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Mailed: August 20, 2014

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Switzerly, Inc.

Serial No. 85720234

Ted D. Karr of Berkeley Law and Technology Group, LLP for Switzerly, Inc.

Karen K. Bush, Trademark Examining Attorney, Law Office 108 (Andrew Lawrence, Managing Attorney).

Before Kuhlke, Kuczma and Adlin, Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

Switzerly, Inc. (“Applicant”) seeks registration of GOOD BOX, in standard characters, alleging a bona fide intention to use the mark in commerce for “Wine.”¹ The Examining Attorney refused registration on the ground that Applicant’s mark is merely descriptive of the identified goods under Section 2(e)(1) of the Act. After the refusal became final, Applicant appealed and Applicant and the Examining Attorney filed briefs.

¹ Application Serial No. 85720234, filed September 4, 2012, under Section 1(b) of the Trademark Act.

A mark is deemed to be merely descriptive of goods, within the meaning of Section 2(e)(1), if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods. *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828 (Fed. Cir. 2007); and *In re Abcor Development*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). A mark need not immediately convey an idea of each and every specific feature of the applicant's goods in order to be considered merely descriptive; rather, it is sufficient that the mark describes one significant attribute, function or property of the goods. *In re H.U.D.D.L.E.*, 216 USPQ 358 (TTAB 1982); and *In re MBAssociates*, 180 USPQ 338 (TTAB 1973). Whether a mark is merely descriptive is determined not in the abstract, but in relation to the goods for which registration is sought, the context in which it is being used on or in connection with the goods, and the possible significance that the mark would have to the average purchaser of the goods because of the manner of its use. *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979). It is settled that "[t]he question is not whether someone presented with only the mark could guess what the goods or services are. Rather, the question is whether someone who knows what the goods or services are will understand the mark to convey information about them." *In re Tower Tech Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002).

When two or more merely descriptive terms are combined, the determination of whether the composite mark also has a merely descriptive significance turns on whether the combination of terms evokes a new and unique commercial impression.

If each component retains its merely descriptive significance in relation to the goods, the combination results in a composite that is itself merely descriptive. *See e.g., In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370 (Fed. Cir. 2004) (PATENTS.COM merely descriptive of computer software for managing a database of records that could include patents, and for tracking the status of the records by means of the Internet); *In re Petroglyph Games, Inc.*, 91 USPQ2d 1332 (TTAB 2009) (BATTLECAM merely descriptive for computer game software); *In re Carlson*, 91 USPQ2d 1198 (TTAB 2009) (URBANHOUSING merely descriptive of real estate brokerage, real estate consultation and real estate listing services); *In re Tower Tech*, 64 USPQ2d at 1314 (SMARTTOWER merely descriptive of commercial and industrial cooling towers); *In re Sun Microsystems Inc.*, 59 USPQ2d 1084 (TTAB 2001) (AGENTBEANS merely descriptive of computer programs for use in developing and deploying application programs); *In re Putman Publishing Co.*, 39 USPQ2d 2021 (TTAB 1996) (FOOD & BEVERAGE ONLINE merely descriptive of news and information services in the food processing industry).

Here, the Examining Attorney's evidence establishes that "good" may be defined as "of high quality; excellent" while "box" may be defined as "a container, case, or receptacle, usually rectangular, of wood, metal, cardboard, etc., and often with a lid or removable cover." Office Action of December 13, 2001.² With its Appeal Brief, Applicant submitted essentially similar evidence to which the Examining Attorney did not object, defining "good" as "of the highest worth or reliability," or "being

² Printouts from "dictionary.com."

positive or desirable in nature” and “box” as “a container typically constructed with four sides perpendicular to the base and often having a lid or cover.” Applicant’s Appeal Brief Exs. A, C.³

We do not consider these terms and their definitions in the abstract, however. Rather, we must determine whether GOOD BOX is merely descriptive in the context of the goods for which it is used, in this case wine. Here, the evidence shows that “good” and “box” both retain their merely descriptive significance when used in the composite mark GOOD BOX for wine. For example:

- A printout from the “squiddo” website is entitled “**Good Wine in a Box**” and has the subheading “**Premium Box Wine: It’s not an Oxymoron.**”

- A printout from the Forbes website states “However, here’s a bit of stereotypical truthiness that is no longer valid. **Box wines** don’t suck. In fact, these days, depending on where you look in the wine aisle, much of the **box wine** in the U.S. is quite good ... I will note that wine enthusiasts are missing an opportunity to find drinking value and enjoyment across a number of other **box wine** offerings if they let one box spoil the pallet, as it may be.”

- A printout from the La Jolla Mom website bears the heading “7 Practicalities Of **(Good) Boxed Wine.**”

- A printout from the “northjersey.com” website bears the heading “Wine Rack: Four **good boxed wines.**”

- A printout from the “kitchn.com” website bears the heading “Can you Recommend a **Good Boxed**

³ In addition to not objecting to this evidence, the Examining Attorney also discussed it in her brief. Examining Attorney’s Appeal Brief at 3. Accordingly, we deem it to have been stipulated into the record. By contrast, the Examining Attorney clearly objected to the other evidence Applicant submitted for the first time with its brief, and because this evidence is untimely, the Examining Attorney’s objections to that additional evidence are sustained. Trademark Rule 2.142(d).

Wine?,” and poses the question “Readers, do you have a favorite **box wine** to recommend?”

- A printout of an article from the “thetimes-tribune.com” website entitled “Holiday parties call for the value and **quality of box wine**,” states “There’s nothing wrong with putting out a **box wine** for a party ... for a big crowd, you want to have a high volume of wine with a broad appeal. That’s what **box wine** is all about ... **Box wines have been good for quite a while now**. The **good box wine** started when an unemployed Silicon Valley worker wanted to find a cheap wine and was disappointed by existing box wines. He founded Black Box wines and created the three-liter box category.”

- Printouts of headlines from “huffingtonpost.com” include “Steer Away From **Big-Box Wine**” and “A **Box Wine** Buying Guide.”

- A printout from the “christoperswinecheese.wordpress.com” website bears the heading “forever in search of a **good box wine?**”

- A printout from Jason’s Wine Blog (“winelog.net”) bears the heading “Finally Going to Try Franzia **Box Wine**,” and states “So I’ve been waiting for an occasion to bust out some more **box wine**. I had a good experience with Hardy’s **Box Wine** in the past, but have been wanting to try something from the King of **Box Wines**: Franzia. The Super Bowl is a perfect occasion for **box wine**”

- A printout of a tweet from Binny’s Beverage states “The key to **good box wine** is finding the right price – quality wine but not prohibitively expensive at 5+ bottles’ volume.”

- A printout from “cnn.com” bears the heading “**Box wine** with serious bang for the buck,” and states “I think **boxed wine** is where people ought to watch their step. Of course, this wasn’t always the case. It used to be that all **boxed wine** was bad. That was easy. Now things are trickier, because a number of producers are actually

putting good wine – and sometimes **really good wine** – **into boxes.**”

• A printout of the “Wikipedia.org” entry for “**Box wine**” states “A **Box wine** (or boxed wine, goon, goon bag, cask wine) is a wine packaged as a bag-in-box ... The process for packaging ‘cask wine’ (**box wine**) was invented by Thomas Angove of Angove’s”

Office Actions of December 13, 2012 and May 10, 2013 (emphasis supplied). In addition, Applicant introduced an article from *The New York Times* entitled “Thinking Inside the Box,” which states: “It’s the epitome of déclassé, the vinous equivalent of trailer trash, the wine snob’s worst nightmare. No, I don’t mean the screw cap. I’m talking about boxed wine. Despite the almost reflexive elevation of noses at the mention of boxed wines, one significant detail undermines these smug dismissals: the idea of putting wine in a box, or more accurately, in a bag within a box, is brilliant.” Office Action Response of April 18, 2013 Ex. A4.

This evidence establishes that in the context of wine, “box” refers to wine sold in a box, as does “boxed,” and that while at one time wine sold in boxes had a reputation for being of lesser quality than wine sold in bottles, “good” box wine is becoming increasingly common and consumers now seek out “good” box or boxed wine, *i.e.*, wine sold in boxes. In fact, the evidence of record makes clear that “the mark as a whole, *i.e.*, the combination of the individual parts,” in this case the words “good” and “box,” does not convey “any distinctive source-identifying impression contrary to the descriptiveness of the individual parts.” *In re Oppedahl & Larson*, 71 USPQ2d at 1372. To the contrary, from “the perspective of a prospective purchaser or user” of wine, “because ... the combination of the terms

does not result in a composite that alters the meaning of either of the elements,” and does not create a double entendre, “refusal on the ground of descriptiveness is appropriate.” *In re Petroglyph Games*, at 1341.⁴

Applicant’s argument that its mark does not describe the wine itself, but at most the packaging for the wine, is not well-taken. As Applicant itself recognizes, “[w]ines may be categorized by type of packaging.” Applicant’s Appeal Brief at 5. In fact, because wine is a liquid, under normal circumstances it must be sold to consumers in some type of container or package, and Applicant’s GOOD BOX mark must appear on the package, in this case a box, containing Applicant’s wine. *See In re Serv-A-Portion Inc.*, 1 USPQ2d 1915, 1916 n.4 (TTAB 1986) (in determining whether SQUEEZE N’ SERV is descriptive for ketchup, stating “... whether it is the package itself, or the ketchup, or both, which is (are) squeezed, is immaterial. The identified product is ketchup but it is understood that this kind of food is necessarily sold in packages, hence the package is as much as part of the goods as the ketchup.”); *Minneapolis Brewing Co. v. Ekhardt & Becker Brewing Co.*, 38 USPQ 344 (Comm’r. 1938) (finding that “‘steinie’ had been adopted in trade as the name of a particular type of bottle designed to contain beer,” and holding that “A trademark for bottled beer must necessarily be affixed to the bottle, and the bottle with its contents are sold together as a single item of merchandise. Every

⁴ Applicant argues in its brief that “good” is not laudatory, and therefore not descriptive. We need not decide whether the term “good” qualifies as laudatory in order to determine that in the context of Applicant’s mark and goods, it is merely descriptive. The evidence makes clear that many consumers seek out “good box wine,” sometimes called “good boxed wine.”

manufacturer of ‘steinie’ bottles has the right to mark his goods with their name, if he so desires, as has also every manufacturer of beer who sells his product in this type of bottle.”).

Indeed, the predecessor to our primary reviewing court has held that a mark which is merely descriptive of the packaging of goods may be found merely descriptive for the goods themselves. *J. Kohnstam, Ltd. v. Louis Marx & Co., Inc.*, 280 F.2d 437, 126 USPQ 362 (CCPA 1960). There, the Court found MATCHBOX SERIES merely descriptive of “toy model vehicles and toy model machines” sold in matchboxes.

We think the word is just as descriptive of a box which is made to look as much like a matchbox as is feasible so that the toys packaged in it can appropriately be designated as a “Matchbox Series” of toys ... Appellant has also *argued* that “MATCHBOX SERIES” is not descriptive of *toys*. We give no weight to this argument for, while it may be literally true, it does not hold with respect to a series of toys sold in simulated matchboxes. The merchandise in the form in which appellant puts it on the market is aptly described as a series of matchbox toys.

Id. 126 USPQ at 364.

Applicant’s argument that GOOD BOX has “multiple meanings” and is therefore not merely descriptive is not persuasive. “It is well settled that so long as any one of the meanings of a term is descriptive, the term may be considered to be merely descriptive.” *In re Chopper Industries*, 222 USPQ 258, 259 (TTAB 1984); *see also, In re IP Carrier Consulting Group*, 84 USPQ2d 1028, 1034 (TTAB 2007); *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979).

Applicant's argument that "good" is not descriptive because there are a number of registrations in which the term is not disclaimed is unavailing, for two reasons. First, Applicant failed to introduce these registrations into evidence prior to filing its appeal and we have therefore sustained the Examining Attorney's objection to our consideration of these registrations. *See*, fn. 3, *supra*. Second, even if these registrations were of record, it is settled that "[a]lthough the United States Patent and Trademark Office strives for consistency, each application must be examined on its own merits. Neither the Trademark Examining Attorney nor the Board is bound to approve for registration an Applicant's mark based solely upon the registration of other assertedly similar marks for other goods or services having unique evidentiary records." *In re Datapipe, Inc.*, 111 USPQ2d 1330, 1336 (TTAB 2014); *see also, In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) ("The Board must decide each case on its own merits ... Even if some prior registrations had some characteristics similar to Nett Designs' application, the PTO's allowance of such prior registrations does not bind the Board or this court.").⁵

Conclusion

While Applicant is correct that we must resolve doubt in its favor, here we have no doubt. On this record, it is clear that consumers immediately understand, upon seeing GOOD BOX for wine, that the wine is a good or "not bad" wine that is sold in a box rather than a bottle or other container. Furthermore, the evidence

⁵ For the same reasons, the third-party registrations of record, of BLACK BOX (Registration No. 2791248) and THE BIG GREEN BOX (Registration No. 4036815), both for wine, are not binding.

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reveals that consumers seek out good box wine and that competitors have a need to use “good box” for wine. *See, In re Boston Beer Co. L.P.*, 47 USPQ2d 1914, 1920-21 (TTAB 1998) (finding THE BEST BEER IN AMERICA to be merely descriptive and without acquired distinctiveness for beer, stating that “Such claims of superiority should be freely available to all competitors in any given field to refer to their products or services”), *aff’d*, 198 F.3d 1370, 53 USPQ2d 1056 (Fed. Cir. 1999); *In re Abcor Development*, 200 USPQ at 217 (“The major reasons for not protecting [merely descriptive] marks are ... 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.”).

Decision: The refusal to register is affirmed.