

This Opinion is Not a
Precedent of the TTAB

Hearing: September 4, 2019

Mailed: October 31, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Kahiki Foods, Inc.
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Serial No. 87648828
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Roger A. Gilcrest of Ice Miller LLP,
for Kahiki Foods, Inc.

Corinne Kleinman, Trademark Examining Attorney, Law Office 122,
John Lincoski, Managing Attorney.

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Before Coggins, English and Hudis,
Administrative Trademark Judges.

Opinion by Hudis, Administrative Trademark Judge:

Kahiki Foods, Inc. (“Applicant”) seeks registration on the Principal Register of the
mark BOWL & STIX (in standard characters) for:

Oriental and Pacific rim cuisine prepared foods, namely, frozen and chilled entrees consisting primarily of meat, fish, poultry or vegetables; frozen tempura kits consisting primarily of meat, fish poultry or vegetables; prepared stir-fry meals comprised primarily of meat and vegetables; prepared oriental and pacific rim cuisine meals comprised primarily of meat and containing some rice, and frozen and chilled spring rolls

in International Class 29.¹ The Application contains the following Mark Statement:
“The mark consists of standard characters, without claim to any particular font style, size, or color.”

The Examining Attorney refused registration on the ground that Applicant’s specimen of use does not show use in commerce of a substantially exact representation of the applied-for mark in the drawing within the meaning of Trademark Act Sections 1 and 45, 15 U.S.C. §§ 1051 and 1127, and Trademark Rules 2.34(a)(1)(iv) and 2.56(a), 37 C.F.R. §§ 2.34(a)(1)(iv), 2.56(a).

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed. Applicant and the Examining Attorney filed briefs and participated in an oral hearing before the Board. We affirm the refusal to register.

Below and to the left is Applicant’s mark as shown in the drawing of the Application. Below and to the right is the specimen of use filed in support of the Application.²

¹ Application Serial No. 87648828 filed on October 17, 2017, under the Trademark Act Section 1(a), 15 U.S.C. § 1051(a), based upon Applicant’s claim of first use anywhere and first use in commerce since at least as early as August 14, 2017.

² Application, TSDR 6-7. Page references herein to the application record refer to the online database of the USPTO’s Trademark Status & Document Retrieval (“TSDR”) system. All citations to documents contained in the TSDR database are to the downloadable .pdf versions of the documents. References to the briefs on appeal refer to the Board’s TTABVue docket system. Coming before the designation TTABVue is the docket entry number; and coming after this designation are the page references, if applicable.

BOWL & STIX

(Drawing)



(Specimen)

I. Evidentiary Record

With the first Office Action, the Examining Attorney made the following items of record:

- Internet page capture from the online ENGLISH OXFORD LIVING DICTIONARIES of the definition of “Bowl.”³
- Internet page capture from Applicant’s website promoting Applicant’s food products in connection with the mark BOWL & STIX.⁴
- Internet page capture from the LUVU website promoting the company’s prepared food products “in our convenient paperboard bowl.”⁵
- Internet page capture from the HEALTHY CHOICE website promoting the company’s prepared food products offered in a bowl.⁶

³ Office Action of January 18, 2018, TSDR 7-10.

⁴ *Id.*, TSDR 11-14.

⁵ *Id.*, TSDR 15-18.

⁶ *Id.*, TSDR 19-21.

- Internet page capture from the KASHI website promoting the company's prepared food products offered in a bowl.⁷
- Internet page capture from the PRINGLES website promoting the company's prepared food products described as "stix."⁸
- Internet page capture from the SRIRACHA website promoting the company's seasoning product as "Seasoning Stix."⁹
- Internet page capture from the online ENGLISH OXFORD LIVING DICTIONARIES of the definition of "Stick."¹⁰
- Internet page capture from the FOOD NETWORK website, providing a recipe for "Seafood Spring Rolls 'Sticks' with a Citrus Dipping Sauce."¹¹
- Internet page capture from the EPICURIOUS website, providing a recipe for "Shrimp and Sesame Sticks with Apricot Dipping Sauce."¹²

With its Response to the first Office Action, Applicant made the following items of record:

- USPTO TESS page captures of third party registrations for the marks MEIN BOWL, POLO BOWL, HOT-TO-GO BOWLS, NISSIN BOWL NOODLES, BEEF BOWL, BOWL NOODLE SOUP, CANTINA BOWL, MIXING BOWL and KOMAWAY BEST BOWL (Cancelled).¹³
- Applicant's prior registrations for the marks BOWL AND ROLL and BOWL & ROLL.¹⁴
- USPTO TESS page captures of third party applications and registrations for marks in which portions have been crossed out and other letters or words are shown above, below or to the side in the nature of visually substituted text. A number of the cited applications have been abandoned and registrations have been cancelled. The following are representative:¹⁵

⁷ *Id.*, TSDR 22-23.

⁸ *Id.*, TSDR 24.

⁹ *Id.*, TSDR 25-26.

¹⁰ *Id.*, TSDR 27-36.

¹¹ *Id.*, TSDR 37-40.

¹² *Id.*, TSDR 41-47.

¹³ Response to Office Action of May 21, 2018, TSDR 29-49.

¹⁴ *Id.*, TSDR 50-53.

¹⁵ *Id.*, TSDR 54-91.

- LONDON GROUP EMBRACING PEOPLE WITH ~~DISABILITIES~~ “with a red overstrike through ‘dis’ in ‘disabilities’”
- THE ~~BASICS~~ SEX WITH DR. MO “the sics of Basics is crossed out with a fuchsia x. Sex is written above the crossed out text, with Dr. Mo ... written below the crossed out text.”
- EASY ~~DOES~~ DID IT. “the word ‘DOES’ ... is crossed out with a stylized half circle line that is followed by the words ‘DID’ and ‘IT.’”
- PROUDLY ~~MADE~~ GROWN IN AMERICA “with the term ‘Made’ crossed out and the term ‘Grown’ above.” (Application Abandoned)
- NOT US ~~P~~ “with a crossed out P” (Application Abandoned)
- ~~DREAMER~~ DOER “the word ‘Dreamer’ [is] crossed out above the word ‘Doer’.” (Application Abandoned)
- WAIT 'TIL ~~NEXT~~. .. 2016 THIS YEAR! “The word next is crossed out.” (Application Abandoned)
- WAIT 'TIL ~~NEXT~~ THIS YEAR “with the word NEXT crossed out” (Application Abandoned)
- NOLA ~~HOLLYWOOD~~ “the term ‘HOLLYWOOD’ [is shown] with ‘HOLLY’ crossed out, and the stylized term ‘NOLA’ featured above the crossed-out ‘HOLLY’.”
- CARPE JUVENIS ~~DIEM~~ DON'T JUST SEIZE THE DAY. SEIZE YOUR YOUTH. “with the word ‘DIEM’ crossed out and the word ‘JUVENIS’ positioned above it in a stylized script.”
- YOU ARE WHAT YOU ~~EAT~~ APPLY “with the word ‘EAT’ crossed out” (Application Abandoned)
- HEART ~~FAILURE~~ SUCCESS PROGRAM “[t]he word ‘Failure’ is crossed out with a red diagonal line from the upper left of the corner to the lower right corner of the word. Above the word ‘Failure,’ starting above the letter ‘T’ is the word ‘Success’ written in red and angled slightly upward.”
- USPTO TESS page captures of third party intent-to-use applications for marks in which portions have been crossed out and other letters or words are shown above, below or to the side in the nature of visually substituted text:¹⁶
 - NOLA ~~HOLLYWOOD~~ “the term ‘HOLLYWOOD’ [is shown] with ‘HOLLY’ crossed out, and the stylized term ‘NOLA’ featured above the crossed-out ‘HOLLY’.” [As noted above, this application matured to registration]

¹⁶ *Id.*, TSDR 92-120.

- \$STREET DREAM\$ WHAT WOULD YOU TRADE FOR ~~ONE~~ TEN MILLION? “with the word ‘ONE’ crossed out with a red ‘X’ and replaced with the ... word ‘TEN’.” (Application Abandoned)
- ALL ~~THINGS~~ WINGS CONSIDERED with “the word ‘THINGS’ crossed out” [This application matured to registration]
- HEAVEN ~~HELL~~ YEAH! “with ... the word hell ... crossed out with an x”. (Application Abandoned)

The Examining Attorney did not make any evidence of record with the final Office Action; and Applicant did not make any evidence of record with its Request for Reconsideration.

With the denial of Applicant’s Request for Reconsideration, the Examining Attorney made the following items of record:

- Internet page capture from the THOUGHTCO website, showing an article entitled “When and How to Use Strikethrough”¹⁷
- WIKIPEDIA definition of “Strikethrough”¹⁸
- Internet page capture from the GRAMMARLY blog, showing an article entitled “Strikethrough and Why It’s so Popular”¹⁹
- Internet page capture from the NEW YORK TIMES website, showing an article entitled “Crossing Out, for Emphasis”²⁰
- Internet page capture from THE BRANDING JOURNAL website, showing an article entitled “From ‘Brian’s Wish’ to ‘Shatterproof’: a brilliant rebrand strategy for an American NGO”²¹
- Internet page capture from THESEMPOST website, showing an article entitled “Using Strikethrough Text on Google AdWords Ads”²²

¹⁷ Denial of Request for Reconsideration of December 31, 2018, TSDR 5-11.

¹⁸ *Id.*, TSDR 12-15.

¹⁹ *Id.*, TSDR 16-19.

²⁰ *Id.*, TSDR 20-25.

²¹ *Id.*, TSDR 26-32.

²² *Id.*, TSDR 33-38.

- Internet page capture from the FRITINANCY blog, showing an article entitled “Stricken”²³
- Internet page capture from the UXMOVEMENT website, showing an article entitled “7 Design Strategies for a Successful Pricing Table”²⁴
- Internet page capture from the SEER website, showing an article entitled “10 Quick Ways to Increase your Site’s Conversion Rate”²⁵

II. Applicable Law

A use-based trademark application must include one specimen for each class, showing use of the mark in commerce on or in connection with the goods. Trademark Act Section 1(a), 15 U.S.C. § 1051(a)(1); Trademark Rules 2.34(a)(1)(iv), 2.56(a), 37 C.F.R. §§ 2.34(a)(1)(iv), 2.56(a). If the specimen submitted does not show **the applied-for mark**, the Examining Attorney will refuse registration because the applicant has not provided evidence of use of the applied-for mark in commerce pursuant to Trademark Act Sections 1 and 45, 15 U.S.C. §§ 1051 and 1127. In other words, “the mark must be a substantially exact representation of the mark as used on or in connection with the goods.” Trademark Rule 2.51(a), 37 C.F.R. § 2.51(a).

The drawing of an application shows the mark sought to be registered. Trademark Rule 2.52, 37 C.F.R. § 2.52. The main purpose of the drawing is to provide notice of the nature of the mark sought to be registered. The mark in the drawing must agree with the mark as used on the specimen in a use-based application. *See* TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) (Oct. 2018) § 807.

²³ *Id.*, TSDR 39-55.

²⁴ *Id.*, TSDR 56-70.

²⁵ *Id.*, TSDR 71-84.

There are two types of trademark application drawings, “standard character (typed) drawings” and “special form drawings.” *See* Trademark Rules 2.52(a)-(b); 37 C.F.R. §§ 2.52(a)-(b). A standard character (typed) drawing of the mark is one comprising “words, letters, numbers, or any combination thereof without claim to any particular font style, size, or color” Trademark Rule 2.52(a), 37 C.F.R. § 2.52(a).

An applicant may submit a standard character drawing if:

- (1) The application includes a statement that the mark is in standard characters and no claim is made to any particular font style, size, or color;
- (2) The mark does not include a design element;
- (3) All letters and words in the mark are depicted in Latin characters;
- (4) All numerals in the mark are depicted in Roman or Arabic numerals; and
- (5) The mark includes only common punctuation or diacritical marks.”

Trademark Rules 2.52(a)(1)-(5), 37 C.F.R. §§ 2.52(a)(1)-(5).

“Applicants who seek to register a mark that includes a two or three-dimensional design; color; and/or words, letters, or numbers or the combination thereof in a particular font style or size must submit a special form drawing.” Trademark Rule 2.52(b), 37 C.F.R. § 2.52(b). A special form drawing “presents a mark comprised, in whole or in part, of special characteristics such as elements of design or color, style(s) of lettering, or unusual form(s) of punctuation.” TMEP § 807.04(a). “A special form drawing is required if words, letters, or numerals are presented in a distinctive form that engenders an uncommon or ‘special’ commercial impression that would be altered or lost were registration to issue based on a standard character drawing.” TMEP § 807.04(b).

For example, where punctuation marks on the submitted specimen result in a mark with a different commercial impression than the mark shown on the standard character (typed) drawing, the drawing cannot be amended to add the punctuation because it would result in a material alteration. Therefore, the applicant would be required to submit a new specimen showing the mark without the punctuation (if it is able to do so). *See In re Guitar Straps Online LLC*, 103 USPQ2d 1745, 1751-52 (TTAB 2012) (finding the mark GOT STRAPS on the drawing not a substantially exact representation of the mark GOT STRAPS? on the specimen).

“The commercial impression of a mark is engendered by the mark as a whole and, more often than not, by the particular display or arrangement of the components thereof.” *In re United Servs. Life Ins. Co.*, 181 USPQ 655, 656 (TTAB 1973) (holding FOR LIFE INSURANCE SEE US not registrable without a special form drawing because the specimen showed the “US” portion of the mark in significantly larger lettering and underlined, suggesting a double entendre because “US” could stand for applicant’s name “United Services” or for the pronoun “us”). Therefore:

the proper test as to the suitability of a typed drawing is whether the mark that is stylized or has a design element engenders an uncommon or “special” commercial impression that would be altered or lost were registration to issue based on a typed drawing. ... Each case requires a careful factual analysis of whether the stylized features evidenced by the specimens of use of a mark sought to be registered in typed form are sufficiently ancillary to the mark’s natural commercial impression that representation in typed form may be accepted as appropriate.

In re Morton Norwich Prods., Inc., 221 USPQ 1023, 1023 (TTAB 1983) (holding LABID not registrable without a special form drawing because the specimen showed the letter “a” in smaller lettering with a diacritical accent that set off the “BID”

portion of the mark, when the word “BID” had an accepted meaning as applied to drug prescriptions, i.e., “twice a day”).

In short, “the mark as actually used must not be so entwined (physically or conceptually) with other material that it is not separable from it in the mind of the consumer.” *In re Yale Sportswear Corp.*, 88 USPQ2d 1121, 1123 (TTAB 2008) (affirming refusal to register because applicant’s drawing of the mark presented as UPPER 90 was not a substantially exact representation of the mark as used in commerce in the form UPPER 90°) (citing *In re Chem. Dynamics Inc.*, 839 F.2d 1569, 5 USPQ2d 1828, 1830 (Fed. Cir. 1988)). *See also In re AFG Indus. Inc.*, 17 USPQ2d 1162, 1164 (TTAB 1990) (special form drawing is required for marks that contain superscripts, subscripts, exponents, or other characters that are not in the USPTO’s standard character set.)

III. Arguments and Analysis

Applicant does not disagree with the requirements of the above-cited provisions of the Trademark Act, the Trademark Rules of Practice, the TMEP or the holdings of our decisions discussed above. Applicant argues that the factual underpinnings of the cited decisions are inapplicable here, because the marks involved in those cases did not involve overstricken letters that eliminated words.²⁶

The core of Applicant’s argument is that:

The subject mark [in Applicant’s specimen] simply uses an overstricken word as would be done in normal text editing practice (and that would immediately be perceived as such), and leaves the viewer with the singular impression that the product is called “BOWL & STIX” (rather

²⁶ Applicant’s Brief, 14 TTABVUE 7, 9-10, 15, and 18.

than BOWL & ROLL). ... That is, the specimen, even though it eliminates the word ROLL, is substantively identical to the drawn mark BOWL & STIX, and thus the drawing indeed substantially exactly represents the mark as used in commerce ... as demonstrated by the specimen.²⁷

In support of its argument that the mark BOWL & STIX should be registered based upon the specimen made of record, Applicant cites to and made of record a number of third party applications and registrations for marks in which portions have been crossed out and other letters or words are shown above, below or to the side in the nature of visually substituted text. A number of the cited applications have been abandoned and registrations have been cancelled.²⁸

Third-party applications are evidence only of the fact that they have been filed, *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1270 n.8 (TTAB 2009), and have no probative value. Abandoned applications have “no probative value other than as evidence that the applications [were] filed.” *Edwards Lifesciences Corp. v. VigiLanz Corp.*, 94 USPQ2d 1399, 1403 n.4 (TTAB 2010). An expired or cancelled registration is evidence of nothing but the fact that it once issued. *Sunnen Prods. Co. v. Sunex Int'l Inc.*, 1 USPQ2d 1744, 1747 (TTAB 1987).

As to the active third party registrations cited and made of record by Applicant, “[i]t has been said many times that each case must be decided on its own facts.” *In re Eagle Crest Inc.*, 96 USPQ2d 1227, 1229 (TTAB 2010) (internal citation omitted). *See also, In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001)

²⁷ *Id.*, 14 TTABVUE 11.

²⁸ Response to Office Action of May 21, 2018, TSDR 54-120; Applicant’s Brief, 14 TTABVUE 10-12.

(“Even if some prior registrations had some characteristics similar to [Applicant’s] application, the PTO’s allowance of such prior registrations does not bind the Board or this court.”). *See also In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1635 (Fed. Cir. 2016) (the USPTO must “examine all trademark applications for compliance with each and every eligibility requirement” regardless of the prior treatment of applications involving similar marks). “Neither the Board nor any Trademark Examining Attorney is bound by decisions of Examining Attorneys to register prior marks.” *In re USA Warriors Ice Hockey Program, Inc.*, 122 USPQ2d 1790, 1793 n.10 (TTAB 2017). *See also In re Merrill Lynch, Pierce, Fenner & Smith Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1142 (Fed. Cir. 1987) (“Each application for registration must be considered on its own merits.”). These prior decisions are particularly apt here, given that Applicant did not make of record the specimens submitted during prosecution of the underlying applications to these third-party registered marks.

Applicant further argues, without factual support, that (1) a normal reading of the mark on the specimen of record is BOWL & STIX, with everything else on the specimen being merely extraneous and given no textual pronunciation or meaning, and (2) if a consumer were asked to recommend Applicant’s goods to someone else, having seen the specimen of record, he or she would identify the product as BOWL & STIX.²⁹ There is nothing in the record to justify these conclusions, and “[a]ttorney

²⁹ Applicant’s Brief, 14 TTABVUE 15, 20.

argument is no substitute for evidence.” *Zheng Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (quoting *Enzo Biochem, Inc. v. Gen-Probe, Inc.*, 424 F.3d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005)).

The Examining Attorney argues that the marks in the drawing and specimen are not substantially exact, as required by Trademark Rule 2.51(a), because “the mark on the specimen includes stylization and/or a design element (the crossed out wording ‘ROLL’ and substitute term ‘STIX’) that creates an uncommon or ‘special’ commercial impression.”³⁰ In other words, says the Examining Attorney, “when the mark on the specimen is displayed in such a way that it conveys something more than what the standard character drawing is conveying or can convey with standard characters, then the drawing is not a substantially exact representation of the mark as it appears on the specimen.”³¹

In support of the Office’s position, the Examining Attorney cites to articles from the THOUGHTCO, GRAMMARLY, NEW YORK TIMES, THE BRANDING JOURNAL, THESEMPOST, FRITINANCY, UXMOVEMENT and SEER websites reporting that crossed-out words accompanied by replacement wording can demonstrate: textual irony, the history of document changes, the deliberate change of thought, a way of saying something without really saying it, ironic commentary, rebranding by the change of commercial impression, an eye-catching form of advertising, a dual meaning, and an

³⁰ Examining Attorney’s Brief, 16 TTABVUE 4-5, 11.

³¹ *Id.*, 16 TTABVUE 6.

indication of differences or the value of a new offer from a prior one.³² We find that none of these vehicles of intended meaning can be conveyed by a standard character (typed) drawing.

In fact, Applicant concedes that the crossed-out word “Bowl” accompanied by the replacement wording “Stix” in Applicant’s specimen is intended to show that BOWL & STIX is a follow-on product to Applicant’s prior product, BOWL & ROLL.³³ Applicant’s intended commercial impression conveyed by the specimen is not, and cannot be, captured by the standard character (typed) drawing BOWL & STIX submitted as part of the Application. We therefore find that the drawing of Applicant’s mark is not a substantially exact representation of the mark as it appears on the specimen made of record.

IV. Decision

The refusal to register Applicant’s mark BOWL & STIX on the ground that Applicant’s specimen of use does not show a substantially exact representation of the applied-for mark in the drawing is affirmed.

³² Denial of Request for Reconsideration of December 31, 2018, TSDR 5-84; Examining Attorney’s Brief, 16 TTABVUE 6-8.

³³ Applicant’s Request for Reconsideration of December 12, 2018, TSDR 7.