

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Mailed: January 29, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re Nouveau Bakery LLC*

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Serial No. 87753592

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Thomas D. Foster of TDFoster - Intellectual Property Law,  
for Nouveau Bakery LLC.

Jessica Ellinger Fathy, Trademark Examining Attorney, Law Office 110,  
Chris A. F. Pedersen, Managing Attorney.

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Before Zervas, Heasley and Lebow,  
Administrative Trademark Judges.

Opinion by Lebow, Administrative Trademark Judge:

Applicant, Nouveau Bakery LLC, applied to register the mark CROISSANT TOAST, in standard characters, on the Principal Register for “bakery products” in International Class 30.<sup>1</sup> The Trademark Examining Attorney refused registration under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that the mark is merely descriptive of the identified goods. When the refusal was made

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<sup>1</sup> Application Serial No. 87753592 was filed on January 12, 2018 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant’s allegation of a bona fide intention to use the mark in commerce.

final, Applicant appealed to this Board and requested reconsideration, which the Examining Attorney denied. The appeal is fully briefed. We affirm the refusal.

### **I. Applicable Law**

Section 2(e)(1) of the Trademark Act prohibits registration on the Principal Register of “a mark which, (1) when used on or in connection with the goods of the applicant is merely descriptive ... of them,” unless the mark has been shown to have acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f). A mark is “merely descriptive” within the meaning of Section 2(e)(1) “if it immediately conveys information concerning a feature, quality, or characteristic of the goods or services for which registration is sought.” *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1709 (Fed. Cir. 2017) (citing *In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)).

Whether a mark is merely descriptive is “evaluated ‘in relation to the particular goods for which registration is sought, the context in which it is being used, and the possible significance that the term would have to the average purchaser of the goods because of the manner of its use or intended use,’” *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (quoting *Bayer*, 82 USPQ2d at 1831), and “not in the abstract or on the basis of guesswork.” *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1513 (TTAB 2016) (citing *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978)). We ask “whether someone who knows what the goods ... are will understand the mark to convey information about them.” *Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1374 (Fed. Cir. 2018) (quoting *DuoProSS Meditech Corp. v. Inviro Med. Devices*,

*Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012) (internal quotation omitted)). A mark is suggestive, and not merely descriptive, if it requires imagination, thought, and perception on the part of someone who knows what the goods are to reach a conclusion about their nature from the mark. *See, e.g., Fat Boys*, 118 USPQ2d at 1515.

We “must consider the commercial impression of a mark as a whole.” *Real Foods*, 128 USPQ2d at 1374 (quoting *DuoProSS*, 103 USPQ2d at 1757 (citation omitted)). “In considering [a] mark as a whole, [we] ‘may not dissect the mark into isolated elements,’ without ‘consider[ing] ... the entire mark.’” *Id.* But we “may weigh the individual components of the mark to determine the overall impression or the descriptiveness of the mark and its various components.” *Id.* (quoting *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370, 1372 (Fed. Cir. 2004)). Indeed, we are “required to examine the meaning of each component individually, and then determine whether the mark as a whole is merely descriptive.” *DuoProSS*, 103 USPQ2d at 1758.

“Evidence of the public’s understanding of [a] term . . . may be obtained from any competent source, such as purchaser testimony, consumer surveys, listings in dictionaries, trade journals, newspapers[,] and other publications.” *Real Foods*, 128 USPQ2d at 1374 (quoting *Royal Crown Co. v. Coca-Cola Co.*, 892 F.3d 1358, 127 USPQ2d 1041, 1046 (Fed. Cir. 2018)). “These sources may include [w]ebsites, publications and use ‘in labels, packages, or in advertising material directed to the goods [or services].’” *N.C. Lottery*, 123 USPQ2d at 1710 (quoting *Abcor Dev.*, 200

USPQ at 218).

## II. Evidence and Argument

The Examining Attorney provided dictionary evidence showing that a “croissant” is a “flaky rich crescent-shaped roll,” and “toast” is “sliced bread browned on both sides by heat.”<sup>2</sup> She highlights a page from Applicant’s website “indicating the offering of ‘packaged breads and croissants’ in close proximity to the use of the mark CROISSANT TOAST.”<sup>3</sup> The same webpage has the following statement: “Toast it! All of our breads make excellent toast, but the Super Flaky Croissant Toast might be the winner. It’s already sliced and the perfect size to pop right in the toaster. A toasted croissant, voila!”<sup>4</sup> Excerpts from that page are shown below:<sup>5</sup>



<sup>2</sup> April 30, 2018 Office Action, TSDR 5-25.

<sup>3</sup> November 25, 2018 Final Office Action, TSDR 8-10.

<sup>4</sup> *Id.* at 10.

<sup>5</sup> *Id.*



Based on the foregoing, the Examining Attorney asserts that “it is clear from the evidence of record that the Applicant’s mark is a combination of the descriptive words ‘croissant’ and ‘toast.’ Specifically, the image of the goods shows croissant style bread that is sliced for making toast, namely, ‘croissant toast.’”<sup>6</sup> She concludes that CROISSANT TOAST “is merely a combination of two descriptive terms that are descriptive of applicant’s goods and do not create a unique, incongruous, or nondescriptive meaning in relation to the goods.”<sup>7</sup>

Applicant argues that CROISSANT TOAST “is suggestive as its internal inconsistency force consumers to exercise a higher level of thinking to perceive its meaning, which is not immediately clear or obvious, let alone merely descriptive.”<sup>8</sup> According to Applicant, “the word CROISSANT brings to mind a soft, moist and flaky

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<sup>6</sup> 9 TTABVUE 5 (Examining Attorney’s Brief).

<sup>7</sup> *Id.* at 4.

<sup>8</sup> 7 TTABVUE 6 (Applicant’s Brief).

crescent shaped bakery product,” whereas “[t]he word TOAST, in contrast, immediately brings to mind a hard, stiff, loaf shaped sliced bakery product.”<sup>9</sup>

Accordingly, Applicant wonders

How in the world can such a delicate and flaky crescent shaped bakery product as shown below be made into a slices of hard toast? How would one cut the croissant without destroying it in the process? How can you cut a crescent shaped croissant into the typical loaf shaped slices so that they can fit into a toaster? How can you toast a croissant without burning it? All these questions readily come to mind when faced with the term CROISSANT TOAST.<sup>10</sup>

As a result of these questions that purportedly come to mind, Applicant concludes that the mark is “incongruous” because “[t]he terms CROISSANT and TOAST seemingly describe two different types of products and require imagination, thought and perception to reach a conclusion as to the nature of the goods. The mark is therefore suggestive and not merely descriptive.”<sup>11</sup> To bring home the point, Applicant provides the following image in its brief:<sup>12</sup>



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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 8.

<sup>12</sup> *Id.* at 7.

### III. Discussion

As noted above, we are “required to examine the meaning of each component individually, and then determine whether the mark as a whole is merely descriptive.” *DuoProSS*, 103 USPQ2d at 1758. If each component is individually descriptive of the identified goods, we must then determine whether their combination “conveys any distinctive source-identifying impression contrary to the descriptiveness of the individual parts.” *Fat Boys*, 118 USPQ2d at 1515-16 (quoting *Oppedahl & Larson*, 71 USPQ2d at 1372). If each word instead “retains its merely descriptive significance in relation to the goods, the combination results in a composite that is itself merely descriptive.” *Id.* at 1516 (citing *In re Tower Tech., Inc.*, 64 USPQ2d 1314, 1317-18 (TTAB 2002)).

The record makes clear that CROISSANT TOAST immediately describes a type of bread that is used for making toast. Indeed, Applicant’s advertising cries out for toasting: “Toast it! All of our breads make excellent toast, but the Super Flaky Croissant Toast might be the winner. It’s already sliced and the perfect size to pop right in the toaster. A toasted croissant, voila!”<sup>13</sup> Applicant’s packaging begs for it:<sup>14</sup>



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<sup>13</sup> November 25, 2018 Final Office Action, TSDR 10.

<sup>14</sup> *Id.*

Notably, Applicant emphasizes the croissant and toast features of its bakery goods on its website under its product mark SUPER FLAKY™:



When the individual terms CROISSANT and TOAST are combined as CROISSANT TOAST, they convey no source-identifying impression contrary to their descriptiveness. *Fat Boys*, 118 USPQ2d at 1515-16. Applicant has not pointed to any new meaning or unique commercial impression resulting from the combination of CROISSANT and TOAST. The two terms retain their descriptive significance and thus the proposed mark, as a whole, is merely descriptive. A consumer need not wonder how croissants sliced for toasting are made, whether they can fit into a toaster, or how they avoid burning once there, since the answers to those questions are answered by the proposed mark itself. “[S]omeone who knows what the goods ... are will understand the mark to convey information about them,” *Real Foods*, 128 USPQ2d at 1374.

We find that CROISSANT TOAST merely describes a feature or characteristic of Applicant’s bakery product: croissants sliced for making toast. The term therefore cannot be appropriated by Applicant; it must remain available to competitors. *See In*



*re Styleclick.com Inc.*, 58 USPQ2d 1523, 1527 (TTAB 2001) (“The intent of Section 2(e)(1) is to protect the competitive needs of others, that is, descriptive words must be left free for public use”) (internal punctuation and citation omitted). Applicant correctly notes that “any doubt with respect to whether a mark is descriptive or suggestive must be resolved in favor of the applicant, and borderline cases should pass to publication.”<sup>15</sup> However, we have no doubt that the proposed mark merely describes Applicant’s bakery goods.

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

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<sup>15</sup> 7 TTABVUE 8 (Applicant’s Brief).