

This Opinion is Not a
Precedent of the TTAB

Mailed: July 10, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

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In re Stephen Van Eynde

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Serial No. 90814404
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Clifford D. Hyra and Micah Gunn of Fresh IP PLC
for Stephen Van Eynde.

Taryn Smith, Trademark Examining Attorney, Law Office 104
Zachary Cromer, Managing Attorney.

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Before Greenbaum, Adlin and Larkin, Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

Applicant Stephen Van Eynde seeks a Principal Register registration for the proposed mark BRKFST KRSPS, in standard characters (“BREAKFAST” disclaimed), for “wafers; bars of sweet jellied bean paste (yohkan); breakfast cereals; candy bars; cereal bars; cereal based energy bars; chocolate-based meal replacement bars; chocolate-based ready-to-eat food bars; chocolate bars; grain-based food bars; granola-based snack bars; high-protein cereal bars; muesli bars; processed cereal-based food to be used as a breakfast food, snack food or ingredient for making other foods; quinoa-based food bars; ready to eat, cereal derived food bars,” in International

Class 30.¹ The Examining Attorney refused registration on the ground that the proposed mark is merely descriptive of the identified goods under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1). After the refusal became final, Applicant appealed and filed a request for reconsideration that was denied. Applicant and the Examining Attorney filed briefs.

I. Evidence and Arguments

The Examining Attorney argues that the term “BREAKFAST” is merely descriptive of the identified goods based on: (1) a dictionary definition indicating that the term means “the first meal of the day especially when taken in the morning” and “the food prepared for a breakfast,”² October 11, 2023 Denial of Request for Reconsideration TSDR 7;³ (2) Applicant’s voluntary disclaimer of “BREAKFAST” (in its original application)⁴; and (3) Applicant’s stated intent to use the proposed mark for, *inter alia*, “breakfast cereals” and “processed cereal-based food to be used as a

¹ Application Serial No. 90814404, filed July 7, 2021, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on an alleged intent to use the mark in commerce.

² <https://www.merriam-webster.com/dictionary/breakfast>.

³ Citations to the application file are to the USPTO’s Trademark Status & Document Retrieval (“TSDR”) online database, by page number, in the downloadable .pdf format.

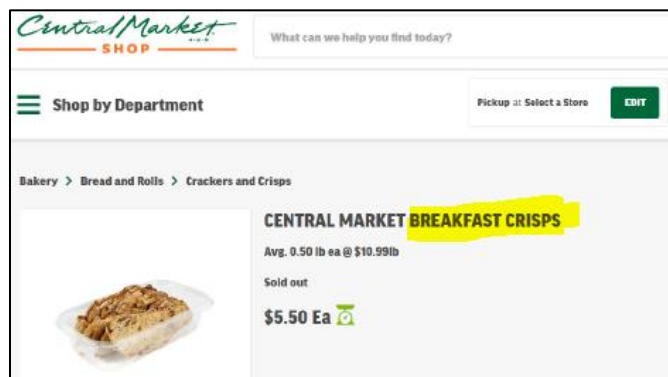
⁴ Applicant’s voluntary disclaimer of “breakfast” may be viewed as a concession that the term was merely descriptive, at least at the time of registration. *Alcatraz Media Inc. v. Chesapeake Marine Tours Inc.*, 107 USPQ2d 1750, 1762 (TTAB 2013), *aff’d*, 565 Fed. Appx. 900 (Fed. Cir. 2014); *Bass Pro Trademarks LLC v. Sportsman’s Warehouse Inc.* 89 USPQ2d 1844, 1851 (TTAB 2008).

breakfast food” 8 TTABVUE 3.⁵ She specifically points out that “applicant’s goods are breakfast foods, or foods to be consumed at the first meal of the day.” *Id.*⁶

As for “KRSPS,” the Examining Attorney argues that the term is “the phonetic equivalent of ‘crisps.’” April 5, 2022 Office Action TSDR 19. Accordingly, she relies on a dictionary definition indicating that “crisps” means “something crisp or brittle.”⁷

In addition, the Examining Attorney relies on third-party uses of the terms “crisps” or “breakfast” in connection with breakfast foods such as the “breakfast cereals” identified in the involved application. These uses are consistent with the dictionary definitions and Applicant’s disclaimer of “BREAKFAST.”

For example, Central Market offers “breakfast crisps,” which it touts as “[b]aked to crispy perfection,” as shown below:



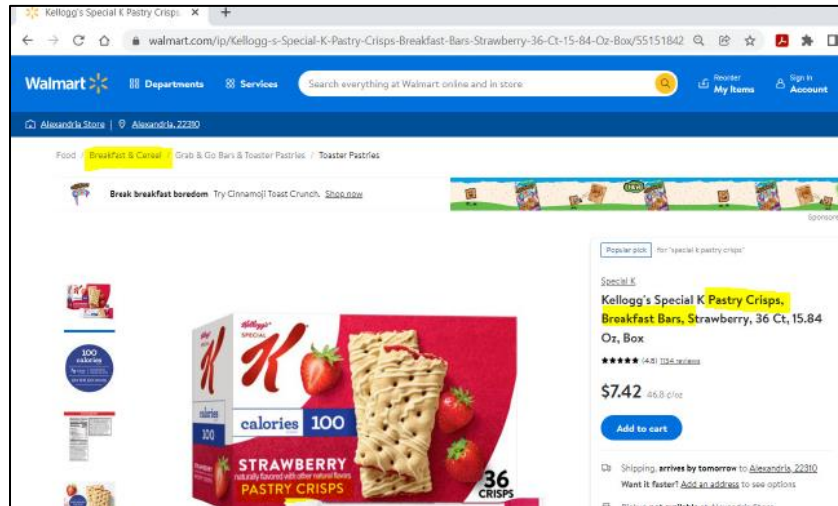
⁵ Citations to the appeal record are to TTABVUE, the Board’s online docketing system. The number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear.

⁶ See *In re Johanna Farms, Inc.*, 222 USPQ 607, 609 (TTAB 1984) (“The term ‘yogurt’ is concededly the name of the goods. That fact is uncontroversial where, as here, the same term has been used in the identification of goods for which registration is sought.”).

⁷ merriam-webster.com/dictionary/crisps.

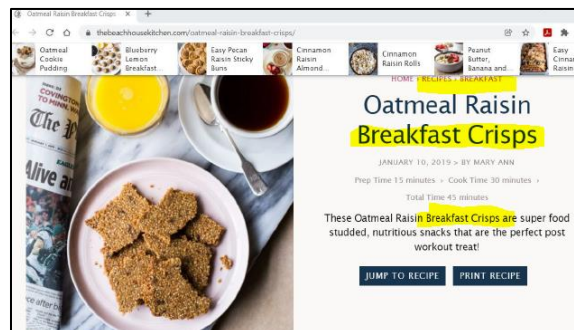
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Id. at 5 (highlighting added). Similarly, Kellogg's offers “strawberry pastry crisps” categorized as “breakfast bars,” as shown below:



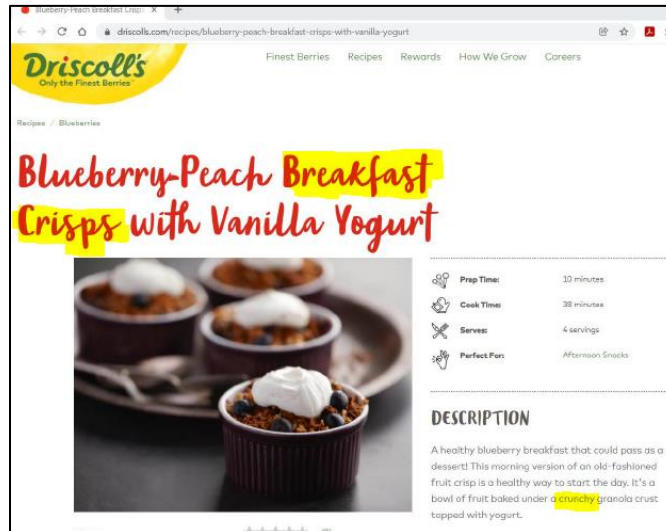
Id. at 15 (highlighting added). *See also* October 11, 2023 Denial of Request for Reconsideration TSDR 80 (Millville “pastry crisps” listed in the “breakfast and cereals” section of Aldi’s website).

Sometimes the word “crisps” is used descriptively in recipes for crisp breakfast food. For example, the breakfast recipe section of The Beach House Kitchen website includes a recipe for “oatmeal raisin breakfast crisps” that appear from the photograph to be crisp or brittle, as shown below:



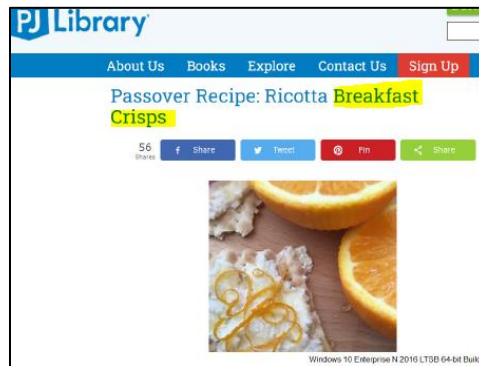
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Id. at 6 (highlighting added). And Driscoll’s website includes a recipe for “blueberry-peach breakfast crisps with vanilla yogurt,” as shown below:



Id. at 16 (highlighting added). As shown, the product features a “**crunchy** granola crust,” *id.* (emphasis added), and we would expect a crunchy crust to also be “crisp.”

The PJ Library website includes a Passover recipe for “ricotta breakfast crisps,” as shown below:



Id. at 18 (highlighting added). The ricotta breakfast crisp depicted appears to be crisp. Additional recipes of record are for “breakfast crisps,” or “crisps” intended to be eaten

for breakfast. *See* October 11, 2023 Denial of Request for Reconsideration TSDR 46-79, 82-93.

Several additional third parties – including Moo Chocolate, PGP International, Atkins and Sierra Fit – use “CRISPS” for crisp or brittle food products, including “wafers” and “bars,” which are among the goods identified in the involved application. April 5, 2022 Office Action TSDR 9-14.

Finally, the Examining Attorney relies on a large number of third-party registrations for food products in which: (1) the term “CRISPS” is disclaimed; (2) the CRISP-formative mark is registered on the Supplemental Register; or (3) the CRISP-formative mark is registered with a claim of acquired distinctiveness under Section 2(f) of the Act.⁸ November 6, 2022 Office Action TSDR 6-47; October 11, 2023 Denial of Request for Reconsideration TSDR 13-45. Significantly, the term “crisps” is included in the identification of goods in several of them. November 6, 2022 Office Action TSDR 6, 36, 38, 42; October 11, 2023 Denial of Request for Reconsideration TSDR 34, 44. *See In re Johanna Farms*, 222 USPQ at 609.

⁸ As explained in footnote 4, when a term is disclaimed, that is a concession that it is merely descriptive. Similarly, marks registered on the Supplemental Register, or on the Principal Register with a claim of acquired distinctiveness, are descriptive. *See Cold War Museum, Inc. v. Cold War Air Museum, Inc.*, 586 F.3d 1352, 92 USPQ2d 1626, 1629 (Fed. Cir. 2009) (where “an applicant seeks registration on the basis of Section 2(f), the mark’s descriptiveness is a nonissue; an applicant’s reliance on Section 2(f) during prosecution presumes that the mark is descriptive”); *Perma Ceram Enter. Inc. v. Preco Indus., Ltd.*, 23 USPQ2d 1134, 1137 n.11 (TTAB 1992) (“a registrant owner of a Supplemental Register registration impliedly admits that the registered term was descriptive ... at least at the time of the registrant’s first use of the term”).

Based on this evidence, the Examining Attorney concludes that the proposed mark BRKFST KRSPS “is merely descriptive of the fact that applicant’s goods are crispy or crunchy foods for consumption at breakfast.” 8 TTABVUE 6.

For his part, Applicant points out that in some third-party registrations, the word “CRISP” is not disclaimed. May 8, 2003 Request for Reconsideration TSDR 16-32. However, in some of these registrations the identified goods are not breakfast or other foods that would be expected to be “crisp or brittle.” *See e.g. id.* at 22 (coconut). In others, the marks are unitary. *See e.g. id.* at 18-20 (BATTERCRISP, NATURALCRISP, CRISP AS THE LAKE), 24 (PARMCRISPS) and 30 (O’CRISPS). Applicant also relies on dictionary definitions indicating that “crisp” has alternative meanings. *Id.* at 32-47.

Applicant argues that the proposed mark is not merely descriptive because there is “an incredible variety of meanings of the term ‘crisp.’” 6 TTABVUE 24.⁹ Furthermore, “[w]hen the term is combined with breakfast, its meaning becomes even harder to elucidate,” because of the “untold number of breakfast items which might be considered ‘crisp,’ from bacon, to apples/pickles, to Poptart’s, to toast, etc.” *Id.* at 25. Applicant contends that the proposed mark is suggestive rather than descriptive because consumers “would not immediately know the meaning of the mark in relation to at least” some of the identified goods. *Id.* at 25-27.

⁹ It was neither necessary nor appropriate for Applicant to refile with his Appeal Brief evidence he submitted with his Request for Reconsideration. *In re Michalko*, 110 USPQ2d 1949, 1950 (TTAB 2014).

II. Analysis

We have no doubt that BRKFST KRSPS is merely descriptive because it “immediately conveys knowledge of a quality, feature, function, or characteristic” of Applicant’s identified goods. *In re Chamber of Com. of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (quoting *In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)); *In re Abcor Dev.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). Specifically, it conveys that Applicant’s wafers, bars and “cereal-based” breakfast foods are crisp and may be eaten for breakfast. Where, as here, a proposed mark is merely descriptive of at least one product in the identification of goods in a particular International Class, the “entire class will fail.” *In re Positec Grp. Ltd.*, 108 USPQ2d 1161, 1171 (TTAB 2013) (citing *In re Chamber of Com.*, 102 USPQ2d at 1220).

While the proposed mark is BRKFST KRSPS rather than BREAKFAST KRISPS, Applicant’s deletion of the vowels in “breakfast crisps” to create a consonant-only, phonetically-equivalent misspelling of BREAKFAST KRISPS does not make the mark non-descriptive. *See Nupla Corp. v. IXL Mfg. Co.*, 114 F.3d 191, 42 USPQ2d 1711, 1716 (Fed. Cir. 1997) (“Nupla’s mark [CUSH-N-GRIP], which is merely a misspelling of CUSHION-GRIP, is also generic as a matter of law”); *In re Quik-Print Copy Shop, Inc.*, 616 F.2d 523, 205 USPQ 505, 507 n.9 (CCPA 1980) (finding QUIK-PRINT merely descriptive of printing and copying services, stating “[t]here is no legally significant difference here between ‘quik’ and ‘quick.’”); *In re Carlson*, 91 USPQ2d 1198, 1203 (TTAB 2009) (“applicant’s applied-for mark, URBANHOUSING in standard character form, will be immediately and directly perceived by consumers

as the equivalent of the admittedly descriptive term URBAN HOUSING, rather than as including the separate word ZING”). Cf. *Standard Paint Co. v. Trinidad Asphalt Co.*, 220 U.S. 446, 455 (1911) (“Bad orthography has not yet become so rare or so easily detected as to make a word the arbitrary sign of something else than its conventional meaning ...”). There is no need for consumers to “buy a vowel” in order to understand that Applicant’s goods are crisp breakfast foods.¹⁰

This is especially so when we keep in mind that “[t]he question is not whether someone presented with only the mark could guess what the goods or services are. Rather, the question is whether someone who knows what the goods or 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)). Here, someone who knows that Applicant offers cereal and muesli bars and “processed cereal-based food to be used as a breakfast food” would understand that BRKFST KRSPS conveys that these goods are crisp or brittle breakfast foods.

Furthermore, the record establishes that third parties use, and consumers understand, the term “breakfast crisps” to convey crisp breakfast foods, such as the cereal, granola and grain-based breakfast wafers and bars identified in the involved application. Indeed, not only do cereal and convenience food producers use “breakfast crisps” to describe cereal, grain and pastry-based foods sold under trademarks such

¹⁰ Applicant essentially concedes that consumers will perceive “KRSPS” as a misspelling or variation of “crisps.” 6 TTABVUE 24-25.

as SPECIAL K, but publicly-disseminated recipes for crisp or brittle granola, cereal and grain-based breakfast foods such as wafers and bars describe those foods as “breakfast crisps.” In other words, “breakfast crisps” describes characteristics of a type of food, rather than the sources thereof.

Thus, when we consider the composite BRKFST KRSPS as a whole, we find that not only are “BRKFST” and “KRSPS” each merely descriptive of Applicant’s goods, but when those terms are combined into the proposed mark, the resulting combination does not evoke a non-descriptive commercial impression. To the contrary, as shown by third-party uses of “breakfast crisps,” each component of Applicant’s proposed mark retains its merely descriptive significance in relation to the goods. The composite is thus merely descriptive. *See, e.g., In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370 (Fed. Cir. 2004) (PATENTS.COM merely descriptive of computer software for managing a database of records that could include patents, and for tracking the status of the records by means of the Internet); *In re Petroglyph Games, Inc.*, 91 USPQ2d 1332 (TTAB 2009) (BATTLECAM merely descriptive for computer game software).

While Applicant is correct that “crisps” could have other meanings in different contexts, or when used for different goods or services, that is beside the point. *In re Chopper Indus.*, 222 USPQ 258, 259 (TTAB 1984) (“It 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.”). *See also In re IP Carrier Consulting Grp.*, 84 USPQ2d 1028, 1034 (TTAB 2007); *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979). Again,

the question “is not whether someone presented with only the mark could guess what the goods or services are,” but instead “whether someone who knows what the goods or services are will understand the mark to convey information about them.” *DuoProSS*, 103 USPQ2d at 1757. Here, the evidence regarding competing crisp breakfast foods (sometimes referred to as “breakfast crisps”), and the recipes for “breakfast crisps,” reveal that consumers who know that Applicant intends to offer cereal and granola-based wafers and bars, some specifically “to be used as a breakfast food,” will understand BRKFST KRSPS to convey that Applicant’s goods are crisp or brittle breakfast foods.¹¹

III. Conclusion

The record leaves no doubt that BRKFST KRSPS, which is merely “breakfast crisps” with the vowels removed, is merely descriptive of Applicant’s cereal, granola and grain-based breakfast foods. Applicant’s competitors should remain free to continue using “breakfast crisps” and variations thereof for their own goods. *See In re Abcor Dev.*, 200 USPQ at 217 (“The major reasons for not protecting [merely descriptive] marks are ... to maintain freedom of the public to use the language

¹¹ Applicant’s third-party registration evidence is unpersuasive. In fact, the record as a whole shows that in the relevant field of breakfast and crisp foods, the USPTO typically requires a disclaimer of “crisps” in non-unitary marks. In any event, neither the existence of Applicant’s third-party registrations nor any of the evidence in their prosecution records (even if it were of record here) compels a specific result in later, allegedly analogous cases. *See, e.g., Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1377 (Fed. Cir. 2018) (“these prior registrations do not compel registration of [Applicant’s] proposed mar[k]”) (citing *In re Cordua Rests., Inc.*, 823 F.3d 594, 600 (Fed. Cir. 2016)); *In re Shinnecock Smoke Shop*, 571 F.3d 1171, 91 USPQ2d 1218, 1221 (Fed. Cir. 2009). To the extent that our decision here may be inconsistent with Applicant’s third-party registrations, “it is the decision required under the statute on the record before us.” *In re Ala. Tourism Dept.*, 2020 USPQ2d 10485, at *11 (TTAB 2020).

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involved, thus avoiding the possibility of harassing infringement suits by the registrant against others who use the mark when advertising or describing their own products.”).

Decision: The refusal to register Applicant’s proposed mark on the Principal Register because it is merely descriptive under Section 2(e)(1) of the Trademark Act is affirmed.