

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: March 15, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Low Carbon Technologies, LLC

Serial No. 88632729

Zachary A.P. Oubre of McAfee & Taft, for Low Carbon Technologies, LLC.

Sara Anne Helmers, Trademark Examining Attorney, Law Office 130,
John Lincoski, Managing Attorney.

Before Kuhlke, Adlin and Lebow,
Administrative Trademark Judges.

Opinion by Lebow, Administrative Trademark Judge:

Applicant, Low Carbon Technologies, LLC, seeks to register the mark LOW CARBON BEEF (“BEEF” disclaimed), in standard characters, as a certification mark on the Principal Register for “beef processing” in Class B.¹ Applicant states in the

¹ Application Serial No. 88632729 (“the Application”) was filed on September 26, 2019, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s allegation of a bona fide intention to use the mark in commerce. Applicant amended the application to allege use during prosecution, ultimately claiming April 17, 2021 as its date of first use anywhere and in commerce. The application originally included beef in Class A, also as a certification mark, but that class was divided out into child application Serial No. 88982329 on July 12, 2021.

Application’s amended certification statement that the mark, “as used or intended to be used by persons authorized by the certifier, certifies or is intended to certify that the goods and/or services provided meet certain environmental standards determined by the certifier.”

The Trademark Examining Attorney has finally refused registration on grounds that the mark merely describes a feature of the services being certified under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), and the specimen of use submitted by Applicant does not show the applied-for mark as actually used in commerce as a certification mark for Class B under Sections 1, 4, and 45 of the Trademark Act, 15 U.S.C. §§ 1052, 1052, 1127.

Applicant filed an appeal that is now fully briefed. For the reasons discussed below, we affirm both refusals to register.

I. Mere Descriptiveness

Section 2(e)(1) of the Trademark Act precludes registration on the Principal Register of terms that merely describe an applicant’s goods or services. 15 U.S.C. § 1052(e)(1). Terms that are merely descriptive cannot be registered on the Principal Register unless they acquire distinctiveness. *Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1373 (Fed. Cir. 2018) (citing 15 U.S.C. § 1052(f).

“A mark is merely descriptive if it immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used.”

TTABVUE and Trademark Status and Document Retrieval (“TSDR”) citations in this opinion refer to the docket and electronic file database for the involved application and are to the downloadable .PDF version of the documents.

Brooklyn Brewery Corp. v. Brooklyn Brew Shop, LLC, 17 F.4th 129, 2021 USPQ2d 1069, at *12 (Fed. Cir. 2021) (quoting *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1728 (Fed. Cir. 2012) and *In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)) (internal punctuation omitted). “The major reasons for not protecting such [merely descriptive] marks are: (1) to prevent the owner of a mark from inhibiting competition in the sale of particular goods; and (2) to maintain freedom of the public to use the language involved, thus avoiding the possibility of harassing infringement suits by the registrant against others who use the mark when advertising or describing their own products.” *In re Stereotaxis Inc.*, 429 F.3d 1039, 77 USPQ2d 1087, 1090 (Fed. Cir. 2005) (quoting *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 217 (CCPA 1978)).

“The analysis regarding the descriptiveness of a certification mark is the same as that with respect to a trademark or service mark.”² See *In re Nat’l Ass’n of Legal Secretaries (Int’l)*, 221 USPQ 50, 52 (TTAB 1983) (certification marks subject to “the Section 2 qualifications and bans, including those of Section 2(e)”); see also *In re Nat’l Ass’n of Veterinary Technicians in Am., Inc.*, 2019 USPQ2d 269108, at *1 (TTAB 2019). It is the Examining Attorney’s burden to show that a term is merely descriptive of an applicant’s goods or services. *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1010 (Fed. Cir. 1987). Once a prima facie case is established, the burden of rebuttal shifts to Applicant. *Id.*; *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1513 (TTAB 2016).

² 6 TTABVue 3 (Examining Attorney’s Brief).

A. Arguments and Analysis

The Examining Attorney contends that LOW CARBON BEEF “is merely descriptive because it immediately conveys information concerning a feature of the certified services, namely, that the certified beef processing services produce fewer greenhouse gas emissions than is typical in the beef processing industry.”³ “Specifically,” he asserts, “the phrase LOW CARBON is commonly used in the food industry to indicate that the relevant food - here, BEEF – is produced with a relatively small carbon footprint. Consumers accustomed to seeing such terminology used to describe food, including beef, will immediately understand that the phrase LOW CARBON BEEF describes a feature of the certified beef processing services.”⁴

The Examining Attorney begins by providing a definition from the OXFORD ENGLISH DICTIONARY which defines “low carbon” as “causing or resulting in only a relatively small net release of carbon dioxide into the atmosphere.”⁵

The Examining Attorney also provides printouts from a number of third-party websites showing that “in the food industry[,] the phrase LOW CARBON is used to describe food that is produced with a smaller-than-typical carbon footprint over the lifecycle of the product[.]”⁶ For example:

- Bon Appetit (eatlowcarbon.org) tells consumers concerned about climate change that “[t]he food system is responsible for a third of global greenhouse gas emissions”

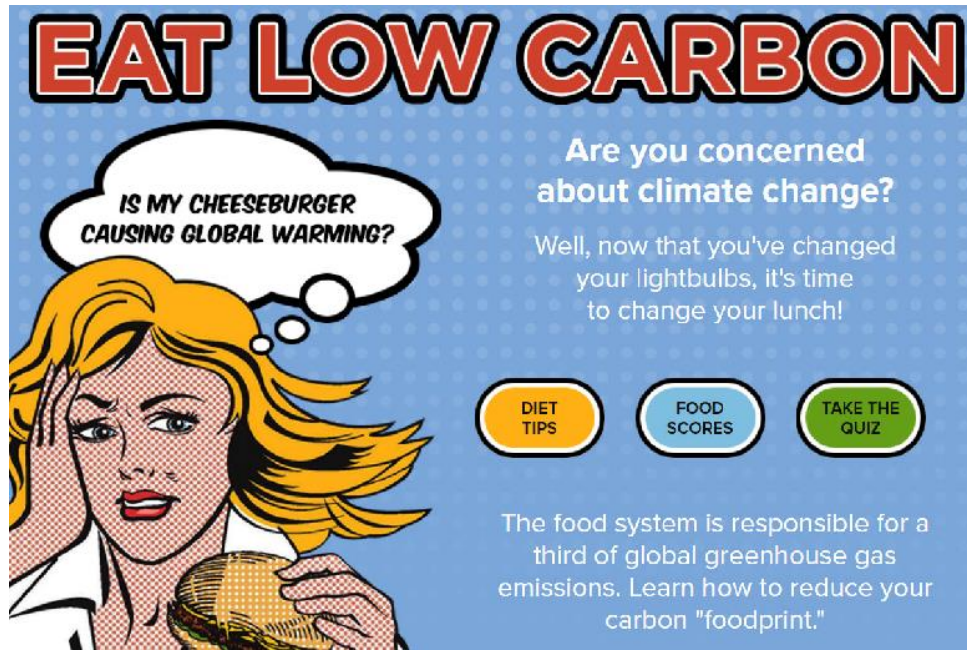
³ *Id.*

⁴ *Id.* at 3-4.

⁵ October 24, 2019 Office Action, TSDR 26.

⁶ 6 TTABVUE 6-7 (Examining Attorney’s Brief).

and encourages them to “[l]earn how to reduce [their] carbon ‘footprint.’”:⁷



• E – The Environmental Magazine (emagazine.com) has an article titled “Low-Carbon Diet: The Easy Way to Fight Global Warming,” that describes a “low-carbon diet” as one in which the dieter “limit[s] foods that generate a lot of carbon (CO₂) emissions in their production and distribution,” and explains that the Eat Low Carbon website’s food scores were generated based on “Life Cycle Assessments [that] measur[e] the amount of CO₂ emitted during a given food product’s entire life cycle”;⁸

• Shrink That Footprint (shrinkthatfootprint.com) has a video titled “What is a low carbon food?” accompanied by an article that describes a “low carbon food” as “one that has production emissions of 1 kg CO₂e/kg or lower”;⁹

• The University of Michigan’s Center for Sustainable Systems (css.umich.edu)

⁷ October 24, 2019 Office Action, TSDR 13.

⁸ *Id.* at 14-15.

⁹ *Id.* at 22-23.

provides a “Carbon Footprint Factsheet” which states that “[a] carbon footprint is the total greenhouse gas (GHG) emissions caused directly and indirectly by an individual, organization, event or product”; explains that a product’s carbon footprint is calculated over its lifecycle; and indicates that “[a] vegetarian diet greatly reduces an individual’s carbon footprint, but switching to less carbon intensive meats can have a major impact as well”;¹⁰

- Wikipedia has an article under the heading “Low-carbon diet,” which characterizes the diet as one that “minimizes the emissions released from the production, packaging, processing, transport, preparation and waste of food”;¹¹ and

- Refinery29 (refinery29.com) has an article titled “Can The Low-Carbon Diet Cure Our Climate Crisis” that discusses how proponents of a low carbon diet “are encouraged by the growth of animal product alternatives” and notes how Bon Appetit Management Company in 2007 launched its Low Carbon Diet program to reduce the food service sector’s contribution to climate change.”¹²

In view of such evidence, the Examining Attorney concludes that: (i) LOW CARBON “is a descriptive term of art in the food industry, describing food produced with small-than-average greenhouse gas emissions; (ii) BEEF is clearly descriptive of Applicant’s “beef processing” certification services, as conceded by Applicant’s disclaimer of that term; and (iii) the combined phrase LOW CARBON BEEF “remains

¹⁰ *Id.* at 29-33.

¹¹ *Id.* at 36.

¹² May 28, 2020 Office Action, TSDR 10-16.

descriptive of the certified services.”¹³

Applicant disagrees LOW CARBON BEEF is merely descriptive, asserting that it is “at least suggestive”¹⁴ Applicant’s services, it maintains, “do not evaluate ‘carbon emissions’ or specific characteristics of beef itself” and instead “certify numerous steps of beef processing and whether or not they meet numerous, non-obvious criteria that are part of its certification proceeding to reduce *overall greenhouse gas emissions*.”¹⁵ Applicant concludes that:

[A] consumer viewing a beef product bearing the Mark would not understand these non-obvious criteria, that they pertain to GHG emissions as opposed to carbon emissions, whether the certification concerns emissions produced by the cattle processed or the processing of that cattle or some other aspect related to the product. Accordingly, the significance of Applicant’s Mark in relation to Applicant’s Services require(s) imagination, thought, or perception to reach a conclusion as to the nature of those goods or services” causing the mark *not* to be merely descriptive.¹⁶

We are not persuaded by this argument. As the Examining Attorney explains, citing *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 1173, 71 USPQ2d 1370, 1371 (Fed. Cir. 2004) (citing *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 1346, 57 USPQ2d 1807, 1812 (Fed. Cir. 2001)), “a mark may be merely descriptive even if it does not describe the ‘full scope and extent’ of the [certified] services.” *See also* TRADEMARK MANUAL OF EXAMINING Procedure (TMEP) §1209.01(b) (Nov. 2023). It is enough if a mark describes only one significant function, attribute, or property. *In re*

¹³ 6 TTABVUE 7-8 (Examining Attorney’s Brief).

¹⁴ *Id.* at 6.

¹⁵ *Id.* at 7.

¹⁶ *Id.*

The Chamber of Commerce of the U.S., 675 F.3d 1297, 1300, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012).

Furthermore, the Examining Attorney observes, “descriptiveness is evaluated from the perspective of a consumer who knows what the certified services are.”¹⁷ Thus, “[t]he question is not whether someone presented only with the mark could guess what the certified services are, but ‘whether someone who knows what the goods and[or] services are will understand the mark to convey information about them.’”¹⁸ *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 1254, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012).

Based on the record evidence, we agree with the Examining Attorney’s conclusion that “a consumer who knows that the certified services are beef processing services will understand the mark LOW CARBON BEEF to convey information about the carbon footprint of the services. They need not be aware of the specific criteria that applicant uses to evaluate beef processing services because they will understand that the mark describes services with a relatively smaller carbon footprint than other similar services.”¹⁹

Applicant also argues that “LOW CARBON and/or the combination of LOW CARBON and BEEF is incongruent” According to Applicant, while “low carbon” is defined as “causing or resulting in only a relatively small net release of carbon

¹⁷ *Id.* at 4.

¹⁸ *Id.*

¹⁹ *Id.*

dioxide into the atmosphere,” BEEF “is commonly understood to have exceptionally high greenhouse gas emissions.” “[T]his incongruity,” asserts Applicant, “is ‘a strong indication that [the] [M]ark is suggestive rather than descriptive.’”²⁰

The Examining Attorney argues, in response, that Applicant appears to use an absolute standard when the term LOW CARBON, rather than a relative one, which is more apt. “This appears to be the interpretation proposed by applicant in its brief, where applicant emphasized the word ‘small’ in the definition and contrasted that with beef being known to have high GHG emissions. However, this interpretation ignores the word ‘relatively’ which precedes ‘small’ in the definition”²¹

He asserts that “even the Wired article, which applicant relies upon as support, recognizes that consumers will view LOW CARBON BEEF as a relative standard,” not an absolute one.²² The article discusses how “[a] steak labeled as low-carbon is likely to have produced many times more emissions than other foods that a shopper might reach for as an alternative” and explains that “[a] low-carbon label ‘implies that it’s lower carbon than something else that they could pick up right there.’ Most of the time, for beef, that simply won’t be true.”²³ Here, asserts the Examining Attorney, “the record clearly demonstrates that consumers will understand LOW CARBON BEEF as describing beef processing that produces fewer GHG emissions than other types of beef processing.” We agree, and find no incongruity in the term

²⁰ *Id.* at 7-8.

²¹ *Id.* at 8.

²² *Id.*

²³ October 21, 2022 Office Action, TSDR 13-16.

LOW CARBON BEEF that detracts from its mere descriptiveness.

The Examining Attorney points to additional evidence of record that he asserts “leaves no doubt that the mark is being used in a descriptive manner”:

- Applicant’s website indicates that “Low Carbon Beef protocols are designed to make high-quality beef with 50% **lower** emissions. ... We **reduce** emissions using better breeding practices and sustainable herd management. With Low Carbon Beef protocols, cattle ranchers can be part of the climate change solution!”:



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- Applicant’s website promotes its programs as “produc[ing] premium quality flavorful beef with **significantly lower** emissions”:²⁵



- Applicant’s promotional materials, titled “**Lowering** the Carbon Footprint of Beef,” explain Applicant’s view that “beef can be a solution for climate change. That’s why we developed low carbon management practices proven to produce beef in a way

²⁴ October 24, 2019 Office Action, TSDR 20 (emphasis added).

²⁵ *Id.* at 23 (emphasis added).

that reduces the environmental impact. ... To be part of the climate change solution, we certify beef that is produced with **at least 10% lower** GHG emissions than industry standard - and in some cases the beef production is carbon negative.”²⁶

- Finally, Applicant’s news release on its website indicates that Applicant was approved as a USDA Process Verified Program Service Provider and that “Low Carbon Beef, a cattle certification program that enables beef farmers and ranchers to earn premiums by **reducing carbon emissions** of their cattle operation.”²⁷ As the webpage explains, “the Low Carbon Beef (LCB) Certification is designed to provide a quantifiable measure for cattle raised with a reduced carbon footprint.”²⁸

B. Conclusion on Mere Descriptiveness

Applicant argues that “[a]t a minimum ... there is doubt as to whether the Mark is merely descriptive” and that “such doubt must be resolved in its favor.”²⁹ We disagree and have no doubt that consumers will view the term LOW CARBON BEEF as merely descriptive because it immediately conveys that Applicant’s services certify methods of beef processing that result in fewer greenhouse gas emissions than is typical in the beef processing industry. As explained by the Examining Attorney and supported by the record, “the phrase LOW CARBON is commonly used in the food industry to indicate that the relevant food - here, BEEF – is produced with a relatively

²⁶ June 3, 2021 Response to Office Action, TSDR 7 (emphasis added).

²⁷ February 3, 2022 Request for Reconsideration, TSDR 28.

²⁸ *Id* (emphasis added).

²⁹ 4 TTABVUE 8 (Applicant’s Brief).

small carbon footprint. Consumers accustomed to seeing such terminology used to describe food, including beef, will immediately understand that the phrase LOW CARBON BEEF describes a feature of the certified beef processing services.”³⁰

II. Specimen of Use

We turn now to the Examining Attorney’s additional refusal to register the mark LOW CARBON BEEF on the ground that the specimen of use submitted by Applicant does not show use of the mark as a certification mark for Class B services.

Trademark Rule 2.56(b)(5) provides that the specimen of use for a certification mark must show how an authorized party other than the owner actually uses the mark in commerce to certify “regional or other origin, material, mode of manufacture, quality, accuracy, or other characteristics of that person’s goods or services; or that members of a union or other organization performed the work or labor on the goods or services.” 37 C.F.R. §2.56(b)(5); *see also* TMEP §1306.02(a)(i)(B).

A specimen must show use of a mark in a way that would create a direct association between the mark and the services offered in the minds of potential consumers. *In re Universal Oil Prods. Co.*, 476 F.2d 653, 177 USPQ 456, 457 (CCPA 1973); TMEP § 1301.04(f)(ii); *see also JobDiva*, 121 USPQ2d at 1126; *In re Adver. & Mktg. Dev., Inc.*, 821 F.2d 614, 2 USPQ2d 2010, 2014 (Fed. Cir. 1987). To show a direct association, specimens consisting of advertising or promotional materials must (1) explicitly reference the services and (2) show the mark used to identify the services and their source. *In re WAY Media, Inc.*, 118 USPQ2d 1697, 1698 (TTAB 2016) (citing

³⁰ 6 TTABVUE 3-4 (Examining Attorney’s Brief).

In re Osmotica Holdings Corp., 95 USPQ2d 1666, 1668 (TTAB 2010)); TMEP § 1301.04(f)(ii). Although the exact nature of the services does not need to be specified in the specimen, there must be something which creates in the mind of the purchaser an association between the mark and the applied-for services. *In re Adair*, 45 USPQ2d 1211, 1215 (TTAB 1997) (quoting *In re Johnson Controls Inc.*, 33 USPQ2d 1318, 1320 (TTAB 1994)).

Applicant provided the following substitute specimens with its October 21, 2022 request for reconsideration, which consist of several images of the goods and their packaging as shown in the following representative example:



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³¹ October 21, 2022 Request for Reconsideration, TSDR 18. Applicant filed a first amendment to allege use on November 18, 2020, but withdrew it on June 3, 2021. *See* June 3, 2021 Response to Office Action, TSDR 1. On February 2, 2022, Applicant filed a second amendment to allege use on February 2, 2022 providing printouts from its website as a specimen of use,

As the Examining Attorney notes, this “beef specimen” “consists of a package of beef that includes two labels. One is a standard food label, containing the name of the product, safe handling instructions, and the information that the beef was processed by Donald’s Meat Processing and that it has been inspected and passed by the USDA. The second is a round sticker placed to the side of the standard label, which reads LOW CARBON BEEF at the top, has a design of a cow with leaves for ears in the middle, and text reading “Reduced GHG Emissions* *Low Carbon Beef LLC www.lowcarbonranch.com” at the bottom.³²

Applicant argues that this specimen is proper because it illustrates that:

[T]he United States Department of Agriculture, performed an evaluation of the processing services provided by an authorized user, Donald’s Meat Processing. In support of this contention, as mentioned above, record evidence shows that the Mark is associated with an approved U.S.D.A. program that allows producers in the industry to use the certification Mark if they can prove their cattle was raised in a manner that emits 10 percent less greenhouse gases, i.e., not carbon emissions alone. See October 21, 2022, Response to Office Action, pp. 1-2, citing WIRED Article.³³

The Examining Attorney, however, rejects the specimen because it “does not associate the mark with the services.”³⁴ Specifically:

which was rejected by the Examining Attorney. That specimen is no longer at issue because it was replaced by the substitute specimen of October 21, 2022. Moreover, Applicant only appeals the Examining Attorney’s refusal to accept the October 21, 2022 specimen: “Applicant ... submits that the Examining Attorney’s refusal to accept the specimen submitted October 21, 2022, as showing the Mark is actually used in commerce as a certification mark for class B is improper.” 4 TTABVUE 9 (Applicant’s Brief). Applicant also does not discuss the website specimen in its brief, thus waiving any appeal with respect to this specimen.

³² 6 TTABVUE 13 (Examining Attorney’s Brief).

³³ 4 TTABVUE 9 (Applicant’s Brief).

³⁴ 6 TTABVUE 14 (Examining Attorney’s Brief).

The beef specimen only refers to beef processing services on the standard food label; the separate sticker containing the applied-for mark does not reference the services. Furthermore, the specimen shows the result of the beef processing services (that is, processed beef) and the mark is used in a manner typical of marks providing information or certifying aspects of the beef, not of the processing services. Additionally, the specimen is likely to be viewed by a consumer interested in purchasing beef not by a consumer looking for beef processing services. As a result, the use of the mark in the beef specimen shows only that the applied-for mark is a certification mark for beef, not that it is a certification mark for beef processing services.³⁵

We agree with the Examining Attorney that there is no direct association shown between the mark LOW CARBON BEEF and the processing services explained by the second label. While “[s]pecimens showing the mark used in rendering the identified services need not explicitly refer to those services in order to establish the requisite direct association between the mark and the services ... ‘there must be something which creates in the mind of the purchaser an association between the mark and the service activity.’” *In re WAY Media*, 118 USPQ2d at 1698 (quoting *In re Johnson Controls, Inc.*, 33 USPQ2d at 1320).

“In the alternative,” Applicant requests that we accept the “Wired Article webpage” discussed above and submitted with Applicant’s office action response of October 21, 2022 “as a substitute specimen that discloses the mark used in commerce by an authorized user as a certification mark in the application.”³⁶ “Specifically,” notes Applicant, “the WIRED Article discloses the Mark as a certification mark approved by the U.S.D.A. for use by producers who raise cattle that emit at least 10

³⁵ *Id.*

³⁶ 4 TTABVUE 9 (Applicant’s Brief).

percent less greenhouse gases into the atmosphere as part of an approved program.”³⁷

As the Examining Attorney notes, however, the Wired article was not submitted as a “verified substitute specimen” and thus cannot be considered as a proper specimen. “ See TMEP § 903.04 (“Generally, when submitting a substitute specimen, the applicant must include an affidavit or declaration under 37 C.F.R. §2.20 verifying that the substitute specimen was in use in commerce as of the pertinent date in 37 C.F.R. §2.59(a)–(b).”). We therefore decline to consider the Wired article as a substitute specimen.”³⁸

Decision: The refusal to register is affirmed under §§ Sections 2(e)(1), and 1, 4, and 45, of the Trademark Act, 15 U.S.C. §§ 1052, 1052, 1127.

³⁷ *Id.*

³⁸ Even if we did consider the article to be a verified specimen, it fails to suffice. As the Examining Attorney notes, “it does not show use of the mark in commerce. The article is merely a report about the applicant and its certification program; it does not show anyone actually using the mark to certify an aspect of the services.” 6 TTABVUE 15 (Examining Attorney’s Brief). Moreover, the identification is for beef processing not beef producing or ranching services.