

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

Oral Hearing: April 24, 2019

Mailed: November 21, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Ocean Technology, Inc.

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Serial No. 87405201

Stephen G. Janoski of Butzel Long,
for Ocean Technology, Inc.

Cameron McBride, Trademark Examining Attorney, Law Office 106,
Mary Sparrow, Managing Attorney.

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Before Ritchie, Greenbaum and Lynch,
Administrative Trademark Judges.

Opinion by Greenbaum, Administrative Trademark Judge:

Ocean Technology, Inc. (“Applicant”) seeks registration on the Principal Register of the following proposed mark for goods ultimately identified as “crabmeat” in International Class 29:¹

¹ Application Serial No. 87405201 was filed on April 10, 2017, based upon Applicant’s allegation of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b) of the Trademark Act, for goods originally identified as “crabmeat; package combinations consisting primarily of crabmeat; packaged entrees consisting primarily of crabmeat; prepared appetizers consisting primarily of crabmeat.”

On January 10, 2018, Applicant filed an Amendment to Allege Use based on a claim of first use anywhere and use in commerce since at least as early as May 31, 2017, and amended the application to the Supplemental Register to obviate a descriptiveness refusal under Section



The application includes the following description of the mark: “The mark consists of the stylized wording ‘ALL NATURAL’ appearing above a crab design, with ‘Gourmet’ in stylized italicized font appearing over the crab’s right claw, and ‘CRABMEAT’ in stylized uppercase font inside of a shaded banner appearing underneath the crab, and the stylized uppercase term ‘PASTEURIZED’ along the bottom portion of the mark.”

“Crabmeat” is disclaimed, and color is not claimed as a feature of the proposed mark.

The Trademark Examining Attorney has refused registration of Applicant’s proposed mark under Sections 1, 2 and 45 of the Trademark Act, 15 U.S.C. §§ 1051, 1052 and 1127, on the ground that it fails to function as a mark because it is merely informational, consisting of non-source indicating informational terms and matter that would not be perceived as identifying and distinguishing Applicant’s goods from

2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1). However, in the August 2, 2018 Request for Reconsideration, Applicant amended the application back to the Principal Register, asserting instead that the proposed mark has acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f), and in the alternative, that it is inherently distinctive. The Examining Attorney did not accept the Section 2(f) claim, but did not reinstate the descriptiveness refusal even though Applicant withdrew its amendment to the Supplemental Register.

those of others or indicating their source.² The Examining Attorney also has refused registration because Applicant failed to comply with a requirement to provide information about the identified goods issued pursuant to Trademark Rule 2.61(b), 37 C.F.R. § 2.61(b).

When the refusals were 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 based on Applicant's failure to comply with the requirement for information issued pursuant to Trademark Rule 2.61(b), and affirm the refusal based on failure to function.

I. Applicable Law

A. Trademark Rule 2.61(b) Requirement for Information

Trademark Rule 2.61(b) provides that the examining attorney "may require the applicant to furnish such information, exhibits, affidavits or declarations ... as may be reasonably necessary to the proper examination of the application." Here, the Examining Attorney issued a final Office Action requiring Applicant to explain whether the goods "do or will consist of 100% real Callinectes crab," to provide samples of advertisements or photographs featuring the identified goods or, if such were not available, of similar goods, and a written statement detailing the nature, purpose and channels of trade of the goods. The wording "100% real Callinectes crab"

² The Examining Attorney consistently references Sections 1, 2, 3 and 45 of the Trademark Act as the basis for the refusal that the proposed mark is merely informational. Section 3 of the Trademark Act, 15 U.S.C. § 1053, applies to marks for services, not goods, and therefore is not applicable here.

is not part of the proposed mark. The Examining Attorney erroneously states in the Brief that the mark refers to “100% real Callinectes crab from North America,” and that the requirement for information pertained to “whether the mark is possibly deceptive or deceptively misdescriptive.” 9 TTABVUE 11. Given that such wording actually is not part of the proposed mark, we have no justification why the requirement for information would be reasonably necessary to the proper examination of the application. We therefore reverse the refusal on that basis. *See* Trademark Rule 2.61(b).

B. Failure to Function – Informational

“[A] proposed trademark is registrable only if it functions as an identifier of the source of the applicant’s goods or services.” *In re DePorter*, 129 USPQ2d 1298, 1299 (TTAB 2019) (citing Sections 1, 2 and 45 of the Trademark Act). “The Trademark Act is not an act to register mere words, but rather to register trademarks. Before there can be registration, there must be a trademark, and unless words have been so used they cannot qualify.” *In re Bose Corp.*, 546 F.2d 893, 192 USPQ 213, 215 (CCPA 1976).

Whether matter applied for as a trademark functions as a trademark depends on how it would be perceived by the relevant public. *In re Eagle Crest, Inc.*, 96 USPQ2d 1227, 1229 (TTAB 2010); *In re Aerospace Optics, Inc.*, 78 USPQ2d 1861, 1862 (TTAB 2006). We make this determination by reviewing the specimens and other evidence of record showing how the applied-for matter is used. *In re Hulting*, 107 USPQ2d 1175, 1177 (TTAB 2013) (quoting *Eagle Crest*, 96 USPQ2d at 1229). “The more commonly a [term or expression] is used, the less likely that the public will use it to

identify only one source and the less likely that it will be recognized by purchasers as a trademark.” *Id.* Where the evidence suggests that the ordinary consumer “would take the words at their ordinary meaning rather than read into them some special meaning distinguishing the [goods] from similar [goods] of other[s],” then the words fail to function as a mark. *In re Standard Oil Co.*, 275 F.2d 945, 125 USPQ 227, 229 (CCPA 1960). Mere intent that a word, design, symbol, or slogan function as a trademark, or the fact that such designation appears on the specimen, is not enough in and of itself to make it a trademark. *See In re Water Gremlin Co.*, 635 F.2d 841, 208 USPQ 89, 90 (CCPA 1980); *In re Manco, Inc.*, 24 USPQ2d 1938, 1941 (TTAB 1992) (citing *In re Remington Prods. Inc.*, 3 USPQ2d 1714, 1715 (TTAB 1987)). To be a trademark, the proposed mark must be used in a manner calculated to project to purchasers or potential purchasers a single source or origin for the goods. *Bose*, 192 USPQ at 215; *In re Volvo Cars of N. Am. Inc.*, 46 USPQ2d 1455, 1459 (TTAB 1998).

The Examining Attorney contends that Applicant’s proposed mark,



, will not be perceived as a trademark for the identified “crabmeat” because it is presented in an informational manner and consists of terms that are commonly used in Applicant’s trade or industry to denote the purity, quality and ingredients of crabmeat and other food products. To support this contention, the Examining Attorney cites to evidence of third party use of the literal terms and to the

way the proposed mark appears on Applicant's specimen. We also consider evidence in the form of declarations submitted by Applicant.

1. Evidence of Third Party Use

As support, the Examining Attorney submitted printouts from a number of third-party purveyors of seafood (and related products such as seafood stock and seasoning for seafood) showing use of the same or effectively synonymous terms to inform purchasers of the quality and ingredients of the products. The most relevant evidence, which pertains to crabmeat, shrimp and other seafood, is summarized below:³

- Blue Crab Bay Co. advertises “gourmet crabmeat,” which it touts as “the most natural canned product available, approved for sale by natural food retailers.”
- Thrive Market sells Crown Prince “natural” “fancy white-lump crab meat.”
- J.M. Clayton Company Seafood offers “Pasteurized Crabmeat.”
- Linton's Seafood offers “Maryland Blue Crab Meat – Pasteurized.”
- Robert Irvine Foods offers “all natural” “gourmet crab cakes.”
- Handy sells “Callinectes Crab Meat From Mexico” touted as “all-natural, sweet crab meat from Callinectes crabs” with benefits including “Better flavor and texture” “Your assurance – no species substitutions” and “No preservatives for better flavor.”

³ The evidence summarized above is attached to the July 12, 2017 Office Action, TSDR 14-18, and the February 16, 2018 Office Action, TSDR 8-9, 14-16, 18-20.

- Fat Crab offers “All Natural – No Preservatives” “Callinectes SPP” from Mexico, touting that “[w]e include the fat when pasteurizing our crabmeat to enrich and accentuate its flavor.”
- Henry & Lisa’s Natural Seafood sells “All Natural Uncooked Shrimp”
- The menu for Hollywood East Café offers “Gourmet Seafood” including dishes featuring lobster, Dungeness Crab, and oysters.
- Harry & David offers various “Gourmet Food & Wine” products, including “gourmet seafood.”
- Maureen C. Berry, a “writer,” “cook” and “photographer,” posted an article titled “Pasteurized Crab Meat: A Lesson in Buying” on her blog.
- Capital Seaboard offers “Pasteurized Crab Meat” from various species including “Domestic Blue Crab,” and explains that when fresh crab meat is not in season, “[t]hese gaps in production are filling, by some, with premium pasteurized crab meat varieties.”
- Twin Tails offers BOSS brand “Pasteurized Crab Meat.”

Applicant contends that the proposed mark is not merely informational, but is suggestive and capable of showing the source of the goods. The standard for a failure to function refusal is not whether the proposed mark is suggestive rather than descriptive, but rather whether the relevant public will recognize it as a trademark identifying only one source. *See In re Phoseon Tech., Inc.*, 103 USPQ2d 1822, 1827 (TTAB 2012) (noting that the critical inquiry in determining whether a proposed mark function as a trademark is the “commercial impression it makes on the relevant

public (e.g., whether the term sought to be registered would be perceived as a mark identifying the source of the goods or merely as an informational phrase”). The evidence outlined above shows use of the wording (and close variations thereof) in the proposed mark by others in the industry to convey their ordinary meanings and provide purchasers with general information about crabmeat and other food products, including shrimp and other seafood. *In re Wal-Mart Stores, Inc.*, 129 USPQ2d 1148, 1153 (TTAB 2019) (widespread informational use of the wording by others indicates consumers would not associate it with a particular source). Indeed, the wording in the proposed mark just informs consumers that the goods are pasteurized crabmeat that is gourmet and all natural.

2. Stylization and Design Elements

The proposed mark also includes stylization, a background carrier and a crab design. “A display of ... unregistrable matter is not registrable on the Principal Register unless the design features of the asserted mark create an impression on the purchasers separate and apart from the impression made by the words themselves....” *In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1639 (Fed. Cir. 2016) (quoting *In re Sadoru Grp., Ltd.*, 105 USPQ2d 1484, 1486 (TTAB 2012)). In this case, the fonts of the wording are not particularly notable or distinctive. *See Sadoru Grp., Ltd.*, 105 USPQ2d 1484 (stylization insufficient given blue “slightly stylized block lettering”). There is nothing about the block and cursive lettering that creates its own impression, apart from the wording. *See In re Northland Aluminum Prods. Inc.*, 777 F.2d 1556, 227 USPQ 961, 964 (Fed. Cir. 1985) (affirming the TTAB’s rejection, as generic, of a stylized mark that was “not so distinctive as to create a

commercial impression separate and apart from the” word (BUNDT) itself). And the crab image, which appears in the middle of the informational wording, appears to be a photorealistic, accurate pictorial representation of a crab. There is nothing stylized, fanciful or abstract about the image, and thus nothing to detract from the commercial impression of the word “crab.” The crab image simply informs prospective consumers that the associated product is crabmeat, and it reinforces the informational nature of the wording surrounding the image. *In re Ocean Tech.*, ___ USPQ2d ___ (TTAB 2019) (Application Serial Nos. 87405211 and 87405233) (and cases cited therein).

3. Applicant’s Specimen

We also agree with the Examining Attorney that the proposed mark, as displayed in its entirety on Applicant’s specimen⁴ below, “just conveys the contents of the package to consumers, and does not show any indication of source that may be perceived by the general public.”⁵ 9 TTABVUE 7.

⁴ Applicant’s specimen included a second page showing the lid for the packaging, but it does not display the proposed mark, and so is not reproduced or further considered in this decision.

⁵ In the Amendment to Allege Use, Applicant describes the specimen as “photographs of product packaging for a corresponding product.”



The specimen displays the proposed mark on the side of the product container in a manner that simply informs purchasers that the package contains all-natural, gourmet, pasteurized crabmeat. Nothing in the combination of wording, carriers, font and crab design in the proposed mark (which, as noted above, does not claim color as a feature of the mark) results in a registrable composite. Rather, this evidence supports a finding that the proposed mark, as a whole, fails to function as a trademark for the identified goods. *See Eagle Crest*, 96 USPQ2d at 1229 (“Slogans and other terms that are considered to be merely informational in nature, or to be common laudatory phrases or statements that would ordinarily be used in business or in the particular trade or industry, are not registrable.”); *Aerospace Optics*, 78 USPQ2d at 1864 (SPECTRUM failed to function as a trademark for illuminated pushbutton switches because it was used in a manner that merely informed potential purchasers of the multiple color feature of the goods). Ultimately, both the content of

the proposed mark and the way it is presented lead to a determination that, viewed in its entirety, it is informational rather than source-indicating.⁶

4. Applicant's Consumer Perception Evidence Unpersuasive

Applicant has attempted to overcome the failure-to-function refusal by variously amending to the Supplemental Register, claiming that the proposed mark has acquired distinctiveness, and asserting that the proposed mark is inherently distinctive. However, matter that does not indicate the source or origin of the identified goods and distinguish them from those of others cannot be registered because it does not meet the statutory definition of a trademark. *See* Sections 1, 2 and 45 of the Trademark Act. This is so regardless of the register on which registration is sought (i.e., Principal or Supplemental), or a claim of acquired distinctiveness.⁷ *See In re Boston Beer Co., L.P.*, 198 F.3d 1370, 53 USPQ2d 1056, 1058 (Fed. Cir. 1999) (THE BEST BEER IN AMERICA “is so highly laudatory and descriptive of the qualities of its product that the slogan does not and could not function as a trademark” and is incapable of acquiring distinctiveness under Section

⁶ In the section of its Reply Brief about the Trademark Rule 2.61(b) Requirement for Information, Applicant appears to argue that the specimen moots the information requirement because “information as set forth on the product packaging could not be clearer.” “The actual packaging ... obviously expressly articulates the product and its truthful description.” 10 TTABVUE 4. These statements reinforce our finding that consumers who encounter the proposed mark on the identified goods would perceive the proposed mark as merely conveying information about the goods.

⁷ Consequently, we need not consider Applicant's claim of acquired distinctiveness under Section 2(f) of the Trademark Act based on ownership of a prior registration and the declarations of Applicant's President, Edward M. Dixon, and three “knowledgeable customer/industry representatives.” Request for Reconsideration, 4 TTABVUE 6. Applicant submitted this evidence with the Request for Reconsideration, asserting, in the alternative, that the proposed mark is inherently distinctive based on the four declarations. 4 TTABVUE.

2(f)); *Water Gremlin*, 208 USPQ at 90 (“Appellant’s asserted intention to adopt the package design to indicate source may well be true, but intent or lack of intent at the time of adoption of a particular design is not controlling. **Nor is proof that a particular container actually functions as a means of indication of source to some purchasers. Not all designs or words which in fact indicate or come to indicate source will be restricted in use to a single merchant.**”) (emphasis added; citation omitted); *In re Helena Rubenstein, Inc.*, 410 F.2d 438, 161 USPQ 606, 608 (CCPA 1969) (a proposed mark “cannot properly be registered as a trademark, even on the Supplemental Register, unless it is intended primarily to indicate origin of the goods and is of such a nature that the ordinary purchaser would be likely to consider that it indicated such origin”).

We consider the declarations of Mr. Dixon and the three “knowledgeable customer/industry representatives” as Applicant’s evidence in support of its argument that the proposed mark functions as a trademark because consumers recognize it as such. *See Eagle Crest*, 96 USPQ2d at 1229 (public perception critical in determining whether a term or expression functions as a trademark).

However, these declarations have limited probative value as evidence to demonstrate that either of the proposed marks is perceived as indicating a single source for the identified “crabmeat.” Mr. Dixon’s declaration is replete with general and conclusory statements and omits any documentary evidence to support Applicant’s position that consumers perceive this matter as source-indicating in contrast to the evidence submitted by the Examining Attorney. In addition, the

claims about Applicant's sales figures and "confidential" advertising expenditures are not supported by documentary evidence, or put into context in the relevant market, and, in any event, that type of information is more directed to the question of acquired distinctiveness rather than capability.

The three other "industry representative" declarants attest to their familiarity with Applicant and its products, and their personal experience with Applicant's use of the proposed mark as a trademark to identify Applicant as the source of the products. Applicant characterizes the declarants as "experienced customers, vendors, and distributors in the relevant food, fish, and seafood industries." Request for Reconsideration, 4 TTABVue 7. However, three declarations is a rather small number, and it is not clear that the declarations from industry insiders with whom Applicant does business reflect the perceptions of most relevant purchasers of "crabmeat," who include ordinary members of the general public. *See In re Pennzoil Prods. Co.*, 20 USPQ2d 1753, 1758 (TTAB 1991) (form declarations from nine marketers of oil products who have business relationships with the applicant "lack persuasiveness on the issue of the primary significance of the [proposed mark] to the purchasing public.").

5. Conclusion

Having considered all of the evidence of record, we find that: Applicant presents the proposed mark in a manner that just conveys information about the identified crabmeat; a number of third parties in the industry use wording that is the same as, or similar to, the wording in the proposed mark to convey information about their products; and the inclusion of minimal stylization, insignificant background carriers,

and a photorealistic image of a crab, does not alter our conclusion regarding consumer perceptions of the proposed mark as a whole. *Cf. D.C. One Wholesaler, Inc. v. Chien*, 120 USPQ2d 1710, 1717 (TTAB 2016) (stylized proposed mark with design element



failed to function as a mark); *Guess? Inc. v. Nationwide Time Inc.*, 16 USPQ2d 1804, 1805 (TTAB 1990) (a common, geometric shape, particularly one serving as a carrier or background design element, is not usually considered distinctive). Although it is possible for “the whole [of a mark to] be greater than the sum of its parts,” *Princeton Vanguard, LLC v. Frito-Lay N. Am., Inc.*, 786 F.3d 960, 114 USPQ2d 1827, 1831 (Fed. Cir. 2015), we do not find that to be true of Applicant’s proposed mark. Rather, “the entire formulation does not add any meaning to the otherwise [informational] mark.” *See In re Steelbuilding.com*, 415 F.3d 1293, 75 USPQ2d 1421 (Fed. Cir. 2005). Accordingly, Applicant’s proposed mark would not be perceived as identifying a particular source of goods. While we have given careful consideration to Applicant’s evidence of alleged consumer perception (i.e., the four declarations) solely to determine whether the proposed mark functions as a trademark, the evidence is insufficient to demonstrate that the relevant consumers recognize the proposed mark as indicating the source of the identified goods rather than as merely informational. *See Eagle Crest*, 96 USPQ2d at 1229. Accordingly, Applicant’s proposed mark fails to function as a trademark for Applicant’s goods.



Decision: The refusal to register Applicant's proposed mark because Applicant failed to comply with a requirement to provide information about the identified goods issued pursuant to Trademark Rule 2.61(b) is reversed. The refusal to register Applicant's proposed mark under Sections 1, 2 and 45 of the Trademark Act on the ground that it fails to function as a trademark is affirmed.