

This Opinion is Not a
Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Houston Bites, LLC
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Serial No. 87170141
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John Ross Flynt of Tumey L.L.P.,
for Houston Bites, LLC.

Douglas M. Lee, Trademark Examining Attorney, Law Office 111,
Robert L. Lorenzo, Managing Attorney.

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Before Lykos, Masiello, and Gorowitz,
Administrative Trademark Judges.

Opinion by Lykos, Administrative Trademark Judge:

Houston Bites, LLC (“Applicant”), a limited liability company located in Houston, Texas, has filed an application to register the mark **Houston Bites** in standard characters on the Principal Register for services ultimately identified as “[p]roviding a website featuring non-downloadable photographs regarding restaurants, food and beverages” in International Class 41.¹ Applicant has disclaimed “Houston” apart from

¹ Application Serial No. 87170141, filed September 13, 2016, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

the mark as shown.

The Trademark Examining Attorney has refused registration 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 services. When the refusal was made final, Applicant appealed and filed a request for reconsideration, which was denied. The appeal is now briefed. For the reasons set forth below, we affirm the refusal to register.

In the absence of acquired distinctiveness, Section 2(e)(1) of the Trademark Act precludes registration of a mark on the Principal Register that, when used in connection with the applicant's goods or services, is merely descriptive of them. 15 U.S.C. § 1052(e)(1). "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 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).

The determination of whether a mark is merely descriptive must be made in relation to the services for which registration is sought, not in the abstract. *In re Chamber of Commerce*, 102 USPQ2d at 1219; *In re Bayer*, 82 USPQ2d at 1831. This requires consideration of the context in which the mark is used or intended to be used in connection with those services, and the possible significance that the mark would have to the average purchaser of the services in the marketplace. *In re Chamber of*

Commerce, 102 USPQ2d at 1219; *In re Bayer*, 82 USPQ2d at 1831; *In re Omaha Nat'l Corp.*, 819 F.2d 1117, 2 USPQ2d 1859 (Fed. Cir. 1987). In other words, the question is not whether someone presented only with the mark could guess the services listed in the identification. Rather, the question is whether someone who knows what the services are will understand the mark to convey information about them. *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012) (quoting *In re Tower Tech, Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002)).

Evidence that a term is merely descriptive to the relevant purchasing public “may be obtained from any competent source, such as dictionaries, newspapers, or surveys,” *In re Bayer*, 82 USPQ2d at 1831, as well as from “labels, packages, or . . . advertising material directed to the [services].” *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978).

The issue before the Board is whether Applicant’s mark **Houston Bites**, as a whole, is merely descriptive of the identified services.

The Examining Attorney takes the position that the mark **Houston Bites** is merely descriptive of the subject matter of Applicant’s services, namely, providing a website featuring non-downloadable photographs relating to light meals and snacks and restaurants featuring such meals and snacks located in Houston, Texas. In support thereof, the Examining Attorney has submitted a dictionary entry for “Houston” as “a city of southeast Texas near Galveston Bay.” *See* December 20, 2016

Office Action, p. 39² (excerpt from www.thefreedictionary.com). The record further shows that Applicant is located in Houston, Texas, and as noted above, Applicant voluntarily disclaimed “Houston.” In addition, the Examining Attorney submitted a dictionary entry for “bites” as an informal term referring to “a light meal or snack.” *See id.* at 3 (excerpt from www.thefreedictionary.com). Both elements of the mark are thus descriptive of the identified services. It is well established that if the individual components of a mark retain their descriptive meaning in relation to the services, the combination results in a composite mark that is itself descriptive and not registrable. *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1516 (TTAB 2016) (citing *In re Tower Tech, Inc.*, 64 USPQ2d 1314, 1317-18 (TTAB (2002))).

With this principle in mind, we find that the combination of “Houston Bites” results in a mark that is merely descriptive of the subject matter of Applicant’s Internet content provision services. Our determination is bolstered by the evidence of third-party use showing it is not uncommon for consumers to encounter “bites” preceded by a geographic location used to identify websites featuring restaurant and food reviews pertaining to the identified locations. *See, e.g.*, CHICAGO BITES at www.chicagobites.com (“Your dining companion for Chicago restaurants, craft beers, farmers markets, food festivals, food trucks & edible adventures.”) submitted with the December 20, 2016 Office Action pp. 20-21; JERSEY BITES at jerseybites.com (website featuring restaurant reviews, food events and meals pertaining to New

² Citations to the prosecution history are to USPTO Trademark Status & Document Retrieval (“TSDR”) database.

Jersey) *id.* at 34-39; SEATTLE BITES FOOD TOURS at www.seattlebitesfoodtours.com (“Our Bites savory and sweet, big and delicious, prepared especially for you.”) submitted with the June 22, 2017 Office Action pp. 4-7; and VENICE BITES FOOD TOURS at venicebitesfoodtours.com (“Join us on a 3.5+ hour tour, walking, eating and drinking through the magical maze known as Venice.”) *id.* at 11-13. These third-party uses illustrate the way in which customers would interpret the combination of the words “Houston” and “Bites” in Applicant’s mark. That is, they would perceive Applicant’s mark as a whole to describe foods that are available in Houston.

Applicant postulates that finding a mark merely descriptive of the “subject matter” of goods or services is the incorrect standard because “subject matter” is not mentioned in the statute. Applicant asserts that “subject matter focus” is “but one factor under a rejection for a ‘generic’ argument” (Brief, p. 2; 5 TTABVUE 3), and that the Examining Attorney has failed to present any evidence of genericness. *Id.* at 4; 5 TTABVUE 5. Applicant’s arguments are misplaced. The language of Section 2(e)(1) is broad, providing that:

No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it . . . (e) Consists of a mark which, (1) when used on or in connection with the goods of the applicant is merely descriptive or deceptively misdescriptive of them . . .

The U.S. Court of Appeals for the Federal Circuit has consistently interpreted this provision as meaning that a mark is merely descriptive “if it immediately conveys knowledge of a ... feature of the goods or services with which it is used.” *Chamber*

of Commerce, 102 USPQ2d at 1219. Clearly, “a feature” encompasses the “subject matter” of Internet content provision services. Moreover, the Examining Attorney did not issue a refusal on the ground that Applicant’s mark is generic; as such, any arguments Applicant offers to rebut a finding of genericness are not pertinent here.

In sum, Applicant’s proposed mark immediately conveys, without need for conjecture or speculation, a feature of Applicant’s services, namely that the subject matter of the photographs displayed on Applicant’s website is light meals and snacks available in Houston, Texas. Accordingly, we find Applicant’s proposed standard character mark **Houston Bites** merely descriptive of “[p]roviding a website featuring non-downloadable photographs regarding restaurants, food and beverages.”

Decision: The refusal to register is affirmed.