

This Opinion is not a
Precedent of the TTAB

Mailed: December 14, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Lamex Foods Inc.

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Serial No. 86467416

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Danielle I. Mattessich and Linhda Nguyen of Merchant & Gould P.C.,
for Lamex Foods Inc.

J. Peter Bodri, Trademark Examining Attorney, Law Office 105,
Jennifer Williston, Managing Attorney.

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Before Bergsman, Ritchie and Larkin,
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Lamex Foods Inc. (“Applicant”) seeks registration on the Principal Register of the mark RANGE FARMS (in standard characters) for “poultry,” in International Class 29.¹ Applicant disclaimed the exclusive right to use the word “Farms.”

The Trademark Examining Attorney has 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. 86467416 was filed on December 1, 2014, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(1), based upon Applicant’s allegation of a *bona fide* intention to use the mark in commerce.

RANGE FARMS for “poultry” is merely descriptive. According to the Trademark Examining Attorney, because the mark consists of two descriptive words, “Range” and “Farms,” that describe where the poultry comes from (*i.e.*, a range and a farm), “the mark immediately conveys information about the goods to a consumer aware of the nature of the goods.”²

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed. We reverse the refusal to register.

Section 2(e)(1) of the Trademark Act precludes registration of “a mark which, (1) when used on or in connection with the goods [or services] of the applicant is merely descriptive . . . of them.” 15 U.S.C. § 1052(e)(1). A term is merely descriptive within the meaning of Section 2(e)(1) “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 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)); *see also In re TriVita, Inc.*, 783 F.3d 872, 114 USPQ2d 1574, 1575 (Fed. Cir. 2015).

We consider whether someone familiar with the identified goods will understand the mark to convey information about them, rather than considering the mark in the abstract. *DuoProSS Meditech Corp. v. Inviro Med. Devices Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012); *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ

² Trademark Examining Attorney’s Brief (9 TTABVUE 5).

215, 218 (CCPA 1978); *In re Remacle*, 66 USPQ2d 1222, 1224 (TTAB 2002). Descriptiveness must be assessed “in relation to the goods for which registration is sought, the context in which it is being used, and the possible significance that the term would have to the average purchaser of the goods because of the manner of its use or intended use.” *Bayer Aktiengesellschaft*, 82 USPQ2d at 1831 (citing *Abcor Dev.*, 200 USPQ at 218). In other words, the issue is not whether someone presented only with the mark could guess the products listed in the description of goods. Rather, the question is whether someone who knows what the products are will understand the mark to convey information about them. *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 103 USPQ2d at 1757 (quoting *In re Tower Tech, Inc.*, 64 USPQ2d 1314, 1316-1317 (TTAB 2002)).

The evidence of record establishes that the words “Range” and “Farm” separately are merely descriptive when used in connection with poultry because they describe where the poultry is produced (*e.g.*, on a farm or on the range). *See e.g.*, the evidence listed below:

1. The word “Range” is defined, *inter alia*, as “a large area of open land for grazing or hunting.”³
2. The word “Farm” is defined, *inter alia*, as “[with modifier] A place for breeding a particular type of animal or producing a specified crop: ‘a fish farm’ and

³ Oxford Dictionaries (2015) (oxforddictionaries.com) attached to the March 20, 2015 Office Action; *see also* The American Heritage Dictionary of the English Language (2016) (no url) attached to the April 26, 2016 Response to Office Action.

“[with modifier] An establishment at which something is produced or processed: ‘*an energy farm.*’”⁴

3. Lombardi Brothers Meats (lombardibrothers.com)

Fulton Valley Farms pledges that our RANGE chickens are raised the natural way. ... Range birds are provided with forage and range space equal to or larger than the houses provided for their security.⁵

4. Malvitz Bay Farms (malvitzbayfarms.com)

We raise **all natural, hormone, and antibiotic free** chickens. Our chickens are raised in range pens eating grass and bugs. These range pens protect the bird from predators.⁶

5. LexisNexis search results for “range chickens” and “range poultry.”⁷

6. American Pastured Poultry Producers Association (appa.org)

“Range Poultry Production Systems: Commonalities between systems,” a web posting describing range poultry production as including “access to fresh pasture and the use of non-medicated, natural feeds.”⁸

7. What appears to be a publication entitled “Range Poultry Housing” (June 2003) published by the Appropriate Technology Transfer for Rural Areas (attar.ncat.org) which refers to “a variety of housing styles commonly used for ranged chickens.”⁹

⁴ *Id.*

⁵ March 20, 2015 Office Action.

⁶ March 20, 2015 Office Action.

⁷ October 26, 2015 Office Action.

⁸ October 26, 2015 Office Action.

⁹ October 26, 2015 Office Action.

However, there is no evidence showing use of the unitary term “Range Farms” in connection with poultry or any other type of agricultural endeavor. Applicant conducted a search for “range farms” using the GOOGLE search engine and only retrieved references to “free-range farms.”¹⁰

When two or more merely descriptive terms are combined, the determination of whether the combined mark also has a merely descriptive significance turns on the question of whether the combination of terms evokes a non-descriptive 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. *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370, 1371 (Fed. Cir. 2004) (quoting *Estate of P.D. Beckwith, Inc. v. Commissioner*, 252 U.S. 538, 543 (1920)); see also *In re Tower Tech, Inc.*, 64 USPQ2d at 1318 (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). On the other hand, a mark comprising a combination of merely descriptive components is registrable if the combination of terms creates a unitary mark with a non-descriptive meaning, or if

¹⁰ September 20, 2015 Response to Office Action. “Free range denotes a method of farming husbandry where the animals, for at least part of the day, can roam freely outdoors, rather than being confined in an enclosure for 24 hours each day.” Wikipedia entry attached to the April 26, 2016 Response to Office Action.

the composite has an incongruous meaning as applied to the goods or services. *See In re Colonial Stores Inc.*, 394 F.2d 549, 157 USPQ 382 (CCPA 1968) (SUGAR & SPICE for “bakery products”); *In re Shutts*, 217 USPQ 363 (TTAB 1983) (SNO-RAKE for “a snow removal hand tool having a handle with a snow-removing head at one end, the head being of solid uninterrupted construction without prongs”). Thus, we must consider the issue of descriptiveness by looking at the mark in its entirety.

“On the other hand, if one must exercise mature thought or follow a multi-stage reasoning process in order to determine what product or service characteristics the term indicates, the term is suggestive rather than merely descriptive.” *In re Tennis in the Round, Inc.*, 199 USPQ 496, 498 (TTAB 1978); *see also, In re Shutts*, 217 USPQ at 364-65; *In re Universal Water Systems, Inc.*, 209 USPQ 165, 166 (TTAB 1980). In this regard, “incongruity is one of the accepted guideposts in the evolved set of legal principles for discriminating the suggestive from the descriptive mark.” *In re Shutts*, 217 USPQ at 365. *See also In re Tennis in the Round, Inc.*, 199 USPQ at 498 (the association of applicant’s mark TENNIS IN THE ROUND with the phrase “theater-in-the-round” creates an incongruity because applicant’s services do not involve a tennis court in the middle of an auditorium).

We have difficulty in accepting the argument of the Trademark Examining Attorney that the mark as a whole is merely descriptive. The idea of a “range farm” is an incongruous or strange way to identify a place for breeding poultry in that the terms “Range” and “Farms” can be used interchangeably. The record shows that the unitary term “Range Farms” has no recognized meaning when used in connection

with poultry and it does not readily and immediately evoke an impression and understanding of where poultry is produced. Because the word “Range” modifies the word “Farms” in the applied-for mark, the compound term RANGE FARMS suggests that poultry is produced on a large area of open farm land. This suggestion requires purchasers to use some imagination and reasoning.

Also, we note that the registration of RANGE FARMS does not preclude competitors from using the descriptive words “Range” and “Farms” individually. Competitors remain perfectly free to use variations of terms such as “range poultry,” “range chickens,” “farm poultry,” “free-range farm,” or “farm chickens.”

We recognize that the suggestive/descriptive dichotomy can require drawing fine lines and involves subjective judgment. Indeed, this case may well present such a challenge in making the necessary classification. At the very least, however, we have doubts about the “merely descriptive” character of the mark before us and, unlike the situation in determining likelihood of confusion under Section 2(d) of the Trademark Act, it is clear that such doubts are to be resolved in favor of applicants. *See In re Box Solutions Corp.*, 79 USPQ2d 1953, 1955 (TTAB 2006); *In re Geo. A. Hormel & Co.*, 218 USPQ 286, 287 (TTAB 1983); *In re Shutts*, 217 USPQ at 365.

Decision: The refusal to register Applicant’s mark RANGE FARMS is reversed.