

**This Opinion is Not a
Precedent of the TTAB**

Mailed:
September 27, 2013

United States Patent and Trademark Office
Trademark Trial and Appeal Board

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In re Canada Enterprises LLC

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Serial No. 85026331

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Kimberly N. Reddick of Red IP Law PLLC for Canada Enterprises LLC.

David C. Reihner, Trademark Examining Attorney, Law Office 111 (Robert
Lorenzo, Managing Attorney).

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Before Bucher, Lykos and Greenbaum, Administrative Trademark Judges.

Opinion by Lykos, Administrative Trademark Judge:

On April 29, 2010, Canada Enterprises LLC (“applicant”) filed an application to register on the Principal Register the mark **Jin-Ja** in standard character format for “herbal tea” in International Class 30.¹ The application, as amended, includes the following statement: “The applicant’s goods do contain ginger.”²

¹ Application Serial No. 85026331, filed pursuant to Section 1(a) of the Trademark Act, alleging October 10, 2009 as the date of first use anywhere and March 30, 2010 as the date of first use in commerce. The application includes the following translation statement: “The wording ‘Jin-Ja’ has no meaning in a foreign language.”

² The examining attorney inquired in his first office action whether applicant’s identified goods contained the ingredient ginger.

The Trademark Examining Attorney has refused registration of the mark 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 applicant's identified goods. The case is fully briefed.³ For the reasons discussed herein, the Board reverses the refusal to register the mark as merely descriptive.

The test for determining whether a mark is merely descriptive is whether it immediately conveys information concerning a significant quality, characteristic, function, ingredient, attribute or feature of the product or service in connection with which it is used, or intended to be used. *See, e.g., In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012); *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987). It is not necessary, in order to find a mark merely descriptive, that the mark describe each feature of the goods or services, only that it describe a single, significant ingredient, quality, characteristic, function, feature, purpose or use of the goods or services. *In re Gyulay*, 3 USPQ2d at 1009-10. Whether a term is merely descriptive is determined not in the abstract, but in relation to the goods or services for which registration is sought, the context in which it is being used on or in connection with the goods or services, and the possible significance that the term would have to the average purchaser of the goods or services because of the manner of its use; that a term may have other meanings in different

³ On May 6, 2013, applicant filed a duplicate copy of its appeal brief originally filed on May 3 with evidence submitted during *ex parte* prosecution appended thereto. The re-submission of evidence with applicant's appeal brief was unnecessary.

contexts is not controlling. *In re Bright-Crest, Ltd.*, 204 USPQ 591 (TTAB 1979).

Applicant has admitted that the goods identified in the application, “herbal tea,” contain ginger as a significant ingredient. See February 8, 2012 Office Action. As such, “ginger” is merely descriptive of the identified goods. See *In re Gyulay*, 3 USPQ2d at 1009-10. The key issue in this appeal, therefore, is whether applicant’s applied-for mark **Jin-Ja** will be perceived by prospective consumers as a novel or mere misspelling of the phonetic equivalent of the descriptive word “ginger.”

It is well established that the novel spelling of a mark that is the phonetic equivalent of a merely descriptive word or term is also merely descriptive if purchasers would perceive the different spelling as the equivalent of the descriptive word or term. See *In re Hercules Fasteners, Inc.*, 203 F.2d 753, 97 USPQ 355 (CCPA 1953) (holding “FASTIE,” phonetic spelling of “fast tie,” merely descriptive of tube sealing machines). In other words, as articulated in prior cases, a slight misspelling of a word will not turn a descriptive or generic word into a non-descriptive mark. See *In re ING Direct Bancorp.*, 100 USPQ2d 1681, 1690 (TTAB 2011) (holding PERSON2PERSON PAYMENT generic for direct electronic funds transfers including electronic payment services between individuals); *In re Carlson*, 91 USPQ2d 1198, 1203 (TTAB 2009) (holding URBANHOUSING, in standard character form, would be perceived by consumers as the equivalent of the descriptive term URBAN HOUSING, rather

than as including the separate word ZING); *In re Ginc UK Ltd.*, 90 USPQ2d 1472, 1475 (TTAB 2007) ("The generic meaning of "togs" not overcome by the misspelling of the term as TOGGS. . ."); *In re Hubbard Milling Co.*, 6 USPQ2d 1239 (TTAB 1987) (holding MINERAL-LYX generic for mineral licks for feeding livestock).

Applicant argues that U.S. consumers would not recognize or pronounce the mark **Jin-Ja** as "ginger." Rather, as applicant contends, the mark **Jin-Ja** is an arbitrary term with no recognizable meaning in the English language. Applicant further contends that the word "Jinja," spelled without a hyphen, identifies a remote geographic location in the country of Uganda, citing to dictionary definitions of that term. Applicant maintains that the hyphenation in its mark serves as a play on the Japanese word "ninja" because although applicant's tea elixir may appear "soothing," when tasted "the spicy flavor sneaks up and packs a powerful punch" (Applicant's Brief, p. 5), or alternatively suggesting to prospective consumers that applicant's herbal teas contain ginseng. Applicant also argues that **Jin-Ja** is not the phonetic equivalent of "ginger" insofar as the correct pronunciation of the word "ginger" is \`jin-jər\, according to definitions obtained from *Merriam-Webster's Dictionary*, *Dictionary.com*, *American Heritage* and *Oxford Advanced American Dictionary*, and none of the dictionaries offer \`jin-jah\ as an alternative pronunciation. Applicant further contends that while there is evidence that the British pronunciation of "ginger" may be "\`jin-jah\," there is no evidence regarding the U.S. pronunciation.

The examining attorney, however, maintains that applicant's mark **Jin-Ja** is the phonetic equivalent of the word "ginger." In support thereof, the examining attorney has submitted an excerpt from *Wikipedia* entitled "Rhotic and non-rhotic accents" discussing the distinction between two main accent groups in the English language: rhotic speakers who pronounce the letter "r" as /r/ when it appears in all positions in a word versus non-rhotic speakers who pronounce the letter "r" only if it is followed by a vowel sound in the same phrase or prosodic unit. As explained further in the *Wikipedia* excerpt:⁴ "Non-rhotic speakers pronounce an /r/ in *red*, and most pronounce it in *torrid* and *watery*, where R is followed by a vowel, but not in *hard* or *car* or *water* when those words are said in isolation." The *Wikipedia* excerpt goes on to identify the geographic origin of non-rhotic speakers in the United States, such as portions of the South, New England and New York. See August 2, 2011 Office Action. The examining attorney also relies on Internet search engine results, an excerpt entitled "Rhotic" obtained from the Australian website *Kids.Net.Au*, as well as an excerpt from an interview with the creator of applicant's product discussing the origin of the name as the British pronunciation of the word "ginger" as "jin-ja." See "Counter Culture: Reuben Canada, Creator of Jin-Ja" at www.loop21.com (February 8, 2012 Office Action). As the examining attorney contends:

⁴ This excerpt from *Wikipedia* was quoted in part in the *Yahoo! India Answers* excerpt also made of record by the examining attorney with the August 2, 2011 Office Action.

Rhotic speakers pronounce the letter “r” where it is located in a word; however, non-rhotic speakers do not pronounce the final letter “r” in a word or the letter “r” in a word, when not followed by a vowel sound. For example, a non-rhotic speaker would pronounce the word “car” as “ca:” or “caah” and “baker” would be pronounced as “bakah” and “hard” would be pronounced as “ha:d” or “haad”. Non-rhotic speakers may be found in the southern United States, New York City, Boston, and New England. Why is this information important? It shows that some people in the United States are non-rhotic speakers, who would pronounce “car” as “caah” and “baker” as “bakah.” They would probably also pronounce “ginger” as “jin’jah” or “jin’ja.” Even rhotic speakers in the United States would not be unaccustomed to hearing the word “caah” and understand that it means “car” or hear “bakah” and understand that it means “baker” or hear “jin’jah” or “jin’ja” and understand that it means “ginger.”

Examining Attorney’s Brief, unnumbered pp. 6-7. Lastly, the examining attorney points to evidence obtained from third-party Internet sites discussing applicant’s herbal tea as evidence of “applicant’s derivation of its mark and propagation of the idea that the designation **Jin-Ja** is derived from the word ginger” and that applicant’s mark is used in close association with the ingredient of ginger in applicant’s herbal tea. *Id.* at 7-8.

Applicant, however, is critical of the examining attorney’s reliance on the excerpt from *Wikipedia*, pointing out that the article does not provide evidence regarding how many U.S. citizens actually speak with a non-rhotic accent. Applicant further contends that the examining attorney did not provide any corroborating evidence from reliable sources to show widespread use of the non-rhotic accent. In addition, applicant urges the Board to give no weight to the evidence submitted by the examining attorney consisting of Internet search engine results because the overall context was omitted.

We find that the examining attorney's evidence falls short of establishing that the term **Jin-Ja** is merely descriptive of applicant's goods. Based on the record before us, we are not persuaded that U.S. consumers are likely to perceive the mark **Jin-Ja** as a novel spelling or misspelling of the word “ginger,” or even pronounce the mark in non-rhotic fashion as “ginjaah.” While we have considered the evidence submitted by the examining attorney from *Wikipedia* because applicant had the opportunity to rebut such evidence, we find this evidence to be of limited probative value. As we have stated previously, evidence procured from *Wikipedia*, without credible and reliable corroborating evidence, is fraught with shortcomings:

Our consideration of Wikipedia evidence is with the recognition of the limitations inherent with Wikipedia (e.g., that anyone can edit it and submit intentionally false or erroneous information). In this case, applicant submitted the Wikipedia information for “Internet Service Provider” in its requests for reconsideration, and the examining attorney had an opportunity to rebut that evidence if she believed that the entry was incorrect. Accordingly, we have considered the Wikipedia entry.

As a collaborative online encyclopedia, Wikipedia is a secondary source of information or a compilation based on other sources. As recommended by the editors of Wikipedia, the information in a particular article should be corroborated. The better practice with respect to Wikipedia evidence is to corroborate the information with other reliable sources, including Wikipedia's sources.

In re IP Carrier Consulting Group, 84 USPQ2d 1028, 1032-3 (TTAB 2007)

In this instance, the examining attorney attempted to corroborate the phenomena of the non-rhotic U.S. speaker as described in *Wikipedia* with an answer from a *Yahoo! India* query consisting of a reprinted portion of the excerpt

from *Wikipedia*, an excerpt from an Australian children’s encyclopedia website, an example from a U.S. website of the British pronunciation of the word “ginger,” and Internet search engine results. This evidence does not serve to substantiate the examining attorney’s determination. It is well established that Internet search engine results submitted without the surrounding context are of limited probative value. *See In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1833 (Fed. Cir. 2007) (“Search engine results – which provide little context to discern how a term is actually used on the web page that can be accessed through the search result link – may be insufficient to determine the nature of the use of a term or the relevance of the search results to registration considerations”). *See also In re Thomas Nelson, Inc.*, 97 USPQ2d 1712, 1715 (TTAB 2011) (search engine results submitted by examining attorney not considered because they did not provide sufficient context to have any probative value). In addition, while evidence obtained from foreign sources may have some probative value depending on the circumstances of the particular case, in this instance, they do not since what is critical is determining how the U.S. consumer will perceive and pronounce applicant’s mark. *Compare In re International Business Machines Corp.*, 81 USPQ2d 1677, 1681 n.7 (TTAB 2006) (web page from foreign source considered because case involved computer technology, and “it is reasonable to consider a relevant article regarding computer hardware” from an English-language website from another country); *In re Remacle*, 66 USPQ2d 1222, 1224 n.5 (TTAB 2002) (professionals in medi-

cine, engineering, computers, telecommunications and other fields are likely to utilize all available resources, regardless of country of origin or medium, and the Internet is a resource that is widely available to these same professionals and to the general public in the United States). As to the Internet articles and print-outs discussing applicant's particular brand of herbal tea, such evidence does not suffice to carry the examining attorney's burden of establishing that prospective consumers encountering applicant's herbal tea will perceive **Jin-Ja** as a misspelling or phonetic equivalent of "ginger." More persuasive would have been evidence obtained from U.S. sources showing use of the non-rhotic accent in the United States for either the word "ginger" or other words ending with the suffix "-er."

The burden is on the USPTO to make a *prima facie* showing that the mark or word in question is merely descriptive from the vantage point of purchasers of an applicant's goods. See *In re Box Solutions Corp.*, 79 USPQ2d 1253, 1255 (TTAB 2006), citing *In re Merrill Lynch, Pierce, Fenner, and Smith, Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1144 (Fed. Cir. 1987). We further add that "[w]hen doubts exist as to whether a term is descriptive as applied to the goods or services for which registration is sought, it is the practice of this Board to resolve doubts in favor of the applicant and pass the mark to publication with the knowledge that a competitor of applicant can come forth and initiate an opposition proceeding in which a more complete record can be established." *In re The Stroh Brewery Co.*, 34 USPQ2d 1796, 1797 (TTAB 1994). Therefore, based

on the record submitted, we find that the Office has not met its burden of proof that applicant's mark, **Jin-Ja**, when used in connection with the identified goods, is merely descriptive.

Decision: The refusal to register applicant's mark as merely descriptive under Section 2(e)(1) of the Trademark Act is reversed.

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Opinion by Bucher, Administrative Trademark Judge, dissenting:

Upon close review of the instant record, I agree with the examining attorney that this term should be refused registration as merely descriptive under Section 2(e)(1) of the Trademark Act.

My colleagues in the majority agree that the word "ginger" is highly descriptive for applicant's beverage. Applicant touts "fresh ginger" as the first ingredient while often mentioning the many and varied health benefits of ginger. Hence, where I disagree with my colleagues is on the question of whether the term "Jin-Ja" immediately conveys information about the most important ingredient of this drink, namely "ginger." I have no doubt.

(1) Applicant's prior statements

In 2010, applicant's Philadelphia-based CEO and alter ego, Reuben Canada, left behind what he described as the safe and secure life of an intellectual property litigator to pursue his adventure of the heart – creating and marketing his "Jin-Ja" herbal beverage. The record contains a copy of the transcript of an interview with Mr. Canada that the examining attorney took from the

Loop21 website on February 8, 2012 (below left). I have also included a version of the same website as it appears more recently (below right):

Loop 21: You mentioned you've always been a creative person, so you've always played around with foods and ingredients?

Canada: Yeah. When I was like 10 or 11 years old, I had perfected this chocolate chip cookie recipe and would sell them at school. But I was young, so I didn't really understand you had to buy the supplies and whatever cookies you sold you had to reinvest in the company to buy more supplies. But I've always loved cooking. It's interesting because I don't really eat that much, which means that when I do eat I like it to be really good. It almost forces me to make a whole bunch of money to afford really good restaurants or make it myself, which I'm more than happy to do.

Loop 21: What does Jin-Ja mean?

Canada: I was trying to figure out a name for it because it has fresh ginger, cayenne, green tea, lemon, mint and sugar, so I was trying to figure out what to call it. At first I was going to call it my middle name or something, or I was looking for a word that meant "wow" or "nice" in another language. It took about three months, and I was looking online and saw this woman's blog who was a breast cancer survivor and she was giving advice to people who were going through breast cancer treatment. She said that her best friend told her to chew on ginger when she felt nauseous. Her best friend was British and she pronounced it Jin-Ja. And I was like "that's the name! that's perfect!"

Loop 21: What are some of the health benefits of Jin-Ja?

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...

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Interestingly, in another published article, Mr. Canada acknowledged that choosing a mark for his "amazing beverage" was harder than naming a child. And I note that he was wearing two different (non-parental) hats at that stage – as entrepreneur and attorney. First, the record reveals that Canada is a business person who wears his passion for his product on his sleeve. Second, as

⁵ Attachment to outgoing Office Action of February 8, 2012, Attachment #3, p. 4, <http://loop21.com/channel/counter-culture-reuben-canada-creator-jin-ja?page=2>, <http://tsdr.uspto.gov/documentviewer?caseId=sn85026331&docId=OOA20120208125211#docIndex=5&page=4>

⁶ <http://loop21.com/channel/counter-culture-reuben-canada-creator-jin-ja?page=2>

would any good IP attorney (irrespective of the identity of the client), he alluded to having to think of the appearance, sound and meaning of the adopted term. As shown in the **Loop21** interview, he described for Danielle Hester in explicit detail the momentary epiphany he had at the end of this laborious naming process. Yet curiously, the single best clue in the entire record about “What does Jin-Ja mean?” simply disappeared from the **Loop21** website sometime after Examining Attorney Reihner issued his Office action of February 2012.

Furthermore, under the heading of actions taken by applicant, more than three years ago, Mr. Canada reinforced this direct association when discussing his recipe for an “*aptly-titled*” gin cocktail featuring his “Jin-Ja” cocktail mixer, the “*Jin-Ja Rogers*.”

Given this admitted equivalence, I disagree with the majority’s conclusion, *supra* at 9, that the examining attorney nonetheless should have been tasked with showing that other competitors have adopted or used this precise designation in connection with a ginger-flavored herbal beverage. We routinely state the principle that when the involved term is the phonetic equivalent of a descriptive or generic designation, it matters not to the application of this statutory subsection that applicant may be the first or only person in the field to have used that letter string.

(2) *Blogger’s notation*

The examining attorney included screen prints of another website featuring a “Philly Homegrown” food blog. From a short blurb introducing applicant’s “non-alcoholic beverage,” it appears that this Philly writer immediately made the connection between the term “Jin-Ja” and the especially important ingredient, *ginger* (“*get it, “jin-ja”*”):



⁷ <http://food.visitphilly.com/maker-producer>

(3) *Persistent imagery of ginger flowers presented with alleged mark*

Although applicant's ginger ingredients would come from the rhizome portion of the plant *Zingiber officinale*, applicant's tags (attached to the neck of a potion bottle with a cork from a wine supply site and sealed with purple wax)

have from day-one featured the image of a red floral spike representing a tropical plant usually associated with southeast Asia. These images became even more prominent on later bottle labels and website pages, and as shown in pictures of



poster-sized exhibits. The pictorial motifs, along with applicant's occasional public presentation of an actual vase of live, exotic-looking ginger canes and flowers, serves to reinforce the "ginger" component of these goods.

(4) *A "Philly Accent"?*

The examining attorney also included a lot of discussion about "non-rhotic" speakers (see citation from the examining attorney's appeal brief reproduced in the majority opinion at 6). In response, applicant argues, in effect, that the examining attorney's focus on "non-rhotic" speakers and the possible existence of a Philly accent is not relevant to this proceeding. However, non-rhoticity is not limited to the United Kingdom, New England, New York or the southern part of the United States. The specific focus in the case at bar is on applicant's home area – the environs of Philadelphia, Pennsylvania.

Even before he had bottles and labels, Canada placed small quantities of his product in a gourmet market across the street from his apartment, followed quickly by increased production and growing availability of the **Jin-Ja** product in other local cafes, grocery stores and markets in South Philly.⁸ In this section of town, if one is alert to the ethnolect of South Philly, one might overhear in the local patois a “venduh” offering “dolluhs” for the “oppahtunity” to place his beverage on the end of the “pahty” aisle. And of course in this same metro area, non-rhoticity is not limited to South Philadelphia. Linguistic studies show that a definite “Philly accent” (among a larger “Mid-Atlantic Dialect”) is found among generations of families who grew up north of Philadelphia on the Mainline and routinely sent their children to boarding schools in the United Kingdom. One might think immediately of current well-known television personalities like Jim Cramer or Chris Matthews.

Perhaps it is no surprise then that applicant’s market expanded naturally from South Philly and the Mainline⁹ to a much larger area of distribution

⁸ The establishments include Pumpkin Café, Restaurant and Market; Cichetteria 19; Green Aisle Grocery; Bacchus; Almanac Market; Essene Market and Café; Di Bruno Bros.; Food and Friends; Neighborhood Market, the Dandelion and Tashan restaurants, etc., having addresses on South St., Spruce St., Poplar St., and additional locations around Rittenhouse Square. See Attachment to outgoing Office Action of January 20, 2011, Attachment #3, p4; Attachment to outgoing Office Action of February 8, 2012, Attachment #28 at p. 30, Attachment #31 at p.33; Attachment #41 at p. 42; “Jin-Ja: A healthful tonic of ginger, citrus and spice that tastes great alone or with a shot of Maker’s Mark,” <http://food.visitphilly.com/jin-ja/>, Attachment #26 at p. 27.

⁹ Outlets such as one applicant secured in Manayunk.

through Whole Foods franchisees in the Mid-Atlantic region.¹⁰ Many of the relevant customers in this trading area – stretching from New York to New Jersey to Philly and Baltimore – upon first seeing “Jin-Ja” on a ginger beverage will immediately “get it,” without need for the written equivalent of a nudge, a wink or an elbow in the ribs as memorialized by the Philly blog writer cited above.¹¹

5. *Items 1, 2 and 3 above comprise a prima facie case*

In short, I find that from the admission against interest by Mr. Canada, and clear understandings reflected in the work of bloggers, from applicant’s and third-parties’ websites to additional evidence most certainly reviewed by the examining attorney (e.g., a third-party registrant who adopted the term **JINJA** in July 2002 provided a translation that “The English translation for the word ‘JINJA’ is ‘ginger’”),¹² combined provide sufficient credible and reliable evidence to make out a *prima facie* case that § 2(e)(1) stands as a bar to the registration of this term. In this sense, even if one concedes that the examining attorney’s entire discussion of the linguistics and phonetics of “non-rhotic” speakers suffers from the inherent weakness of reliance on Wiki documents,

¹⁰ Attachment to outgoing Office Action of February 8, 2012, Attachment #28, p. 29, “His food product took off, with help,” by Dianna Marder, http://articles.philly.com/2012-01-26/food/30666967_1.

¹¹ While I do not rely on any foreign websites placed into the record by the examining attorney, query whether questions of etymology, phonology and international phonetics are really that different from the topics given some Board imprimatur in cases such as *In re Remacle*, 66 USPQ2d at 1224 n.5?

¹² Registration No. 2670215 issued on December 31, 2002; renewed.

these citations simply corroborate applicant's admissions and third-party uses placed into the record by the examining attorney.

6. *Practical tips for the examining corps?*

Examining attorneys cannot produce expert witnesses. These professionals who are on production cannot take valid and probative surveys to nail down "Philly speak" for the word "ginger." Yet where an issue such as regional pronunciations comes into play, the challenge of making a *prima facie* case is a critical part of the assignment.

So perhaps as hundreds of very capable attorneys in the examining corps scratch their collective heads, trying to draw out "lessons-learned" from this reversal, a creative and efficient possibility might well have been to provide applicant and this Board with hyperlinks to online video clips – such as one where well-known MSNBC television commentator, Chris Matthews (who incidentally, likes to discuss on-air his "Philly accent"), towards the end of a four-minute segment, refers three times to EPIC's Ginger McCall as "\'jin-jah\"."13

¹³ <http://videocafe.crooksandliars.com/heather/matthews-accuses-epics-mccall-slandering>. By the way, this tip pointing to evidence of the spoken dialect, *inter alia*, was not included in the record before us.