

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed:
December 20, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Patty's Original Cheese Zombies, Inc.

v.

Dumloads On Us

—
Cancellation No. 92058966
Against Registration No. 4154469

—
Peter J. Tormey of Antero & Tormey LLP, for
Patty's Original Cheese Zombies, Inc.

Sharon Adams of Adams Law Office, for
Dumloads On Us.

—
Before Ritchie, Adlin, and Hightower, Administrative Trademark Judges.

Opinion by Ritchie, Administrative Trademark Judge:

Dumloads on Us ("Defendant") owns a registration on the Principal Register for the mark CHEESE ZOMBIES, in standard character format and with CHEESE

disclaimed, for “filled bakery products,” in International Class 30,¹ which issued June 5, 2012.

On April 2, 2014, Patty’s Original Cheese Zombies, Inc. (“Plaintiff”) filed a petition to cancel the registration on the ground that when used in connection with “filled bakery products,” the term “cheese zombies” is generic or, in the alternative, that the term is merely descriptive under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), and that it has not acquired distinctiveness.

Both parties filed briefs and Plaintiff filed a reply brief.

The Record and Evidentiary Issues

The record includes the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of Registration No. 4154469. The record further includes the following evidence from Plaintiff:

1. Deposition testimony of Martha Riley, former teacher, vice-principal, and principal at Mt. Diablo Unified School District, dated October 1, 2015.
2. First notice of reliance on newspaper articles and school menus showing third-party use of the terms “cheese zombie” and “cheese zombies.”
3. Second notice of reliance on recipes for “cheese zombies.”
4. Notice of reliance on a letter from Defendant, also included as an exhibit to the petition to cancel and the Answer thereto.²

¹ Registration No. 4154469 issued from application Serial No. 77832075, filed September 22, 2009 based on dates of first use of September 22, 2009 and first use in commerce of February 28, 2012.

² This is not appropriate material for a notice of reliance. However, as further discussed in the “Standing” section, the letter is mentioned in the pleadings.

The record also includes the following evidence from Defendant:

1. Deposition of Eric Giacobazzi, its president, dated December 3 and 12, 2015, with exhibits.

Defendant purports to introduce the results of a survey from SurveyMonkey into the record, via the December 3 and 12 depositions of Mr. Giacobazzi.³ Plaintiff objects to this evidence on several grounds. First, no notice was given that Mr. Giacobazzi would be testifying as an expert. Second, Mr. Giacobazzi is not qualified to testify as an expert. Third, the survey results are hearsay.

Mr. Giacobazzi testified that he designed the survey and that he commissioned a service called SurveyMonkey to execute the survey:

A: Yeah. Exhibit 4 is a survey I did by SurveyMonkey and –

Q: When you say it's a survey that you did, what does that mean?

A: So I came up with the questions and I designed it, and then from there, SurveyMonkey is a website where you can – I purchased – you can purchase audiences, which is what I did. And I narrow the audience down to a – people that have purchased baked goods within the last 30 days. So I paid for this information.⁴

Mr. Giacobazzi's testimony indicates that besides this survey with SurveyMonkey he has designed only one other survey in the past eight years.⁵ There is no indication that Defendant designated or disclosed Mr. Giacobazzi as an expert witness, that he has knowledge particular to trademark surveys, or that he has the background or

³ The survey results are attached as Exhibit 4, and Exhibits 5 through 10 are webpages with information about SurveyMonkey. 27 TTABVUE 38-54, 78-99.

⁴ 21 TTABVUE 9-10

⁵ 21 TTABVUE 21.

skills to testify as an expert. Fed. R. Evid. 702; Fed. R. Civ. P. 26(a)(2); Trademark Rule 2.120(a)(2), 37 C.F.R. § 2.120(a)(2); *see also Promark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1247 (TTAB 2015). *Id.*

To the extent he could claim to be testifying from personal knowledge, Mr. Giacobazzi did not personally observe or oversee the survey; his design was limited to drafting the questions; and he testified that he is not personally familiar with how SurveyMonkey conducts its business.⁶ Thus, we find that because Mr. Giacobazzi was neither designated nor qualified as an expert, and since he cannot otherwise submit the survey results based on personal knowledge, the survey results constitute hearsay. Plaintiff's objection to the survey is sustained, and we do not consider the survey results in our analysis.

Standing

"The facts regarding standing ... are part of [a plaintiff's] case and must be affirmatively proved. Accordingly, [plaintiff] is not entitled to standing solely because of the allegations in its petition." *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982). To prove its standing to oppose the registration of an allegedly generic term, a plaintiff may show it is engaged in the manufacture or sale of the same or related goods as those listed in the defendant's application or registration; that is, that plaintiff has the right to use the term in a descriptive or generic manner. *Nature's Way v. Nature's Herbs*, 9 USPQ2d 2077, 2080 (TTAB 1989); *Ferro Corp. v. SCM Corp.*, 219 USPQ 346, 352 (TTAB 1983); *see also*

⁶ 21 TTABVUE 16.

Binney & Smith Inc. v. Magic Marker Industries, Inc., 222 USPQ 1003, 1010 (TTAB 1984).

In its answer to the Amended Petition to Cancel, Defendant asserted as a third affirmative defense the following:

Petitioner fails to establish priority of use. Petitioner simply began using a confusingly similar mark to Registrant's Mark *after* Registrant obtained its Mark.

9 TTABVUE 4 (emphasis in original).

Accordingly, in stating that Plaintiff is using a "confusingly similar mark," Defendant admits that Plaintiff has standing to bring this action. Defendant further "admits sending a letter to Petitioner."⁷ This was stated in response to paragraph 3 of the Amended Petition, which states:

Petitioner received a letter from an Eric Giacobazzi who purports to be the owner and operator of Registrant/Respondent Dumploads on Us, Inc. claiming to own the rights to the registered trademark "Cheese Zombies." Petitioner believes and therefore alleges that this letter is a precursor to a potential trademark infringement dispute involving the use of the product name "cheese zombies" or "cheese zombies" and that Petitioner stands to be found liable for infringement, damages and further ordered to discontinue the use of the name "cheese zombie" or "cheese zombies" for the products that it sells.⁸

We find that Plaintiff has established a real interest in this proceeding, and therefore has established its standing to bring this action.

⁷ 8 TTABVUE 2.

⁸ 7 TTABVUE 3-4.

Genericness

There is a two-part test used to determine whether a proposed mark is generic: (1) what is the genus of goods at issue? and (2) does the relevant public understand the designation primarily to refer to that genus of goods? *H. Marvin Ginn Corp. v. Int'l Assn. of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986); see also *Princeton Vanguard, LLC v. Frito-Lay N. Am., Inc.*, 786 F.3d 960, 114 USPQ2d 1827, 1830 (Fed. Cir. 2015). Evidence of the public's understanding of a term may be obtained from any competent source, including testimony, surveys, dictionaries, trade journals, newspapers and other publications. *Id.* (citing *In re Northland Aluminum Products, Inc.*, 777 F.2d 1556, 1559, 227 USPQ 961 (Fed. Cir. 1985)). It is Plaintiff's burden to establish that CHEESE ZOMBIES is generic by a preponderance of the evidence. *Princeton Vanguard*, 114 USPQ2d at 1830 n.2.

A. The genus of goods at issue

Plaintiff refers to Defendant's goods as "a loaf of bread baked with cheese inside."⁹ Defendant, however, categorizes the genus as its identified "filled bakery products."¹⁰ There is no evidence of record that would indicate that Defendant's identification does not accurately categorize the genus. See *Magic Wand Inc. v. RDB, Inc.*, 940 F.2d 638, 19 USPQ2d 1551, 1552 (Fed. Cir. 1991) ("[A] proper genericness inquiry focuses on the description of [goods or] services set forth in the [application or] certificate of registration."). Furthermore, we note that Plaintiff's proposed genus is encompassed

⁹ 22 TTABVUE 8.

¹⁰ 24 TTABVUE 8.

in the identification of goods. Thus we find that the genus is, as identified, “filled bakery products,” keeping in mind that a term is generic “if the relevant public understands the term to refer to part of the claimed genus of goods or services, even if the public does not understand the term to refer to the broad genus as a whole.” *In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1638 (Fed. Cir. 2016); *see also In re Analog Devices Inc.*, 6 USPQ2d 1808, 1810 (TTAB 1988), *aff’d*, 871 F.2d 1097, 10 USPQ2d 1879 (Fed. Cir. 1989).

B. The relevant public

The second part of the genericness test is whether the relevant public understands the designation primarily to refer to that class of goods. The relevant public for a genericness determination is the purchasing or consuming public for the identified goods. *Magic Wand*, 19 USPQ2d at 1553. Because there are no restrictions or limitations to the channels of trade or classes of consumers for these goods, the relevant consuming public comprises ordinary consumers who purchase and eat filled bakery products. *See Princeton Vanguard*, 114 USPQ2d at 1830.

C. Public perception

To determine the public perception of the term “CHEESE ZOMBIES” as it applies to “filled bakery products,” we must analyze the meaning of the applied-for mark “as a whole.” *Princeton Vanguard*, 114 USPQ2d at 1831 (citing *In re Steelbuilding.com*, 415 F.3d 1293, 75 USPQ2d 1420, 1421 (Fed. Cir. 2005)).

1. Dictionary definitions

In undertaking our analysis of the term as a whole, our primary reviewing court, the Court of Appeals for the Federal Circuit, has noted that it may be appropriate “as a first step” to analyze the constituent terms in the applied-for mark. *Id.* at 1833; *see also 1800Mattress.com IP*, 586 F.3d 1359, 92 USPQ2d 1682, 1684 (explaining that the Board appropriately considered the separate meanings of “mattress” and “.com” when determining that the combination “mattress.com” was generic); *In re Hotels.com LP*, 573 F.3d 1300, 1304, 91 USPQ2d 1532, 1535 (Fed. Cir. 2009) (affirming the Board’s finding that “the composite term HOTELS.COM communicates no more than the common meanings of the individual components”).

In analyzing the constituent terms “CHEESE” and “ZOMBIES,” we consider their meaning to the consuming public as indicated by dictionary definitions and other “competent” sources. *See Northland*, 227 USPQ at 963.

Defendant submitted the following definitions from *Dictionary.com*:¹¹

Cheese: *noun* 1. The curd of milk separated from the whey and prepared in many ways as a food; 2. A definite mass of this substance, often in the shape of a wheel or cylinder.

Zombie: *noun* 1. The body of a dead person given the semblance of life, but mute and will-less, by a supernatural force, usually for some evil purpose.

There is no dictionary definition of record for the combined term “cheese zombie” or its plural “cheese zombies.”

¹¹ 27 TTABVUE 32, 36.

2. Deposition testimony

We next look at Ms. Riley's deposition testimony. She served as teacher, vice-principal, and principal in the Mt. Diablo Unified School District for a combined total of 42 years.¹² Ms. Riley testified that "cheese zombies" were served at schools in the Mt. Diablo Unified School District during her term there, including at Clayton Valley, when she was vice-principal there from 1988 to 1992, as well as during the twelve years that she was principal at Northgate.¹³

Q: Could you describe a cheese zombie for us?

A: Well, it's got this wonderful puff of pastry around this nice gooey little narrow thing of cheese.¹⁴

Ms. Riley testified that "cheese zombies" were popular, and were available every day.¹⁵ Even former students would come back to the school and buy them:

Q: Did people just come by to buy zombies at the school?

A: Well, when I was at Northgate, yes, because they were former students and they were in college and they would come by and want to buy, you know, get cheese zombies, and two of them were sent up once by a campus supervisor because she didn't think they, you know, didn't know whether they should be on campus.

Q: So they came to your office?

A: Yeah, I and [sic] gave them a pass and they went and got their cheese zombies.¹⁶

¹² 20 TTABVUE 5.

¹³ 20 TTABVUE 8.

¹⁴ 20 TTABVUE 8.

¹⁵ 20 TTABVUE 9.

¹⁶ 20 TTABVUE 10.

Finally, Ms. Riley noted that the sale of “cheese zombies” was ongoing from when she first joined the district in 1967.¹⁷

3. Media references

Plaintiff submitted media references to the term “cheese zombies,” as referring to filled bakery products. These include the following:

The Times; April 18, 1998; Give zombie new life in your own kitchen, by Joan Morris;

Dear Joan: Where can I get a **cheese zombie** like the ones they make in high school? They’re really good and I don’t think I’m allowed to go to school to buy one. Is there a recipe?

Dear Shawn: Kathleen and Karen with Mt. Diablo Unified School District’s Food Services say they get several requests each year from former students looking for their favorite comfort food. They have kindly shared the recipe. For 2 ½ pounds of **cheese zombies**, here’s what you need.¹⁸

Seattle Times: April 19, 1989; Student, Cooks Love ‘Zombies’ Affordable, Cheese-Filled Bread a Hit with Trade Journal, Bellevue Schools: By Margarita Overton; If the Bellevue School District’s bakers made them often enough, Leigh Burg would have a “**cheese Zombie**” for lunch every other day.¹⁹

San Francisco Chronicle: May 17, 2015; Junk food a cash cow for schools: is it time to kill the **cheese zombie**?; That’s the recommendation of well-meaning lawmakers in California. Concerned about the epidemic of obesity among school children, they have backed legislation to boot junk food off school campuses. The “zombie,” a cheese-filled bread snack that has been popular at some East Bay schools for years, might be considered for extinction.²⁰

Columbian (Vancouver, WA); June 7, 2005; Love at First Bite; Cheesy, buttery Zombie a longtime hit in local lunchrooms; . . . The cheesy, buttery sandwiches, always served with cream of tomato soup, have

¹⁷ 20 TTABVUE 12.

¹⁸ 16 TTABVUE 9.

¹⁹ 16 TTABVUE 14.

²⁰ 16 TTABVUE 16.

been an elementary school cafeteria favorite in the Vancouver district for about 40 years. Classrooms hold countdowns to serving day when Zombies appear on the monthly meal schedule. Parents choose Zombie day to visit their children at lunch, and school employees who seldom eat cafeteria food circle **Cheese Zombie** dates on their appointment calendars.²¹

Walla Walla Union-Bulletin: 11/2/2003; **Cheese Zombies**: In a small room . . . much like a laboratory . . . they're making their yummy creations. Story by Cathy Grimes of the Union-Bulletin; The most popular lunch at Edison Elementary School begins in a warm bright kitchen before the first bell rings. Head cook Karen Jorgensen starts work before 8 a.m. filling the kitchen with the scent of bread dough, an essential ingredient for what will become **cheese zombies**.²²

Plaintiff also included evidence of school menus listed in newspapers in California, Washington State, and Missouri, that highlight “cheese zombies” as a lunch item.²³

Defendant argues that the references in the record to the term “cheese zombies” are geographically limited, particularly clustered in the East Bay region of the San Francisco Bay Area. While several of the media references and Ms. Riley refer to “cheese zombies” in the context of the Mt. Diablo Unified School District, other references, including school menus, are clearly from other areas, including outside California.

4. Recipes

Plaintiff submitted evidence of at least eight recipes for “cheese zombies.” These include recipes set forth on the following websites:²⁴

chilehousesf.com

²¹ 16 TTABVUE 19.

²² 16 TTABVUE 30.

²³ 16 TTABVUE 11, 12, 13, 26-27, 28, 29.

²⁴ 17 TTABVUE 8, 10, 12, 14, 17, 19, 21.

food.com
napahighreunion.blogspot.com
recipequeens.blogspot.com
<https://redpajamamama.wordpress.com>
<http://materialmama.typepad.com>; and
<http://claycord.com>.

5. Testimony from Defendant's President

Mr. Giacobazzi, Defendant's President, testified in his December 3 deposition that "cheese zombies" were served at the middle school he attended:

Q: You went to Foothill Middle School, didn't you?

A: I did.

Q: They served Cheese Zombies in the lunchroom at Foothill Middle School when you were having lunch there, didn't they?

A: They did.

Q: And they called them Cheese Zombies, didn't they?

A: Correct.²⁵

D. Discussion

In considering the evidence of record, we find that the dictionary definitions do not show the term CHEESE ZOMBIES to be generic. In particular, while "cheese," a dairy product often included in foods, may be understood by the relevant public to refer to the filling of certain baked products, there is no indication that a supernatural, undead "zombie" would be understood to refer to bread or other baked products, and as noted *supra*, there is no dictionary definition for the composite terms "cheese zombie" or "cheese zombies."

²⁵ 21 TTABVUE 22-23.

There are media references, school menus, and even recipes that describe filled bakery products as “cheese zombies.” Supporting these is the testimony of Ms. Riley and Mr. Giacobazzi. When viewed as whole, however, we do not find that the evidence of record is sufficient to show that the relevant consumer would understand the term “cheese zombies” as a type of “filled bakery products,” including “a loaf of bread with cheese inside.” See *In re Merrill Lynch, Pierce, Fenner & Smith Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1143 & n.1 (Fed. Cir. 1987) (finding CASH MANAGEMENT ACCOUNT not generic for stock brokerage and related services, pointing out that “[t]he issue ... is how the consuming public views the mark”). We therefore find that Plaintiff has not proven by a preponderance of the evidence that the term “CHEESE ZOMBIES” is generic for a type of “filled bakery products.”

Mere Descriptiveness

We next consider Plaintiff’s alternative claim that the term is merely descriptive without having acquired distinctiveness. A term is deemed to be merely descriptive of goods or services, within the meaning of Section 2(e)(1), if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods. See *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (citing *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987)); see also *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). Whether a term is merely descriptive is determined not in the abstract, but in relation to the goods for which registration is sought, the context in which it is being used on or in connection with those goods, and the possible

significance that the term would have to the average purchaser of the goods because of the manner of its use. That a term may have other meanings in different contexts is not controlling. *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979). Moreover, it is settled 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.” *In re Tower Tech Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002); *see also In re Patent & Trademark Services Inc.*, 49 USPQ2d 1537 (TTAB 1998); *In re Home Builders Association of Greenville*, 18 USPQ2d 1313 (TTAB 1990); *In re American Greetings Corp.*, 226 USPQ 365 (TTAB 1985). If a mark requires imagination, thought and perception to ascertain the nature of the goods, then it is suggestive. *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1755 (Fed. Cir. 2012) (citing *In re Abcor Dev. Corp.*, 200 USPQ 215).

A composite of descriptive terms is registrable only if it has a separate, non-descriptive meaning. *In re Colonial Stores, Inc.*, 394 F.2d 549, 157 USPQ 382 (CCPA 1968) (holding SUGAR & SPICE not merely descriptive of bakery products). Plaintiff argues that the term “CHEESE ZOMBIES” is at least merely descriptive of a feature or characteristic of Defendant’s goods, since they are understood by third parties to describe filled bakery products. Plaintiff further asserts that the mark has not acquired distinctiveness. Defendant disputes that the term is merely descriptive but

does not, in the alternative, claim acquired distinctiveness, and has presented no evidence in that regard.²⁶

In the prior section on “Genericness,” we discussed the media references, school menus, recipes and testimony that describe filled bakery products as “cheese zombies.” Specifically, media reports and school menus refer to “cheese zombies” being served in school lunches in various places. Ms. Riley similarly testified to “cheese zombies” being a filled bakery product sold in a school district over a period of decades during her tenure there as a teacher, vice-principal, and principal, specifically describing it as a “wonderful puff of pastry around this nice gooey little narrow thing of cheese.”²⁷ Mr. Giacobazzi confirmed that the same type of “cheese zombies” were sold at Foothill Middle School when he went to school there,²⁸ and various recipes explain how to make a filled bakery product described as “cheese zombies.”²⁹

Based on the evidence of record, considered as a whole, we find that Plaintiff has shown by a preponderance of the evidence that Defendant’s composite term “CHEESE ZOMBIES,” when viewed in relation to “filled bakery products,” immediately conveys an idea of characteristics of the goods, that is, that they are a type of baked bread product filled with cheese. Indeed, it is clear from all of the

²⁶ To the extent Defendant would rely on its survey for such evidence, we have found the survey to be inadmissible and insufficient. Again, though, Defendant has not made an argument of Section 2(f) acquired distinctiveness even in the alternative.

²⁷ 20 TTABVUE 7, 8.

²⁸ 21 TTABVUE 22-23.

²⁹ 24 TTABVUE 8, 10, 12, 14, 17, 19, 21.

evidence that “cheese zombies” always or almost always is used to describe the same type of baked item filled with cheese. Therefore, we find that the mark is merely descriptive of the identified goods, and we affirm the petition to cancel.

Even if Defendant had asserted acquired distinctiveness of its applied-for mark, due to the high number of third-party descriptive uses of the term “cheese zombies” for “filled bakery products,” it is apparent on this record that Defendant’s use is not substantially exclusive. *See, e.g., Levi Strauss & Co. v. Genesco, Inc.*, 742 F.2d 1401, 222 USPQ 939, 940-41 (Fed. Cir. 1984) (“When the record shows that purchasers are confronted with more than one (let alone numerous) independent users of a term or device, an application for registration under Section 2(f) cannot be successful, for distinctiveness on which purchasers may rely is lacking under such circumstances.”); *Quaker State Oil Refining Corp. v. Quaker Oil Corp.*, 453 F.2d 1296, 172 361, 363 (CCPA 1972) (evidence insufficient to establish distinctiveness due to significant and continuous concurrent use of term by competitor such that applicant's use was not substantially exclusive); *Ayoub, Inc. v. ACS Ayoub Carpet Serv.*, 118 USPQ2d 1392, 1404 (TTAB 2016).

Decision: The petition to cancel Registration No. 4154469 is denied on the ground of genericness; the Petition is granted on the ground that the term “CHEESE ZOMBIES” is merely descriptive and has not acquired distinctiveness.