

This Opinion is Not a
Precedent of the TTAB

Mailed: November 17, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re A Pizza LLC

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Serial No. 88283932

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Thomas D. Foster of TDFoster – Intellectual Property Law,
for A Pizza LLC.

Udeme U. Attang, Trademark Examining Attorney, Law Office 115,
Daniel Brody, Managing Attorney.

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Before Wellington, Goodman, and Larkin,
Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

A Pizza LLC (“Applicant”) seeks registration on the Principal Register of the proposed standard character mark ORIGINAL FOLDED PIZZA (PIZZA disclaimed) for “pizzas” in International Class 30.¹

The Trademark Examining Attorney refused registration of Applicant’s proposed mark under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the

¹ Application Serial No. 88283932 was filed on January 31, 2019 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s allegation of a bona fide intention to use the mark in commerce.

ground that the proposed mark is merely descriptive of the goods identified in the application.

When the Examining Attorney made the refusal final, Applicant requested reconsideration, which was denied, and then appealed. Applicant and the Examining Attorney have filed briefs.² We affirm the refusal to register.

I. Record on Appeal³

The record on appeal consists of the following:

- Dictionary definitions of the words “original,” “fold,” and “pizza,” and a Wikipedia entry entitled “Calzone,” made of record by the Examining Attorney;⁴
- Webpages using the term “folded pizza” in connection with calzones, made of record by the Examining Attorney;⁵
- Pages from Applicant’s website at apizzaforeveryone.com, made of record by Applicant,⁶ and the Examining Attorney;⁷ and

² Citations in this opinion to the briefs refer to TTABVUE, the Board’s online docketing system. *Turdin v. Tribolite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014). Specifically, the number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page number(s) of the docket entry where the cited materials appear.

³ Citations in this opinion to the application record are to pages in the Trademark Status & Document Retrieval (“TSDR”) database of the United States Patent and Trademark Office (“USPTO”).

⁴ April 13, 2019 Office Action at TSDR 2-12, 16-17.

⁵ *Id.* at TSDR 13-15, 18-19; November 7, 2019 Final Office Action at TSDR 54-56.

⁶ October 15, 2019 Response to Office Action at TSDR 7-8.

⁷ November 7, 2019 Final Office Action at TSDR 57-60.

- Third-party registrations of marks for pizza containing a disclaimer of the word “original,” alone or in combination with other words, made of record by the Examining Attorney.⁸

II. Analysis of Refusal

Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), prohibits registration on the Principal Register of “a mark which, (1) when used on or in connection with the goods of the applicant is merely descriptive . . . of them,” unless the mark has acquired distinctiveness under Section 2(f) of the Act, 15 U.S.C. § 1052(f).⁹

“A mark is ‘merely descriptive’ within the meaning of Section 2(e)(1) ‘if it immediately conveys information concerning a feature, quality, or characteristic of the goods or services for which registration is sought.’” *In re Omniome, Inc.*, 2020 USPQ2d 3222, *3 (TTAB 2020) (quoting *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1709 (Fed. Cir. 2017)). “A mark need not recite each feature of the relevant goods or services in detail to be descriptive, it need only describe a single feature or attribute.” *Id.* (quoting *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012)).

Whether a mark is merely descriptive is “evaluated ‘in relation to the particular 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,’” *Chamber of Commerce*, 102

⁸ *Id.* at TSDR 2-13, 17-47, 51-53. Two of the third-party registrations made of record by the Examining Attorney do not cover pizza. *Id.* at TSDR 14-16, 48-50.

⁹ Applicant does not claim that its proposed mark has acquired distinctiveness.

USPQ2d at 1219 (quoting *In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)), and “not in the abstract or on the basis of guesswork.” *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1513 (TTAB 2016) (citing *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978)). We ask “whether someone who knows what the goods and services are will understand the mark to convey information about them.” *Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1374 (Fed. Cir. 2018) (quoting *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012) (internal quotation omitted)). A mark is suggestive rather than merely descriptive if it requires imagination, thought, and perception on the part of someone who knows what the goods are to reach a conclusion about their nature from the mark. *See, e.g., Fat Boys*, 118 USPQ2d at 1515.

Applicant’s proposed mark consists of the words ORIGINAL FOLDED PIZZA. We “must consider the *commercial impression* of a mark as a whole.” *Real Foods*, 128 USPQ2d at 1374 (quoting *DuoProSS*, 103 USPQ2d at 1757 (citation omitted)). “In considering [a] mark as a whole, [we] ‘may not dissect the mark into isolated elements,’ without ‘consider[ing] . . . the entire mark,’” *id.* (quoting *DuoProSS*, 103 USPQ2d at 1757), but we “may weigh the individual components of the mark to determine the overall impression or the descriptiveness of the mark and its various components.” *Id.* (quoting *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370, 1372 (Fed. Cir. 2004)). Indeed, we are “required to examine the meaning of each

component individually, and then determine whether the mark as a whole is merely descriptive.” *DuoProSS*, 103 USPQ2d at 1758.

If the words in the proposed mark are individually descriptive of the identified goods, we must then determine whether their combination “conveys any distinctive source-identifying impression contrary to the descriptiveness of the individual parts.” *Fat Boys*, 118 USPQ2d at 1515-16 (quoting *Oppedahl & Larson*, 71 USPQ2d at 1372). If each word instead “retains its merely descriptive significance in relation to the goods, the combination results in a composite that is itself merely descriptive.” *Id.* at 1516 (citing *In re Tower Tech., Inc.*, 64 USPQ2d 1314, 1317-18 (TTAB 2002)); *see also In re Mecca Grade Growers, LLC*, 125 USPQ2d 1950, 1953-55 (TTAB 2018).

“Evidence of the public’s understanding of [a] term . . . may be obtained from any competent source, such as purchaser testimony, consumer surveys, listings in dictionaries, trade journals, newspapers[,] and other publications.” *Real Foods*, 128 USPQ2d at 1374 (quoting *Royal Crown Co. v. Coca-Cola Co.*, 892 F.3d 1358, 127 USPQ2d 1041, 1046 (Fed. Cir. 2018)). “These sources may include [w]ebsites, publications and use ‘in labels, packages, or in advertising material directed to the goods.’” *N.C. Lottery*, 123 USPQ2d at 1710 (quoting *Abcor Dev.*, 200 USPQ at 218).

“It is the Examining Attorney’s burden to show, *prima facie*, that a mark is merely descriptive of an applicant’s goods or services.” *Fat Boys*, 118 USPQ2d at 1513 (citing *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1010 (Fed. Cir. 1987)). “If such a showing is made, the burden of rebuttal shifts to the applicant.” *Id.* (citing *In re Pacer Tech.*, 338 F.3d 1348, 67 USPQ2d 1629, 1632 (Fed. Cir. 2003)).

The Examining Attorney argues that ORIGINAL FOLDED PIZZA “is highly descriptive because it identifies a feature and characteristic of applicant’s pizza goods,” 6 TTABVUE 3, and that “both the individual components and the composite result are descriptive of applicant’s goods and do not create a unique, incongruous, or nondescriptive meaning in relation to the goods.” *Id.* at 4.

The Examining Attorney specifically argues that it “is well settled that the term ORIGINAL used alone or paired with descriptive wording is merely laudatory and descriptive of goods or services being the first of their kind,” *id.*, citing the third-party registrations of ORIGINAL-formative marks in which the word has been disclaimed. *Id.* at 4-6. Citing dictionary definitions of the words FOLDED and PIZZA, she argues that when ORIGINAL is combined with those words in Applicant’s proposed mark, the combination “directly conveys information about a feature and characteristic of the goods, namely, that applicant’s pizza goods are the first of its [sic] kind and that the pizza has one part laid over another part.” *Id.* at 6. She cites the third-party webpages showing the use of the phrase “folded pizza” in connection with calzones,¹⁰ *id.*, and Applicant’s own website, portions of which are depicted below, in arguing that “consumers of pizza goods are well acquainted with the wording FOLDED PIZZA to describe pizza in which one part is laid over another.” *Id.*

¹⁰ The Board “may take judicial notice of information from dictionaries, encyclopedias, and other standard referenced works,” *In re Information Builders Inc.*, 2020 USPQ2d 10444, *3 n.6 (TTAB 2020), “including online dictionaries that exist in printed form or have regular fixed editions.” *In re MK Diamond Prods., Inc.*, 2020 USPQ2d 10882, *6 n.37 (TTAB 2020). We take judicial notice that a “calzone” is “a baked or fried turnover of pizza dough stuffed with various fillings usually including cheese.” MERRIAM-WEBSTER DICTIONARY (merriam-webster.com, last accessed on November 17, 2020).

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we're open!



apizza for everyone!
organic dough • organic tomato sauce • premium ingredients
incredibly fast • always affordable

taking pizza out of the box with the original folded pizza

flat for here • folded to go • compostable packaging

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apizzas

9" pies with organic dough & organic tomato sauce

1. take it or eat it (here)

 **original apizza** 9" round (dine-in only)

 **folded apizza** conveniently folded in half (dine-in or take-out)

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¹¹ October 15, 2019 Response to Office Action at TSDR 7.

¹² *Id.* at TSDR 8.

The Examining Attorney concludes that “ORIGINAL FOLDED PIZZA merely describes a feature or characteristic of applicant’s goods, i.e., applicant’s goods are the first of its kind and the pizza goods have one part laid over another part.” *Id.* at 8.

Applicant’s sole argument is that “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 the composite has an incongruous meaning as applied to the goods or services.” 4 TTABVUE 6. Citing a screenshot from an online slang dictionary reproduced in its brief, *id.* at 7,¹³ Applicant claims that “the word ‘folded’ means ‘drunk’ which adds an alternative congruous [sic] meaning to the mark - that of a drunk slice of pizza.” *Id.* at 6. Applicant claims that the proffered meaning “is akin to such hypothetical marks as ‘The Drunk Crab’ for a restaurant that serves crab or ‘Drunk Oyster’ for an oyster bar.” *Id.* Applicant concludes that “[c]learly the FOLDED PIZZA portion of applicant’s mark has an alternative incongruous meaning as applied to the goods and the refusal should be reconsidered and withdrawn.” *Id.* at 7.

As noted above, we first consider the individual elements of Applicant’s proposed mark in determining whether the mark as a whole is merely descriptive. Applicant does not address the significance of the word ORIGINAL at the beginning of its

¹³ Applicant did not make the screenshot of record during prosecution, but the Examining Attorney did not object to it and addressed Applicant’s accompanying argument on the merits, 6 TTABVUE 7, so we will consider the screenshot and the argument. *See* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (“TBMP”) Section 1203.02(e) (2020).

proposed mark. The Examining Attorney made of record a definition of “original” in its noun form as “that from which a copy or reproduction is made,”¹⁴ and we take judicial notice that in its adjective form, the word “original” means “of or relating to, or constituting an origin or beginning,”¹⁵ In the context of Applicant’s statement on its website shown above about “taking pizza out of the box with the original folded pizza,”¹⁶ these dictionary definitions establish that the word ORIGINAL in Applicant’s mark lauds its “folded pizzas” as the first of their kind. *See In re Ervin*, 1 USPQ2d 1665, 1666 (TTAB 1986) (stylized mark “The ‘Original’” for a scorer for playing euchre found to be merely descriptive because the mark’s “‘first-of-its-kind’ connotation” served “to convey a claimed attribute, characteristic or quality of applicant’s product without the need for deliberation, imagination or forethought, [and] its laudatory character meets the classic test for differentiation of descriptive from suggestive or arbitrary terminology.”); *Gen. Foods Corp. v. Ralston Purina Co.*, 220 USPQ 990, 994 (TTAB 1984) (ORIGINAL BLEND for cat food found to be merely descriptive because it “possesses nothing more than a merely descriptive significance, that of conveying the information to purchasers that the cat food to which it is applied is the first in a line of flavor varieties and the fact that this first-of-its-kind variety is a blend of flavors.”). There is no doubt that the word ORIGINAL in Applicant’s

¹⁴ April 13, 2019 Office Action at TSDR 2.

¹⁵ MERRIAM-WEBSTER DICTIONARY (merriam-webster.com, last accessed on November 17, 2020).

¹⁶ October 15, 2019 Response to Office Action at TSDR 7.

proposed mark is merely descriptive of the goods because it touts the “first-of-its-kind” nature of Applicant’s “original folded pizza.”¹⁷

With respect to the word FOLDED in Applicant’s proposed mark, the Examining Attorney made of record a definition of the verb “fold” as “to lay one part over another part of,”¹⁸ and Applicant’s website shown above uses the adjective “folded” in precisely that sense in stating that Applicant’s “folded pizzas” are “conveniently folded in half.”¹⁹ There is nothing in the record, including Applicant’s website, to support Applicant’s claim that the word FOLDED in its mark would convey to its consumers an “alternative incongruous meaning,” 4 TTABVue 7, as “a drunk slice of pizza.” *Id.* at 6. “That a term may have other meanings in different contexts is not controlling.” *In re Canine Caviar Prods., Inc.*, 126 USPQ2d 1590, 1598 (TTAB 2018), and “[i]t 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 Mueller Sports Med., Inc.*, 126 USPQ2d 1584, 1590 (TTAB 2018) (quoting *In re Chopper Indus.*, 222 USPQ 258, 259

¹⁷ The record suggests that the use of ORIGINAL is common in the pizza business because the word is disclaimed in multiple registrations of marks for pizza, including “THE ORIGINAL” BIZARRO NEW YORK PIZZA and design; GINO’S EAST OF CHICAGO THE ORIGINAL; SOPHIA LOREN ORIGINAL ITALIAN PIZZA; CRISPY! CRACKERY! CRUNCHY! ORIGINAL THIN! (stylized); THE ORIGINAL RED’S SAVOY PIZZA; WALT’S ORIGINAL PRIMO PIZZA; P DELICIOUS ORIGINAL and design; ST LOUIS AUTHENTIC ORIGINAL EST. 1964 and design; and “ORIGINAL ST. LOUIS STYLE PIZZA” and design. November 7, 2019 Final Office Action at TSDR 2-7, 10-13, 17-25, 32-34, 42-47.

¹⁸ April 13, 2019 Office Action at TSDR 5 (MERRIAM-WEBSTER DICTIONARY).

¹⁹ *Id.* at TSDR 8. As noted above, the Examining Attorney also made of record webpages in which the term “folded pizza” is used in connection with calzones. The record does not show that anyone other than Applicant has used the term “folded pizza” in connection with pizza per se, but “there is no requirement that the Examining Attorney prove that others have used the mark at issue or that they need to use it,” *Fat Boys*, 118 USPQ2d at 1514, and the “fact that Applicant may be the first or only user of a term does not render that term distinctive, if it otherwise meets the standard” for descriptiveness. *Id.*

(TTAB 1984)). There is no doubt that the word FOLDED in Applicant's proposed mark is merely descriptive of the goods because it describes the fact that certain of Applicant's pizzas are "folded in half."

Finally, the disclaimed word PIZZA at the end of the proposed mark is the singular form of the "pizzas" identified in the application and has no source-identifying significance. As a generic term, PIZZA is "the ultimate in descriptiveness." *In re Serial Podcast, LLC*, 126 USPQ2d 1061, 1063 (TTAB 2018) (quoting *H. Marvin Ginn Corp. v. Int'l Ass'n of Fire Chiefs, Inc.*, 782 F.2d 960, 228 USPQ 528, 530 (Fed. Cir. 1986)).

The record shows that Applicant's proposed mark ORIGINAL FOLDED PIZZA as a whole is no more than the sum of its descriptive parts. As shown above, Applicant's website discusses

**taking pizza out of the box with the original folded
pizza**

with no indication that Applicant claims "original folded pizza" as its trademark, and other text on its site explains that a "folded pizza" is a pizza that is "conveniently folded in half." The "explanatory text accompanying the [proposed] mark is not complicated," *N.C. Lottery*, 123 USPQ2d at 1710, and the "commercial context here demonstrates that a consumer would immediately understand the intended meaning of" ORIGINAL FOLDED PIZZA, *id.*, namely, that it describes the first pizza to be "conveniently folded in half" for dine-in or take-out consumption. The "evidence shows that the mark is less an identifier of the source of the goods . . . and more a description

of a feature or characteristic of those goods” *Id.* Because each word in the proposed mark “retains its merely descriptive significance in relation to the goods, the combination results in a composite that is itself merely descriptive.” *Fat Boys*, 118 USPQ2d at 1516. We find that the Examining Attorney established a prima facie case that the proposed mark ORIGINAL FOLDED PIZZA is merely descriptive of the goods, and that Applicant failed to rebut that case.²⁰

Decision: The refusal to register is affirmed.

²⁰ Applicant argues that “[a]t the very least . . . applicant has raised doubts about the ‘merely descriptive’ character of the mark,” and that “it is clear that such doubts are to be resolved in favor of applicants.” 4 TTABVUE 7. As discussed above, Applicant correctly states the law in cases of doubt regarding mere descriptiveness, but this is not such a case.