

This Opinion is Not a
Precedent of the TTAB

Mailed: March 28, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Mush Foods, Inc.

Serial No. 97315576
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Thomas Y. Yee, Jun Hyuk Hong and Matthew Samet of
Perkins Coie LLP,¹
for Mush Foods, Inc.

William Verhosek, Trademark Examining Attorney, Law Office 114,
Nicole Nguyen, Managing Attorney.

—
Before Wellington, Greenbaum, and Casagrande,
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Mush Foods, Inc. (“Applicant”) seeks registration on the Principal Register of the standard character proposed mark MUSH for “Ready-to-eat cereals; Breakfast cereals; all the foregoing made in whole or significant part of oats,” in International Class 30.²

¹ After filing its appeal brief, Applicant filed a revocation of power of attorney, and notice of appearance for new counsel (as identified in caption above). 9 TTABVue.

² Application Serial No. 97315576 was filed on March 16, 2022, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant’s claim of first use anywhere on June 24, 2015 and in commerce on August 20, 2015.

The Trademark Examining Attorney issued a final refusal of registration under Sections 1, 2 and 45 of the Trademark Act (“the Act”), 15 U.S.C. §§ 1051, 1052 and 1127, on the basis that the proposed mark is generic, or alternatively, under Section 2(e)(1) of the Act, 15 U.S.C. §§ 1052(e)(1), on the basis that the proposed mark is merely descriptive and that Applicant has failed to show the proposed mark has acquired distinctiveness under Section 2(f) of the Act, 15 U.S.C. § 1052(f), when used in connection with the goods.

Applicant appealed and requested reconsideration. When the request for reconsideration was denied, the appeal resumed. The appeal is fully briefed. We affirm the genericness refusal to register and therefore do not reach the alternative refusal.

I. Is MUSH Generic for the Identified Goods?

“A generic name--the name of a class of products or services--is ineligible for federal trademark registration.” *U.S. Patent & Trademark Office v. Booking.com B.V.*, 591 U.S. 549, 140 S. Ct. 2298, 2301 (2020). Generic terms are “by definition incapable of indicating source, are the antithesis of trademarks, and can never attain trademark status.” *In re Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 828 F.2d 1567, 1569 (Fed. Cir. 1987), *quoted in In re Cordua Rests., Inc.*, 823 F.3d 594, 599 (Fed. Cir. 2016). “Generic terms are common names that the relevant purchasing public understands primarily as describing the genus of goods or services being sold. They are by definition incapable of indicating a particular source of the goods or services.” *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 1344 (Fed. Cir. 2011) (citations

omitted); *see also Royal Crown Co. v. Coca-Cola Co.*, 892 F.3d 1358, 1366 (Fed. Cir. 2018). “A registration is properly refused if the word is the generic name of any of the goods or services for which registration is sought.” *Cordua Rests.*, 823 F.3d at 605.

Whether a proposed mark is generic rests on its primary significance to the relevant public. *In re Am. Fertility Soc’y*, 188 F.3d 1341, 1347 (Fed. Cir. 1999); *Magic Wand Inc. v. RDB Inc.*, 940 F.2d 638, 640 (Fed. Cir. 1991). Making this determination “involves a two-step inquiry: First, what is the genus of goods or services at issue? Second, is the term sought to be registered ... understood by the relevant public primarily to refer to that genus of goods or services?” *H. Marvin Ginn Corp. v. Int’l Ass’n of Fire Chiefs, Inc.*, 782 F.2d 987, 990 (Fed. Cir. 1986). “[A] term can be generic for a genus of goods or services if the relevant public . . . understands the term to refer to a key aspect of that genus.” *Cordua Rests.*, 823 F.3d at 604.

A. Genus (Genera) of Goods

Because the identification of goods or services in an application defines the scope of rights that will be accorded the owner of any resulting registration under Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b), generally “a proper genericness inquiry focuses on the description of [goods and/or] services set forth in the [application or] certificate of registration.” *Cordua Rests.*, 823 F.3d at 602 (quoting *Magic Wand*, 940 F.2d at 640). In this case, we find that the identification of goods, “ready-to-eat cereals; breakfast cereals; all the foregoing made in whole or significant part of oats,” appropriately expresses the genus or genera of goods at issue.

Thus, the ultimate inquiry is whether the relevant public understands MUSH to refer to the identified goods. Based on this record, the relevant consumer includes members of the general public looking to purchase “ready-to-eat cereals” or “breakfast cereals” made entirely or in significant part of oats. *Loglan Inst. Inc. v. Logical Language Grp.*, 962 F.2d 1038, 1041 (Fed. Cir. 1992) (quoting *Magic Wand*, 940 F.2d at 641).

B. Does the Relevant Public Understand MUSH to Refer to the Genus?

“Evidence of the public’s understanding of the term may be obtained from any competent source, such as purchaser testimony, consumer surveys, listings in dictionaries, trade journals, newspapers and other publications.” *Merrill Lynch*, 828 F.2d at 1570; *see also Cordua Rests.*, 823 F.3d at 599. In some cases, dictionary definitions and an applicant’s own recitation of goods or services may suffice to show genericness. *In re Gould Paper Corp.*, 834 F.2d 1017, 1019 (Fed. Cir. 1987); *see also Am. Fertility Soc’y*, 188 F.3d at 1346.

The Examining Attorney submitted the dictionary definition “mush (n.) ... a thick porridge made with cornmeal boiled in water or milk.”³ We take judicial notice of the definition of “porridge”: “(n.) ... a soft food made by boiling oatmeal or another cereal in water or milk.”⁴ In other words, “mush” is defined in terms of being a “thick porridge,” and “porridge” is a food made by boiling oatmeal. Indeed, another

³ MERRIAM-WEBSTER DICTIONARY; attached to June 29, 2022 Office Action, TSDR pp. 5-6.

⁴ THE AMERICAN HERITAGE DICTIONARY (www.ahdictionary.com). The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or have regular fixed editions, *see In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff’d*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016), and we do so here.





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dictionary definition in the record defines “oatmeal mush” as: “noun ... US ... porridge made with oatmeal.”⁵

In addition, the Examining Attorney submitted Internet evidence showing third-party use of the term “mush” in connection with food items made of oatmeal, including the following recipe excerpts (arrows provided for emphasis):

⁵ OXFORD LEXICO US DICTIONARY (www.lexico.com); attached to June 29, 2022 Office Action, TSDR p. 17.

Banana Spice Oatmeal Mush

5 of 5 (1)
MEMBER RATINGS 

Introduction

I created this recipe because I wanted a complete breakfast made in one pot. All the ingredients in this recipe are combined at once before heating. The resulting product is aptly named "Mush". The texture may be off-putting to some people, but I actually like mush. Bananas well integrated into my oatmeal.

Minutes to Prepare: 1
Minutes to Cook: 8
Number of Servings: 1

Ingredients

- 1/3 cup old fashion oats
- 1 cup nonfat milk
- 1/2 medium banana sliced into disks
- 1 tbsp brown sugar
- 1/4 tsp cinnamon or pumpkin spice or Penzey's Cake Spice

Directions

Combine all ingredients into one pot. Cook on medium high heat until the mixture starts to boil, stirring occasionally. Turn the heat down so that mixture is just bubbling. Cook for about 5 minutes, stirring frequently, until mush reaches the desired consistency. Remove from heat and let the mixture stand for 2 minutes before serving.

Serving Size: Makes one serving
Number of Servings: 1

Nutritional Info

| |
|------------------------|
| Servings Per Recipe: 1 |
| Amount Per Serving |
| Calories: 298.1 |
| Total Fat: 2.4 g |
| Cholesterol: 4.9 mg |
| Sodium: 134.8 mg |
| Total Carbs: 63.5 g |
| Dietary Fiber: 4.5 g |
| Protein: 12.5 g |

[View full nutritional breakdown of **Banana Spice Oatmeal Mush** calories by ingredient](#)

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⁶ Recipe taken from website "SparkRecipes" (www.recipes.sparkpeople.com); attached to June 29, 2022 Office Action, TSDR p. 20.

HOW TO MAKE MUSH AND PORRIDGE

3 Comments

Mush and porridge were cheap, nourishing meals in the 1800s, but the grains had to be cooked many hours. There were no instant hot cereal mixes like there are today. Mush and porridge were often cooked the night before in order to be ready for breakfast.

Print PDF

INFORMATION BELOW FROM 1800s COOKBOOKS

MUSH AND PORRIDGE

Mush is meal or grain cooked in water to the consistency of rather thin pudding. The most important point connected with the preparation of these is thoroughness in the cooking. The goodness of mush depends greatly on its being long and thoroughly boiled.

If sufficiency cooked, it is wholesome and nutritious, but exactly the reverse if made in haste. It is not too long to have it altogether three or four hours over the fire. Mushes are best cooked the day before they are needed, as long cooking improves rather than injures the grain.

All of these recipes may be made into porridges by following the rules given for mushes, except that a larger proportion of water should be used. Porridges are like mushes, only thinner.

OATMEAL MUSH

Put one-half cup oatmeal and one-half teaspoon salt into a double boiler and pour on one pint of boiling water. Place the upper vessel of the boiler on the stove, and boil two minutes. This effectually starts the cooking. Then put the upper vessel into the lower, and cook for five hours. The water in the under boiler should boil during this time, and will occasionally need

⁷ From website www.vintagerecipesandcookery.com; attached to June 29, 2022 Office Action, TSDR p. 11.

Applicant acknowledges the above-mentioned record evidence but contends that the Examining Attorney “has failed to meet their burden to show that [MUSH] is generic.”⁸ Specifically, Applicant makes the following arguments:

- “none of the Examiner’s evidence shows that Applicant’s competitors use ‘mush’ to name their goods”⁹
- The Examining Attorney’s evidence “fails to show that relevant consumers ‘primarily use’ Applicant’s Mark generically ‘to refer to the genus’ of Applicant’s Goods.”¹⁰
- “the dictionary definitions cited by the Examin[ing Attorney] are insufficient, as none apply to Applicant’s Goods,” and asserting that “Applicant’s Goods are not a ‘thick porridge made with cornmeal’ or ‘boiled in water or milk.’”¹¹
- “The Examiner’s remaining evidence, consisting of nearly all recipes not clearly linked to U.S. consumers, fails to show that relevant consumers ‘primarily use’ Applicant’s Mark generically ‘to refer to the genus’ of Applicant’s Goods.”¹² In particular, Applicant asserts that “one of the recipe webpages uses ‘mush’ as a designation of source for a mushroom-based food company” and “[a]nother recipe webpage takes information from the 1800s and thus has no bearing on the understanding of consumers today.”¹³ Otherwise, Applicant characterizes the Examiner’s recipe evidence as “com[ing] from websites that are ‘relatively obscure’ and thus do not show that the relevant consumer public refers to ‘mush’ generically.”¹⁴

With respect to Applicant’s argument as to the absence of generic uses of “mush” by competitors, such evidence, while relevant where it exists, is not required where, as here, other evidence shows that consumers will understand the term to refer to

⁸ 11 TTABVUE 2.

⁹ 11 TTABVUE 2.

¹⁰ 11 TTABVUE 4.

¹¹ 11 TTABVUE 3.

¹² 11 TTABVUE 4.

¹³ 11 TTABVUE 4.

¹⁴ 11 TTABVUE 4.

the genus. *See, e.g., In re Gould Paper Corp.*, 834 F.2d 1017, 1018-19 (Fed. Cir. 1987) (affirming the Board’s finding that SCREENWIPE was generic for “pre-moistened, antistatic cloth for cleaning computer and television screens” based on dictionary definitions of the words, third-party registrations, and the applicant’s own generic use of the claimed mark on its specimen, even though there was no evidence of third-party use of the proposed mark); *In re Helena Rubinstein, Inc.*, 410 F.2d 438, 441 (CCPA 1969) (affirming genericness refusal, holding: “we agree with the observation of the examiner that ... ‘Applicant’s long use of the wording, and the fact that others have not used it up to this time, does not make it any less an apt description for the goods, which others in the trade are entitled to use’”); *In re Preformed Prods. Co.*, 323 F.2d 1007, 1008 (CCPA 1963) (affirming genericness refusal, holding that exclusive use, even when coupled with “large sales volume of such goods and its substantial advertising expenditure ... cannot take the common descriptive name of an article out of the public domain and give the temporarily exclusive user of it exclusive rights to it”); *In re Empire Tech. LLC*, 123 USPQ2d 1544, 1564 (TTAB 2017) (rejecting the applicant’s argument that the fact that none of its competitors “use the term [COFFEE FLOUR] at issue” raised “doubt as to whether the term actually primarily refers to a genus of goods or services and whether competitors can effectively identify their goods or services without using that particular phrase,” in view of the “well-settled principle that being the first and only user of a generic term even if the public associates it with the first user does not make an otherwise generic term non-generic.”); *In re Greenliant Sys., Ltd.*, 97 USPQ2d 1078, 1083 (TTAB 2010) (“the fact

that an applicant may be the first or only user of a generic designation ... does not justify registration if the only significance conveyed by the term is that of the category of goods.”); *cf. KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 72 USPQ2d 1833, 1838 (2004) (discussing “the undesirability of allowing anyone to obtain a complete monopoly on use of a descriptive term simply by grabbing it first.”).

As to the dictionary definitions, we disagree with Applicant that they do not apply to Applicant’s goods. As the evidence shows, “mush” is defined as “a thick porridge” and “porridge,” in turn, is defined as “a soft food made by boiling oatmeal” or another cereal. Put plainly, the definitions establish that “mush” is a type of food made by boiling oatmeal or other cereal grains. Indeed, the last definition discussed above makes clear that there is “oatmeal mush,” which is a type of “porridge made with oatmeal.” Applicant’s goods, which include “breakfast cereals ... made in whole or significant part of oats,” are clearly encompassed by these definitions.

Finally, in terms of the Internet evidence showing recipes for different types of “mush” or “oatmeal mush,” we find this evidence is highly probative for purposes of determining the general public’s understanding as to the meaning of “mush” in connection with the goods identified in the application. Although Applicant is correct that some of the recipe evidence is from the website “Vintage Recipes and Cookery,” the information provided on this site is for a contemporary audience. In other words, while the website offers some historical background for the food item called “mush,” it also highlights the ease of preparation and nutritional value information for the

general public today. In addition, other recipe evidence, such as the YouTube screenshots for a video “D.I.Y. Best Oatmeal mush ever!” (with a link to another video “How To Make Mush”) make clear today’s general public is exposed to instructions on how to prepare “mush” and understands the meaning of the term.¹⁵

The Internet recipe evidence, noted above, also undermines Applicant’s factual assertion that there is no evidence that consumers use or understand the term “mush” in the generic sense. In any event, the Federal Circuit has made clear that “[t]he test is not only whether the relevant public would itself use the term to describe the genus, but also whether the relevant public would understand the term to be generic.” *In re 1800Mattress.com IP, LLC*, 586 F.3d 1359, 1364 (Fed. Cir. 2009). And, here, the Internet recipe evidence, in conjunction with the dictionary evidence, makes clear that the public understands the term to refer to the genus.

Upon careful review of the entire record, we disagree with Applicant and ultimately find the evidence submitted by the Examining Attorney establishes that the relevant public understands “mush” to refer to “ready-to-eat cereals” or “breakfast cereals” made entirely, or in significant part, of oats. Although it may be a less common term today than it once was, and it frequently is associated with porridge now, the word “mush” remains in use today to refer to a food item that may be made of oats, such as the goods identified in the application. “Mush” is a common name that the relevant public understands as primarily describing the genus of goods, which

¹⁵ Screenshots attached to January 26, 2023 Office Action, TSDR pp. 15-17.

are ready-to-eat cereals or breakfast cereals made of oats, and thus it is legally incapable of indicating the source of the goods. *Cordua Rests.*, 823 F.3d at 604.

Decision: We affirm the refusal to register Applicant’s proposed mark MUSH on the ground that it is generic for the identified goods.¹⁶

¹⁶ As mentioned above, because we find that the proposed mark MUSH is generic and thus barred from registration, we need not reach the alternative grounds for refusal, namely, whether the mark is merely descriptive and Applicant has failed to show the mark has acquired distinctiveness when used in connection with the goods. That is because generic terms are unregistrable irrespective of how much of the product has been sold or how many people may associate the generic term with the user. *See, e.g., Royal Crown Co. v. Coca-Cola Co.*, 892 F.3d 1358, 1370 (Fed. Cir. 2018) (“[g]eneric terms cannot be rescued by proof of distinctiveness or secondary meaning no matter how voluminous the proffered evidence may be”) (citation omitted); *In re G. D. Searle & Co.*, 360 F.2d 650, 653, 656 (CCPA 1966) (where the term is unregistrable because it is the “generic’ name of the product,” then “inquiry under sections 2(e) and 2(f) is not necessary.”); *accord Roselux Chem. Co. v. Parsons Ammonia Co.*, 299 F.2d 855, 863 (CCPA 1962).