

**THIS OPINION IS NOT A
PRECEDENT OF THE TTAB**

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Bradley Dobos

Serial No. 76680112

Bradley Dobos, *pro se*.

Margaret Power, Trademark Examining Attorney, Law Office
103 (Michael Hamilton, Managing Attorney).

Before Rogers, Bergsman and Wellington, Administrative
Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Bradley Dobos seeks registration on the Principal Register of GOJI BERRY (in standard character format) as a mark for "fruit, namely, raw and unprocessed berry only indigenous to several regions in the Himalayas" in International Class 31.¹ The term "Berry" has been disclaimed in the application. Applicant also amended the application to seek registration based on a claim that the

¹ Application Serial No. 76680112 was filed on July 31, 2007 based upon applicant's allegation of first use in commerce at least as early as December 31, 1977.

proposed mark has acquired distinctiveness under Trademark Act Section 2(f).

This case is now before the Board on appeal from the final refusal of the examining attorney to register the proposed mark based upon the ground that GOJI BERRY is generic for the identified goods, and in the alternative that if it is not found to be generic, that it is merely descriptive and applicant has failed to show that the proposed mark has acquired distinctiveness. Applicant and the examining attorney have fully briefed the issues in this case. We affirm the refusal to register on the basis that GOJI BERRY is generic.

Generic terms are by definition incapable of indicating source and thus can never attain trademark status. *In re Merrill, Lynch, Pierce, Fenner, and Smith Inc.*, 828 F.2d 1567, 4 USPQ2d 1141 (Fed. Cir. 1987). A designation is a generic name if it refers to the class or category of goods and/or services on or in connection with which it is used. *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 57 USPQ2d 1807 (Fed. Cir. 2001), citing *H. Marvin Ginn Corp. v. International Association of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528 (Fed. Cir. 1986). The test for determining whether a designation is generic

is its primary significance to the relevant public. Section 14(3) of the Trademark Act; *In re American Fertility Society*, 188 F.3d 1341, 51 USPQ2d 1832 (Fed. Cir. 1999); *Magic Wand Inc. v. RDB Inc.*, 940 F.2d 638, 19 USPQ2d 1551 (Fed. Cir. 1991); and *H. Marvin Ginn Corp., Id.* The United States Patent and Trademark Office has the burden of establishing by "clear evidence" that a designation is generic and thus unregistrable. *In re Merrill Lynch*, 4 USPQ2d at 1143. Evidence of the relevant public's understanding of a designation may be obtained from any competent source, including testimony, surveys, dictionaries, trade journals, newspapers, and other publications. *In re Northland Aluminum Products, Inc.*, 777 F.2d 1556, 227 USPQ 961 (Fed. Cir. 1985).

We first consider the category or genus of goods. Applicant's goods, as recited in the application, are "fruit, namely, raw and unprocessed berry only indigenous to several regions in the Himalayas." Applicant and the examining attorney do not dispute the genus of goods and, based on the record, we find that the genus of goods may be broadly characterized as "berries from the Himalayas," for while applicant has limited its goods to those that are

indigenous to "several regions in the Himalayas,"² applicant has not limited the goods to any particular type of berry. Nonetheless, if the relevant purchasing public would find GOJI to be the name of even one type of berry from the Himalayas, then the refusal must be affirmed, for it is not necessary that the term describe all berries indigenous to the region. See *In re Analog Devices, Inc.*, 6 USPQ2d 1878) (Fed.Cir. 1989) (A registration can be cancelled if the registered mark has become generic for any or all of the goods identified).

We next must determine whether the term GOJI BERRY is understood by the relevant public primarily to refer to one or more types of berries from the Himalayas. The examining attorney contends that "[t]he relevant public understands the term 'goji berry' to be the common name for [the identified goods]." Brief, (unnumbered) p. 4. She attached third-party website evidence to her Office actions which, she contends, "defines goji berry, discusses the health benefits of the goji berry, describes the

² A mountain system of south-central Asia extending about 2,414 km (1,500 mi) through Kashmir, northern India, southern Xizang (Tibet), Nepal, Sikkim, and Bhutan. The Himalayas include nine of the world's ten highest peaks, including Mount Everest. The American Heritage Dictionary of the English Language, (4th ed. 2000). The Board may take judicial notice of dictionary definitions. *University of Notre Dame du Lac v. J. C. Gourmet*

characteristics of the goji berry, references products such as juice, supplements, and creams that contain the goji berry as an ingredient, discusses the history of the goji berry, shows vendors of the goji berry other than applicant, and explains the different types of goji berries from the Himalayas."³ *Id.* She also attached printouts of a Wikipedia entry for "Wolfberry" which states that "[a]ccording to the United States Department of Agriculture Germless Resources Information Network, [Wolfberry] is also known as Chinese wolfberry, goji berry...Unrelated to the plant's geographic origin, the names Tibetan goji and Himalayan goji are in common use in the health food market for products from this plant." Based on the evidence, the examining attorney concludes that "the term 'goji berry' is generic for raw and unprocessed fruit berries from the Himalayas; thus, the term 'goji berry' cannot become a trademark under any circumstance." *Id.* at (unnumbered) p. 8.

In response, applicant essentially argues that he coined the term "Goji" several decades ago and that others

Food Imports Co., Inc., 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

³ We note that the evidence displays third-party use of the term being spelled with an uppercase "G" (Goji) and with a lowercase "g" (goji). This does not detract from the import of the

have since used the term improperly or "fraudulently" to refer to berries. Specifically, he contends that he created the term "goji" in 1974 for the Lycium⁴ berry that he found while conducting research in the Himalayas and that the term is based on various regional nomadic names given to the berry. He asserts that in 1977 he began to "import and distribute these berries calling them Goji Berry, in commerce to my clients and customers." Brief, p. 8. Applicant further states that he later learned (in 2003) that "berries that were being sold [by others] as Goji berries were in fact the Chinese Wolfberry of the same botanical family as the Goji, but of lesser medicinal value than the Goji." *Id.* According to applicant, "the sole purpose of [his] application is to protect consumers from purchasing fraudulent products under the guise of this very specific natural medicinal fruit...which can only be found in very specific regions of the Himalayan Mountains as described [in the identification of goods]."

Applicant does not attempt to rebut the examining attorney's evidence to the extent that the evidence shows

evidence, namely, that the term itself is being used generically and not a source-identifier for any one product.

⁴ "Lycium" is defined as:

Prop. n. 1. A genus of deciduous and evergreen shrubs often spiny; cosmopolitan in temperate and subtropical regions. Webster's Revised Unabridged Dictionary.

considerable third-party use of the term "Goji" or "Goji berry" as a generic reference to berries from the Himalayas. Rather, he argues that any other use of "Goji" is "fraudulent" because "the only authentic [Goji] berries came from my company." *Id.* at p. 9. Furthermore, as the examining attorney noted in her brief, applicant apparently concedes that the term "goji" is now generic.

Specifically, on page 7 of his brief under the heading

"Summary of Argument," applicant states:

V. That the term Goji very recently became a generic term making it supposedly merely descriptive under Section 2(e)(1).

Applicant makes several other references to the identified goods in an apparent generic fashion as "Goji berries" or "Gobies". To wit,

That Applicant/Appellant has annually purchased the entire crop of "Goji" Berries from these regions where they grow wild. That Applicant/Appellant is and has been the only importer of the authentic "Goji" Berry for three decades. For the first two decades "Gojis" were sold to consumers primarily in the (sic) Seattle, Washington, followed by another decade...

(Brief, p. 7)

Even if we were to ignore applicant's admission that the term "Goji" has become generic and his own use of the term "goji" in his brief, the evidence of record makes it clear that the proposed mark GOJI BERRY is a generic

reference for a type of berry falling within the relevant genus of goods. The numerous website articles of record demonstrate that "Goji berry" is a common term used by the public to describe a certain type of berry obtained from a plant in the Himalayas. The evidence also includes advertisements from competitors of applicant, namely, internet retailers of the berries touting the nutritional benefits of the "Goji berries." In her brief, the examining attorney points to various examples of generic use of the term "Goji" or "Goji berry" and, as noted, applicant does not dispute or take issue with this evidence. Finally, we take judicial notice of the following definition for the term "Goji":

Etymology: modification of Chinese (Beijing) *gǒuqǐ* the shrub *Lycium chinense*

Date: 2003

: the dark red mildly tart berry of a thorny chiefly Asian shrub (*Lycium barbarum*) that is typically dried and used in beverages.

Merriam-Webster's Collegiate Dictionary, Eleventh Edition.

In view of the overwhelming amount of evidence, we have no trouble concluding that applicant's mark, GOJI BERRY, is a generic reference for the identified goods and is perceived as such by the relevant public. The examining attorney has met her burden of establishing by clear

evidence that the term GOJI BERRY is generic for the relevant genus of goods.

In our determination, we have considered all of the evidence of record, including the affidavits submitted by applicant in support of his contention that his mark has acquired distinctiveness. These affidavits, which are fairly uniform in substance, have little, if any, persuasive value. For instance, there are averments such as "I was purchasing berries known as 'Goji' from [applicant]" and "to my knowledge this was the only source of Goji Berries in the western world." These statements indicate generic use of the term "Goji" to describe the type of berries being sold by applicant and seem to indicate that there are currently other sources of "Goji berries."

Even if we were to accept a key factual assertion to applicant's argument, namely, that he coined the term "Goji" and was the first to use the term in commerce in connection with the Lycium berries from the Himalayas, it is evident that the term has been subsequently adopted by others in the relevant field as the generic name for berries from the Himalayas. The examining attorney's evidence makes this clear. It is well settled that

although a term may at adoption be a distinctive designation for a product, if the term over a period of time comes to identify the product itself, rather than the source thereof, it becomes generic and cannot be exclusively appropriated by any one party. *Continental Airlines, Inc. v. United Air Lines Inc.*, 53 USPQ2d 1385 (TTAB 1999) [term "E-ticket" was adopted by many airlines as common descriptive term for electronic ticketing and reservation services]; see also, *In re Randall and Hustedt*, 226 USPQ 1031 (TTAB 1985); *In re Texas Meat Brokerage, Inc.*, 199 USPQ 40 (TTAB 1978); and J. T. McCarthy, 2 *McCarthy on Trademarks and Unfair Competition*, § 12:25 (4th ed. 2006) for a general discussion of names for new products becoming generic. Thus, although applicant dismisses subsequent third-party uses of the term as "fraudulent," applicant has failed to introduce any evidence that he has attempted to police his alleged trademark rights, or that any such uses by others have been found to be in any way improper or unlawful. In addition, applicant's claim that he annually purchases the entire crop of the involved berries from the Himalayas and is the only source for what he considers to be "Goji berries" does not warrant a conclusion that the term is not generic. See

In re American Institute of Certified Public Accountants, 65 USPQ2d 1972 (TTAB 2003) (CPA EXAMINATION found to be generic notwithstanding applicant's contention that it was the only source of the cpa examination used throughout the United States). In other words, it is irrelevant that applicant may be the only purveyor of "Goji berries" so long as others use said term as a generic reference to the berries.

Accordingly, we find that the term GOJI BERRY is primarily used and understood by the relevant public as a generic name for a type of berry from the Himalayas and thus is incapable of functioning as a mark indicating applicant as the source of goods of this type.

In the alternative, even if we found that GOJI BERRY was not a generic term, the evidence of record, including the previously-discussed declarations, is not sufficient to establish that GOJI BERRY has acquired distinctiveness under Trademark Act Section 2(f).

Decision: The refusal on the ground of genericness is affirmed.