicant failed to comply with a requirement to provide information about the identified goods.

Trademark Act, 15 U.S.C. § 1052(e)(1). However, in the August 2, 2018 Request for Reconsideration, Applicant amended the application back to the Principal Register, asserting instead that the proposed mark has acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f), and in the alternative, that it is inherently distinctive. The Examining Attorney did not accept the Section 2(f) claim, but did not reinstate the descriptiveness refusal, even though Applicant withdrew its amendment to the Supplemental Register.

² The Examining Attorney consistently references Sections 1, 2, 3 and 45 of the Trademark Act as the basis for the refusal that the proposed mark is merely informational. Section 3 of the Trademark Act, 15 U.S.C. § 1053, applies to marks for services, not goods, and therefore is not applicable here.

When the refusals were made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed.³ We affirm both refusals to register.

I. Applicable Law

A. Trademark Rule 2.61(b) Requirement for Information

Trademark Rule 2.61(b) provides that the examining attorney “may require the applicant to furnish such information, exhibits, affidavits or declarations ... as may be reasonably necessary to the proper examination of the application.”

In the July 12, 2017 Office Action, the Examining Attorney required Applicant to explain whether the goods “do or will consist of 100% real Callinectes crab from North America,” and advised Applicant that registration may be refused on the ground that the proposed mark is deceptive under Section 2(a) of the Trademark Act, 15 U.S.C. § 1052(a), or alternatively deceptively misdescriptive under Section 2(e)(1) of the Trademark Act, if Applicant responded that the goods “do not or will not consist of 100% real Callinectes crab from North America[.]” Applicant did not respond to the requirement, which was made final in the February 16, 2018 Office Action as to “100% real Callinectes crab.” In the August 2, 2018 Request for Reconsideration, and in response to a requirement about the identification of goods, Applicant amended the identification of goods to the current, single item, namely “crabmeat,” arguing that

³ This appeal is related to application Serial Nos. 87405201, 87405211 and 87405233, which were scheduled for an oral hearing on April 24, 2019. As the April 8, 2019 Board Order explains, although this appeal was submitted for a decision on the merits based on the briefs alone, the Board added it to the April 24, 2019 oral hearing in the interest of judicial economy.

this amendment “clearly describes the goods and makes the examiner’s demand for further information moot.” The Examining Attorney accepted the amendment, but did not consider Applicant’s argument to be responsive to the requirement for information, which he maintained.

Applicant has a duty to respond to an information request. *See Star Fruits S.N.C. v. U.S.*, 393 F.3d 1277, 73 USPQ2d 1409, 1415 (Fed. Cir. 2005) (interpreting the USPTO’s counterpart patent rule on information requests and holding that “[s]o long as there is some legitimate reason for seeking the information ... the applicant has a duty to respond.”); *In re AOP LLC*, 107 USPQ2d 1644, 1651 (TTAB 2013). If the applicant does not believe that it has relevant information, the applicant should submit a statement to this effect. *In re Planalytics, Inc.*, 70 USPQ2d 1453, 1457 n.2 (TTAB 2004). An applicant’s failure to respond to an information requirement is grounds for a refusal. *See In re DTI P’ship LLP*, 67 USPQ2d 1699, 1701 (TTAB 2003) (“The Trademark Rules of Practice have the effect of law, and failure to comply with a request for information is grounds for refusal of registration.”); *see also AOP*, 107 USPQ2d at 1651; *In re Cheezwhse.com Inc.*, 85 USPQ2d 1917, 1919 (TTAB 2008).

We find that the information requirement was reasonably necessary to the proper examination of the application, as stated in Trademark Rule 2.61(b), because the information is directly relevant to the issue of whether 100% REAL CALLINECTES CRAB FROM NORTH AMERICA is deceptive or deceptively misdescriptive of the identified “crabmeat,” and thus whether additional grounds for refusal exist.⁴ We

⁴ In cases where an applicant fails to comply with Trademark Rule 2.61(b) requirements, the Board also has relied on adverse factual presumptions to affirm alternative substantive

disagree with Applicant that the identification amendment moots the information requirement, and consider this amendment nonresponsive to the requirement. In view of the above, the refusal to register Applicant's proposed mark because Applicant failed to respond to the Trademark Rule 2.61(b) final requirement for information is proper and is affirmed.

Applicant's failure to comply with the Trademark Rule 2.61(b) requirement is a sufficient basis, in itself, for affirming the refusal to register Applicant's proposed mark. *See DTI P'ship*, 67 USPQ2d at 1702. Nevertheless, for purposes of completeness, we consider whether the proposed mark is merely informational under Sections 1, 2 and 45 of the Trademark Act.

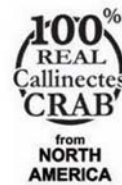
B. Failure to Function – Informational

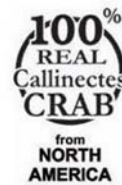
“[A] proposed trademark is registrable only if it functions as an identifier of the source of the applicant's goods or services.” *In re DePorter*, 129 USPQ2d 1298, 1299 (TTAB 2019) (citing 15 U.S.C. §§ 1051, 1052 and 1127). “The Trademark Act is not an act to register mere words, but rather to register trademarks. Before there can be registration, there must be a trademark, and unless words have been so used they cannot qualify.” *In re Bose Corp.*, 546 F.2d 893, 192 USPQ 213, 215 (CCPA 1976).

Whether a term or expression functions as a trademark depends on how it would be perceived by the relevant public. *In re Eagle Crest, Inc.*, 96 USPQ2d 1227, 1229

refusals in addition to refusing registration based on the lack of response to the information requirement. *In re AOP LLC*, 107 USPQ2d at 1651 (noting that since “applicant has inexcusably failed to comply with the information requirement” we address the issue “based on the presumption” that “the responses would have been unfavorable.”) (citing *e.g.*, *Cheezwhse.com*, 85 USPQ2d at 1919).

(TTAB 2010); *In re Aerospace Optics, Inc.*, 78 USPQ2d 1861, 1862 (TTAB 2006). We make this determination by reviewing the specimens and other evidence of record showing how the terms or expressions actually are used in the marketplace. *In re Hulting*, 107 USPQ2d 1175, 1177 (TTAB 2013) (quoting *Eagle Crest*, 96 USPQ2d at 1229). “The more commonly a [term or expression] is used, the less likely that the public will use it to identify only one source and the less likely that it will be recognized by purchasers as a trademark.” *Id.* Mere intent that a word, design, symbol, or slogan function as a trademark, or the fact that such designation appears on the specimen, is not enough in and of itself to make it a trademark. *See In re Manco, Inc.*, 24 USPQ2d 1938, 1941 (TTAB 1992) (citing *In re Remington Prods. Inc.*, 3 USPQ2d 1714, 1715 (TTAB 1987)). To be a mark, the words must be used in a manner calculated to project to purchasers or potential purchasers a single source or origin for the goods. *In re Volvo Cars of N. Am. Inc.*, 46 USPQ2d 1455, 1459 (TTAB 1998). Thus, terms and expressions that merely convey information are not registrable.



The Examining Attorney contends that Applicant’s proposed mark, , will not be perceived as a trademark for the identified “crabmeat” because it consists of common terms that are widely used in Applicant’s trade or industry to denote the purity, quality and ingredients of crabmeat and other food products. As support, the Examining Attorney submitted printouts from a number of third-party purveyors of

such foods showing use of the same or effectively synonymous terms to inform purchasers of the quality, ingredients and geographic origin of the products. The most relevant evidence, which pertains to crabmeat, fish and other seafood, is summarized below:⁵

- Cameron’s Seafood sells “100% authentic Maryland Blue Crabs.”
- Cheat!ng Gourmet sells “BLUE CRAB CROSTINI” featuring “100% Real Blue Crab meat.”
- Florida Blue Crab sells crab cakes made with “100% real lump crab meat.”
- Maryland Blue Crab Express sells frozen “Blue Crab Meat Lump - 100% Domestic Product of U.S.A.” described as having been “picked domestically” to “ensure[] that we always have the best possible crab meat.”
- Handy sells “Callinectes Crab Meat From Mexico” touted as “all-natural, sweet crab meat from Callinectes crabs” with benefits including “Better flavor and texture” “Your assurance – no species substitutions” and “No preservatives for better flavor.”
- Giant Food sells Sebastian fresh crab meat lump. The sole listed ingredient is “100% Blue Crab Meat The Callinectes Sapidus/The Real Blue Crab.”
- The Village Inn menu features several dishes made with “100% Real Maine Lobster.”

⁵ Merriam-Webster defines “Callinectes” as “a genus of swimming crabs (family Portunidae) comprising the New World blue crabs” and “North America” as a “continent of the Western Hemisphere ... including ... the United States [and] Mexico” Attached to the July 12, 2017 Office Action TSDR 9, 11. The evidence summarized above is attached to the July 12, 2017 Office Action, TSDR 12-15, and the February 16, 2018 Office Action, TSDR 7, 9, 11, 13-14.

- Gorton's offers "Beer Battered Fish Tenders" made with "100 real fish" "no fillers" "no artificial colors, flavors or preservatives."
- Mele Bistro, a restaurant that lists "the origin of each item on the menu ... next to the item on the menu," touts "Our North American jumbo sea scallops are handpicked scallops," "All of our shrimps are from North America and packaged in North America" and "All of our seafood are from ... North America"

The Examining Attorney also argues that the applied-for mark, as displayed on Applicant's specimen below, "just conveys the contents of the package to consumers, and does not show any indication of source that may be perceived by the general public."⁶ 9 TTABVUE 7.



Applicant contends that the proposed mark is not merely informational, but is suggestive and capable of showing source. This argument is inapposite. The standard

⁶ In the Amendment to Allege Use, Applicant describes the specimen as "photographs of product packaging for a corresponding product."

for a failure-to-function refusal is not whether the proposed mark is suggestive rather than descriptive, but whether the relevant public will recognize it as a trademark identifying only one source. *See In re Phoseon Tech., Inc.*, 103 USPQ2d 1822, 1827 (TTAB 2012) (noting that the critical inquiry in determining whether a proposed mark function as a trademark is the “commercial impression it makes on the relevant public (e.g., whether the term sought to be registered would be perceived as a mark identifying the source of the goods or merely as an informational phrase”). The evidence outlined above shows use of the wording (and its equivalents) in the applied-for mark by others in the industry to inform purchasers of the quality, ingredients and geographic origin of crabmeat and other food products, including lobster, fish and seafood. *D.C. One Wholesaler, Inc. v. Chien*, 120 USPQ2d 1710, 1716 (TTAB 2016) (widespread informational use of the wording by others indicates consumers would not associate it with a particular source). And the specimen displays the proposed mark on the side of the product container in a manner that simply informs purchasers that the package contains 100% pure *Callinectes* crabmeat from North America. This evidence supports a finding that the proposed mark fails to function as a mark for the identified goods. *See Eagle Crest*, 96 USPQ2d at 1229 (“Slogans and other terms that are considered to be merely informational in nature, or to be common laudatory phrases or statements that would ordinarily be used in business or in the particular trade or industry, are not registrable.”); *Aerospace Optics*, 78 USPQ2d at 1864 (SPECTRUM failed to function as a trademark for illuminated pushbutton switches

because it was used in a manner that merely informed potential purchasers of the multiple color feature of the goods).

Applicant has attempted to overcome the failure-to-function refusal by variously amending to the Supplemental Register, claiming that the proposed mark has acquired distinctiveness, and asserting that the proposed mark is inherently distinctive. However, matter that does not indicate the source or origin of the identified goods and distinguish them from those of others cannot be registered because it does not meet the statutory definition of a trademark. *See* Sections 1, 2 and 45 of the Trademark Act. This is so regardless of the register on which registration is sought, or a claim of acquired distinctiveness.⁷ *See In re Boston Beer Co., L.P.*, 198 F.3d 1370, 53 USPQ2d 1056, 1058 (Fed. Cir. 1999) (THE BEST BEER IN AMERICA “is so highly laudatory and descriptive of the qualities of its product that the slogan does not and could not function as a trademark” and is incapable of acquiring distinctiveness under Section 2(f)); *In re Helena Rubenstein, Inc.*, 410 F.2d 438, 161 USPQ 606, 608 (CCPA 1969) (a proposed mark “cannot properly be registered as a trademark, even on the Supplemental Register, unless it is intended primarily to indicate origin of the goods and is of such a nature that the ordinary purchaser would be likely to consider that it indicated such origin”).

⁷ Consequently, we need not consider Applicant’s claim of acquired distinctiveness under Section 2(f) of the Trademark Act based on ownership of a prior registration and the declarations of Applicant’s President, Edward M. Dixon, and three “knowledgeable customer/industry representatives.” Applicant submitted this evidence with the Request for Reconsideration, asserting, in the alternative, that the applied-for mark is inherently distinctive based on the four declarations. 4 TTABVUE. We will address the declarations in our discussion of public perception.

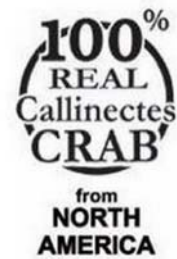
The declarations of Mr. Dixon and the three “knowledgeable customer/industry representatives” have limited probative value as evidence to demonstrate that the applied-for mark is perceived as indicating a single source for the identified “crabmeat.” Mr. Dixon’s declaration is replete with general and conclusory statements, omits any documentary evidence to support claims about Applicant’s sales figures and “confidential” advertising expenditures, and provides no context for the figures. The three other declarants attest to their familiarity with Applicant and its products, and their personal experience with Applicant’s use of the applied-for mark as a mark to identify Applicant as the source of the products. However, three declarations is a rather small number, and it is not clear that the declarations reflect the perceptions of the relevant purchasers. This lack of evidence is particularly problematic given the testimony of Mr. Dixon about the alleged “enormous commercial value and recognition attributable to the trademark,” which is “apparent by the significant effort, sales and expenditures to publicize the trademark” for the identified crabmeat, and his testimony that “[t]hese efforts have served to fortify the fact that the public and the relevant trades are well aware of the highly unique and readily recognizable trademark itself.” Request for Reconsideration, 4 TTABVUE 12, Dixon Decl. ¶ 2.

Having considered all of the evidence of record, we find that due to the common use by a number of third parties in the industry of wording that is the same as or similar to the applied-for mark to convey information about their products, which is consistent with Applicant’s own use of the wording on the specimen, Applicant’s

proposed mark would not be perceived as identifying a particular source of goods. The inclusion of stylization and a minimal background design does not alter our conclusion regarding consumer perceptions of the proposed mark as a whole. *Cf. D.C. One Wholesaler*, 120 USPQ2d at 1717 (stylized applied-for mark with design element



failed to function as a mark); *Guess? Inc. v. Nationwide Time Inc.*, 16 USPQ2d 1804, 1805 (TTAB 1990) (a common, geometric shape, particularly one serving as a carrier or background design element, is not usually considered distinctive). In light of the record as a whole, Applicant's evidence is insufficient to demonstrate that consumers recognize the applied-for mark as indicating the source of the identified goods rather than as merely informational. *See Eagle Crest*, 96 USPQ2d at 1229. Accordingly, Applicant's proposed mark fails to function as a trademark for Applicant's goods.



Decision: The refusals to register Applicant's proposed mark are affirmed.