

This Opinion is Not a
Precedent of the TTAB

Mailed: March 16, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Klickitat Valley Chianina, LLC
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Serial No. 76715490
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Michael J. Folise of Black, Lowe & Graham PLLC,
for Klickitat Valley Chianina, LLC.

Emily Chuo, Trademark Examining Attorney, Law Office 101,
Ronald R. Sussman, Managing Attorney.

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Before Kuhlke, Shaw and Hightower,
Administrative Trademark Judges.

Opinion by Shaw, Administrative Trademark Judge:

Klickitat Valley Chianina, LLC (“Applicant”) seeks registration on the Principal Register of CERTIFIED CHIANINA BEEF (in standard characters) as a mark for “Meat and processed foods, namely, dressed beef,” in International Class 29.¹

The Trademark Examining Attorney refused registration of Applicant’s mark under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that

¹ Application Serial No. 76715490 was filed on December 4, 2013 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), claiming a date of first use anywhere of July, 2006 and a date of first use in commerce of July 11, 2006.

CERTIFIED CHIANINA BEEF is merely descriptive of the identified goods. Applicant then amended its application to disclaim exclusive rights to the terms CHIANINA BEEF and to seek registration under Section 2(f), 15 U.S.C. § 1052(f), by establishing that the mark has acquired distinctiveness. The Examining Attorney continued the Section 2(e)(1) refusal on the ground that Applicant's showing of acquired distinctiveness was insufficient in light of the highly descriptive nature of the mark. When the refusal was made final, Applicant appealed. The case is fully briefed. We affirm the refusal to register.

The only issue before us is whether Applicant's mark has acquired distinctiveness. A claim of distinctiveness under § 2(f) may be construed as conceding that the matter to which it pertains is not inherently distinctive and, thus, not registrable on the Principal Register absent proof of acquired distinctiveness. *See Cold War Museum, Inc. v. Cold War Air Museum, Inc.*, 586 F.3d 1352, 92 USPQ2d 1626, 1629 (Fed. Cir. 2009) ("Where an applicant seeks registration on the basis of Section 2(f), the mark's descriptiveness is a nonissue; an applicant's reliance on Section 2(f) during prosecution presumes that the mark is descriptive."). *See also Yamaha Int'l Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 1577, 6 USPQ2d 1001, 1005 (Fed. Cir. 1988).

The amount and character of evidence required to establish acquired distinctiveness depends on the facts of each case and particularly on the nature of the mark sought to be registered. *See Roux Labs., Inc. v. Clairol Inc.*, 427 F.2d 823, 829, 166 USPQ 34, 39 (CCPA 1970). Typically, more evidence is required where a mark is so highly descriptive that purchasers seeing the matter in relation to the named goods

would be less likely to believe that it indicates source in any one party. *Yamaha Int'l Corp.*, 6 USPQ2d at 1008 (“[T]he greater the degree of descriptiveness the term has, the heavier the burden to prove it has attained secondary meaning.”) (internal citation omitted).

In its reply brief, Applicant argues that because the descriptiveness of its mark is not an issue, the Examining Attorney’s arguments regarding descriptiveness should not be considered. Applicant “requests that the Examining Attorney’s argument, set forth in Section III(A) of her Appeal Brief be stricken and accorded no weight with respect to the sole issue on appeal, acquired distinctiveness under Lanham Act Section 2(f).”² We disagree that the Examining Attorney’s arguments regarding descriptiveness should not be considered. Inasmuch as the degree of descriptiveness of Applicant’s mark affects the amount and character of evidence required to establish acquired distinctiveness, the Examining Attorney’s evidence and arguments are relevant to the decisional process. The request to strike any of the Examining Attorney’s argument is denied.

I. Mere Descriptiveness under Section 2(e)(1)

We begin with a determination of the descriptive nature of Applicant’s mark, CERTIFIED CHIANINA BEEF. “A term 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.” *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (quoting *In re Bayer Aktiengesellschaft*, 488

² Applicant’s Reply Br., pp. 1-2, 5 TTABVue 1-2.

F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)); *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1009-10 (Fed. Cir. 1987). Whether a particular term is merely descriptive is determined in relation to the goods for which registration is sought and the context in which the term is used, not in the abstract or on the basis of guesswork. *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978); *In re Remacle*, 66 USPQ2d 1222, 1224 (TTAB 2002).

The Examining Attorney submitted a dictionary definition for “certified” which defines the word as to “recognize (someone or something) as possessing certain qualifications or meeting certain standards.”³ “Chianina” is defined as “any of a breed of tall white cattle of Italian origin noted especially for producing lean meat.”⁴ “Beef” is the generic name of the goods. Thus, viewed as a whole, the term CERTIFIED CHIANINA BEEF merely describes beef certified as coming from Chianina cattle.

The Examining Attorney submitted Internet web page excerpts showing use of the term “certified Chianina beef” or “certified Chianina” in connection with beef. The following examples are representative:⁵

- A Facebook page from a restaurant called Balducci Ristorante stating: “The world famous Bistecca Fiorentina which has **certified Chianina beef** can only be found in Balducci. Chianina comes from one of the oldest cattle breeds in the world.”
- A webpage from a restaurant called La Bucaccia stating: “Restaurant La Bucaccia offers typical Tuscan dishes made from top-quality ingredients such as I.G.P. **certified Chianina beef**.”

³ Oxforddictionaries.com , Office Action of September 17, 2014, p. 2.

⁴ Merriam-webster.com, Office Action of March 18, 2014, p. 11.

⁵ Office Action of September 17, 2014, TSDR pp. 7-19, Office Action of July 8, 2016, TSDR pp. 38-54 (emphasis added).

- A webpage from a travel website called Agriturismo.it stating: “The [listed] farm sells a range of local organically produced items: . . . cheeses and typical Marche meats (quality **certified Chianina beef**).”
- A webpage from cooking-vacations.com featuring a review of a restaurant stating: “Flavors like saffron, porcini mushrooms, artichokes, truffles, and **certified Chianina beef** . . . from a wood-burning oven await you.”
- A Tweet from a restaurant called Tuscanic stating: “We have just launched our tartare burger made of 100% **certified chianina beef**. Fancy a bite? It’s soooooo worth it!!”
- A webpage from a restaurant called Tiberina Carni, stating: “Tiberina Carni offers a wide range of tasty meat and meat products, such as pork sausages and spare ribs...but also the best cuts of beef, including IGP 5R **certified Chianina**”
- A webpage from TripAdvisor regarding a restaurant called Steak Burger Gourmet, stating: “[O]ur ‘italianburger gourmet’ are made with **certified Chianina beef**. . . .”
- A review from the travel website umbriatuscanyreview.com of the restaurant Le Grotte Funaro, stating: “Truffles, porcino mushrooms, game, **certified Chianina beef** are at the basis of Alfredo’s cuisine.”
- A webpage from travel website tuscanynowandmore.com, stating: “The menu is big on local specialties . . . and steak tartare made from **certified Chianina beef**—the local white cattle, and the only breed from which an authentic bistecca alla fiorentina (“Florentine steak”) should be made.”⁶

The Examining Attorney also made of record three registrations for conceptually similar marks which were registered on the Supplemental register or under Section 2(f):⁷

- Registration No. 2692398, for the mark CERTIFIED HEREFORD BEEF for “beef” in International Class 29; registered under Section 2(f) with

⁶ We note that some of the Examining Attorney’s Internet evidence comes from foreign sources. Although reliance on Internet evidence from foreign sources may be inappropriate in some instances, we find these internet sites to be relevant inasmuch as they appear to be directed at American consumers. “Information originating on foreign websites or in foreign news publications that are accessible to the United States public may be relevant to discern United States consumer impression of a proposed mark.” *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1835 (Fed. Cir. 2007).

⁷ Office Action of March 18, 2014, TSDR pp. 2-10.

BEEF disclaimed;

- Registration No. 3902279, for the mark CERTIFIED DEVON BEEF for, *inter alia*, “beef” in International Class 29; registered on the Supplemental Register with DEVON BEEF disclaimed; and
- Registration No. 3902279, for the mark CERTIFIED PIEDMONTESE BEEF for, *inter alia*, “beef” in International Class 29; registered on the Supplemental Register with PIEDMONTESE BEEF disclaimed.

Additionally, Applicant notes that its mark was previously registered on the Supplemental Register to a third party but has since been canceled;⁸ however, Applicant has not made the prior registration of record.

The foregoing dictionary definitions and Internet excerpts establish that the term CERTIFIED CHIANINA BEEF is widely used by restaurants and travel sites to describe a well-regarded type of beef as coming from a particular breed of cattle, the Chianina. The third-party registrations show that the Examining Attorney’s treatment of Applicant’s mark is consistent with the Office treatment of conceptually similar marks. In addition, Applicant’s disclaimer of CHIANINA BEEF is an admission that these terms are at least descriptive. Accordingly, we find that CERTIFIED CHIANINA BEEF is highly descriptive as applied to Applicant’s goods: “meat and processed foods, namely, dressed beef.” Applicant, therefore, has “the burden to show a concomitantly high level of secondary meaning.” *In re Steelbuilding.com*, 415 F.3d 1293, 75 USPQ2d 1420, 1424 (Fed. Cir. 2005).

⁸ Registration No. 3118461, Application of December 4, 2013, p. 7.

II. Acquired Distinctiveness

We turn next to Applicant's showing of acquired distinctiveness. "In general, to establish that a term has acquired distinctiveness, 'an applicant must show that in the minds of the public, the primary significance of a product feature or term is to identify the source of the product rather than the product itself.'" *In re La. Fish Fry Prods., Ltd.*, 797 F.3d 1332, 116 USPQ2d 1262, 1265 (Fed. Cir. 2015) (quoting *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1729 (Fed. Cir. 2012)). Whether acquired distinctiveness has been established is a question of fact, see *In re Loew's Theatres, Inc.*, 769 F.2d 764, 226 USPQ 865, 869 (Fed. Cir. 1985), and the burden of proving that a mark has acquired distinctiveness is on the applicant. See *Yamaha Int'l*, 6 USPQ2d at 1006.

In determining whether the applied-for mark has acquired distinctiveness, the following factors are generally considered: (1) length and exclusivity of use of the mark in the United States by an applicant; (2) the type, expense and amount of advertising of the mark in the United States; and (3) an applicant's efforts in the United States to associate the mark with the source of the goods, such as unsolicited media coverage and consumer studies. *In re Steelbuilding.com*, 415 F.3d 1293, 75 USPQ2d 1420, 1424 (Fed. Cir. 2005); Trademark Rule 2.41(a)(3), 37 C.F.R. § 2.41(a)(3).

To establish acquired distinctiveness, Applicant submitted two declarations: one from Robert E. Morrow, Applicant's Manager, and one from Nancy Becker, a customer. The Morrow declaration claims, *inter alia*:⁹

- Substantially exclusive use by Applicant since September, 2005;
- Between 2000 and 2014, Applicant "has advertised and promoted its 'Certified Chianina Beef' products by conducting and sponsoring dinners featuring the products to [over 100] ranchers, cattlemen, restaurateurs, and beef product wholesalers, highlighting [Morrow's] trips to Italy to observe Chianina Steer animal husbandry;"
- That Applicant has also advertised nationally on RFD-TV; and
- That "[a]t least \$82,750.00 has been spent by . . . Applicant in promoting its 'Certified Chianina Beef' products to the relevant consuming public since the adoption of the mark."

The Becker declaration¹⁰ states that she is a "wholesale/retail" customer who has "been purchasing 'Certified Chianina Beef' products from the Applicant since 1997 for personal consumption" and, further, she only associates the "[high] quality of product with the Applicant Klickitat Valley Chianina, LLC by virtue of its 'Certified Chianina Beef' Trademark."

Applicant's evidence of acquired distinctiveness does not establish that the primary significance of CERTIFIED CHIANINA BEEF, in the minds of the public, "is to identify the source of the product rather than the product itself." *La. Fish Fry Prods.*, 116 USPQ2d at 1265. First, Applicant's use since 2006, while indicative of a degree of commercial success, is not conclusive or persuasive considering both the nature of the mark sought to be registered and the widespread use of CERTIFIED

⁹ Applicant's response of September 5, 2014, TSDR pp. 10-11.

¹⁰ *Id.* at 12-13.

CHIANINA BEEF by others. *See Levi Strauss & Co. v. Genesco, Inc.*, 742 F.2d 1401, 222 USPQ 939, 940-41 (Fed. Cir. 1984) (“When the record shows that purchasers are confronted with more than one (let alone numerous) independent users of a term or device, an application for registration under Section 2(f) cannot be successful, for distinctiveness on which purchasers may rely is lacking under such circumstances.”). Moreover, Applicant states that it has spent “[a]t least \$82,750.00” to promote its products and conducted a number of dinners for more than 100 “ranchers, cattlemen, restaurateurs, and beef product wholesalers.” But these efforts to advertise and promote Applicant’s products are extremely modest over the given time frames. Only a single piece of evidence, the Becker declaration, indicates the degree to which members of the relevant public actually associate the term CERTIFIED CHIANINA BEEF with Applicant’s goods.

Applicant argues that its beef is relatively expensive and therefore, “the market for [its] products is limited and the evidence of secondary meaning is thus commensurate with the relevant purchasing market.”¹¹ This argument is unpersuasive. Applicant has not introduced any sales or production figures for its beef from which we can discern the size of Applicant’s prospective market. Nor has Applicant provided any information about its market share from which we could judge Applicant’s success in promoting its product. In sum, substantially more evidence bearing directly on the degree of public recognition of Applicant’s mark would be required to demonstrate that it has acquired public recognition as a source

¹¹ Applicant’s Br., p. 8, 1 TTABVUE 8.

indicator. *In re Steelbuilding.com*, 75 USPQ2d at 1424. Considering all of the evidence of record, we find that Applicant has failed to demonstrate that its mark has become distinctive of its beef.

For the foregoing reasons, we agree with the Examining Attorney's determination that Applicant has failed to meet its burden of proving acquired distinctiveness of the applied-for mark.

Decision: The refusal to register Applicant's mark CERTIFIED CHIANINA BEEF is affirmed.