

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

Mailed: October 17, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Harry and David, LLC

Serial No. 97680254
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Carolyn A. Galgano and Thomas M. Galgano of Galgano IP Law PLLC, for Harry and David, LLC.

Elena Kravtsoff, Trademark Examining Attorney, Law Office 113,
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Before Greenbaum, Bradley and O'Connor,
Administrative Trademark Judges.

Opinion by O'Connor, Administrative Trademark Judge:

I. Background

Harry and David, LLC (“Applicant”) seeks registration on the Principal Register of the mark HARRY & DAVID POP! POPCORN, in standard characters, for

Popcorn; Popped popcorn; Flavor-coated popped popcorn;
Caramel-coated popcorn; Chocolate-coated popcorn;

Ready-to-eat popcorn; Gift boxes containing popcorn, in International Class 30.¹

In response to the Examining Attorney's requirement of a disclaimer of POP! POPCORN, Applicant only disclaimed the word POPCORN, arguing that POP! does not merely describe a feature of the applied-for goods.²

The Trademark Examining Attorney maintained the disclaimer requirement and refused registration of the mark under Section 6(a) of the Trademark Act, 15 U.S.C. § 1056(a), based on Applicant's failure to disclaim POP! POPCORN, on the ground that the wording is merely descriptive of Applicant's goods within the meaning of Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1).³ Applicant appealed and requested reconsideration, which was denied. The appeal is now fully briefed. We reverse the refusal to register.

II. Legal Standard

The Director of the USPTO "may require the applicant to disclaim an unregistrable component of a mark otherwise registrable." Trademark Act Section 6(a). Merely descriptive terms are unregistrable under Trademark Act Section 2(e)(1), and therefore are subject to disclaimer if the mark is otherwise registrable. *See, e.g., In re Omaha Nat'l Corp.*, 819 F.2d 1117, 1119-20 (Fed. Cir. 1987)

¹ Application Serial No. 97680254 was filed on Nov. 16, 2022 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant's claim of first use of the mark anywhere and in commerce at least as early as Oct. 13, 2022.

² April 14, 2023 Priority Action, TSDR 2; June 7, 2023 Response to Office Action, TSDR 5. References 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 downloaded .pdf versions of the documents.

³ July 7, 2023 Final Office Action, TSDR 2.

(affirming disclaimer requirement for “first tier” in the mark FirstTier & design for use in connection with banking services).⁴ A term “is merely descriptive if it immediately conveys information concerning a feature, quality, or characteristic of the goods or services for which registration is sought.” *In re N.C. Lottery*, 866 F.3d 1363, 1367 (Fed. Cir. 2017) (citing *In re Bayer A.G.*, 488 F.3d 960, 963 (Fed. Cir. 2007)). In contrast, a term is suggestive, and not merely descriptive, if it requires imagination, thought and perception to reach a conclusion as to the nature of the goods. *StonCor Grp., Inc. v. Specialty Coatings, Inc.*, 759 F.3d 1327, 1332 (Fed. Cir. 2014) (citations omitted). Failure to comply with a disclaimer requirement is a ground for refusal of registration. *See In re La. Fish Fry Prods., Ltd.*, 797 F.3d 1332, 1335 (Fed. Cir. 2015) (USPTO can condition registration of a mark on disclaimer of unregistrable component).

However, disclaimer of an otherwise unregistrable element is not required if the term is combined or merged together with other elements of a composite mark, so that they form a unitary whole having a distinct meaning that itself is not merely descriptive. *In re Slokevage*, 441 F.3d 957, 962 (Fed. Cir. 2006) (citing *Dena Corp. v. Belvedere Int’l, Inc.*, 950 F.2d 1555, 1561 (Fed. Cir. 1991)); *In re EBS Data Processing*,

⁴ As part of an internal Board pilot program to broaden acceptable forms of legal citation in Board cases, citations in this opinion are in the form recommended in TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 101.03 (2024). This opinion cites decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs and Patent Appeals by the pages on which they appear in the Federal Reporter (*e.g.*, F.2d, F.3d or F.4th). For opinions of the Board, this opinion uses citations to the Lexis legal database and cites only precedential decisions, including in the citation, where available, the application serial number or proceeding number. Practitioners should also adhere to the practice set forth in TBMP § 101.03.

Inc., Ser. No. 73145310, 1981 TTAB LEXIS 110, at *4 (TTAB 1981). As our primary reviewing court has said,

A unitary mark has certain observable characteristics. Specifically, its elements are inseparable. In a unitary mark, these observable characteristics must combine to show that the mark has a distinct meaning of its own independent of the meaning of its constituent elements. In other words, a unitary mark must create a single and distinct commercial impression.

Dena Corp., 950 F.2d at 1560. “A unitary mark simply has no ‘unregistrable component,’ but is instead an inseparable whole.” *Id.*

III. Analysis

The Examining Attorney argues that the word “pop” means “to cause to explode or burst open,” as in “popped some popcorn,” such that the term “POP!” merely indicates a quality, characteristic or feature of Applicant’s goods, that they bust open with an explosive sound, or pop.⁵

Applicant argues that the word “pop” is not merely descriptive because it has multiple meanings, including to “push, put, or thrust suddenly or briefly” and “a small portion of something that makes a vivid impression.”⁶ According to Applicant, when used in connection with its identified goods, “POP!” could not only mean “to cause to explode or burst open,” but could also suggest “the sound the goods make when cooking,” “how the goods are to be eaten (you ‘pop’ them in your mouth[], for example)”

⁵ Examining Attorney’s Brief, 8 TTABVUE 4 (citing, inter alia, online version of Merriam-Webster Dictionary, April 14, 2023 Priority Action, TSDR 4).

⁶ Applicant’s Brief, 6 TTABVUE 6-7 (citing online version of Merriam-Webster Dictionary, June 7, 2023 Response to Office Action, TSDR 13-14).

or “that the goods are small but make a vivid impression on the consumer (the thought of the goods ‘pop’ into your mind).”⁷

It cannot be disputed that one of the dictionary definitions of “pop” is “to cause to explode or burst open,” as in “popped some popcorn,” reflected in the Merriam-Webster Dictionary evidence submitted by both the Examining Attorney and Applicant.⁸ However, even if “pop” thus describes a characteristic of Applicant’s goods, namely, the process by which they are produced, this does not end the inquiry on whether POP! POPCORN must be disclaimed.

Here, the HARRY & DAVID POP! portion of the mark HARRY & DAVID POP! POPCORN forms a unitary, nondescriptive expression such that disclaimer of exclusive rights in POP! POPCORN is not required under the facts of this case; the present disclaimer of POPCORN suffices. Notably, POP! immediately follows the words HARRY & DAVID. In this location, the term POP!, with its exclamation point, forms an interjection, modifying and linking the preceding words together in a distinct grammatical phrase, HARRY & DAVID POP! *See, e.g., In re Tires, Tires, Tires, Inc.*, Serial No. 77091459, 2009 TTAB LEXIS 654, at *10 (TTAB 2009) (critical factor in determining if words constitute a unitary phrase “is that the two or more words serve to modify each other and enhance the meaning of the composite”). The exclamation point sets these words apart, physically and conceptually, from the trailing word POPCORN, which is generic for the applied-for goods.

⁷ Applicant’s Brief, 6 TTABVUE 7.

⁸ April 14, 2023 Priority Action, TSDR 4; June 7, 2023 Response to Office Action, TSDR 13.

The other dictionary meanings of “pop” as used on or in connection with the applied-for goods reinforce that HARRY & DAVID POP! is a unitary expression that carries a cohesive and distinct impression of its own, which is independent from the sum of the parts. Aside from the meaning “to cause to explode or burst open,” definitions of “pop” include

- to push, put, or thrust suddenly or briefly⁹
- to go, come, or appear suddenly¹⁰
- to be or become striking or prominent¹¹
- a small portion of something that makes a vivid impression¹²
- something such as a color that looks very bright and noticeable next to something else¹³
- power or strength.¹⁴

These meanings of “pop,” when considered in the applied-for mark HARRY & DAVID POP! POPCORN and in relation to the identified popcorn and popcorn products, further support our finding that HARRY & DAVID POP! is a unitary expression with “a distinct meaning of its own independent of the meaning of its constituent elements,” *Dena Corp.*, 950 F.2d at 1561, indicating the source of a handy snack, striking flavors and/or memorable treats or gift items. The words HARRY & DAVID POP! thus “function as a unit, with each relating to the other rather than

⁹ April 14, 2023 Priority Action, TSDR 4 (online version of Merriam-Webster Dictionary).

¹⁰ *Id.* at 5.

¹¹ *Id.*

¹² *Id.* at 7.

¹³ July 7, 2023 Final Office Action, TSDR 27 (online version of Collins Dictionary).

¹⁴ *Id.* at 28.

directly to the goods.” *In re Kraft, Inc.*, Serial No. 73283428, 1983 TTAB LEXIS 134, at *4 (TTAB 1983).¹⁵

While the record in this case reveals approximately 100 third-party registrations for marks containing the word POP or POP! for use in connection with popcorn goods, issued as long ago as 1951¹⁶ and as recently as 2023,¹⁷ some of which contain a disclaimer of POP or POP! and some of which do not, these registrations do not establish a clear practice one way or the other regarding disclaimers of the words POP or POP! in a mark that is registered for use in connection with popcorn. The most that can be said of this evidence is that it is inconclusive, and highlights why prior decisions in other applications do not bind the Board, underscoring the need to evaluate each case on its own merits. *See In re Nett Designs, Inc.*, 236 F.3d 1339, 1342 (Fed. Cir. 2001).

¹⁵ Applicant’s specimens, printouts from Applicant’s website containing photos of and offering the goods for sale, are not to the contrary. The photos show the mark used on bright, colorful packaging, with images of flying popcorn kernels and website text reading “We created this crunchy treat with a little pizzazz, lots of pop, and a big punch of flavor.” Nov. 16, 2022 Specimens, TSDR 1-4. The product listing reads “Harry & David Pop!TM Popcorn,” reinforcing the unitary impression of HARRY & DAVID POP! *See id.* Although on the packaging the words HARRY & DAVID are shown in a smaller and lighter font than POP! or POPCORN, this is of no moment as the Application seeks to register the mark in standard characters, such that the words can be displayed in any font style, size or color. *Citigroup Inc. v. Cap. City Bank Grp., Inc.*, 637 F.3d 1344, 1353 (Fed. Cir. 2011); TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMPEP) § 1207.01(c)(iii) (May 2024).

¹⁶ E.g., U.S. Reg. 0550995 for PURDUE POP & Design (POP disclaimed), registered Nov. 20, 1951, *see* July 7, 2023 Final Office Action, TSDR 141; U.S. Reg. 699109 for JIFFY POP (no disclaimer), registered June 7, 1960, *see* Jan. 5, 2024 Request for Reconsideration, TSDR 60.

¹⁷ E.g., U.S. Reg. 6980972 for POP HAPPINESS (POP disclaimed), registered Feb. 14, 2023, *see* April 14, 2023 Priority Action, TSDR 36; U.S. Reg. 7112220 for NEW POP (no disclaimer), registered July 18, 2023, *see* Jan. 5, 2024 Request for Reconsideration, TSDR 42.

IV. Conclusion

We find that, on the record of this particular case, the phrase HARRY & DAVID POP! is a unitary expression, and disclaimer of the term POP! POPCORN (rather than just POPCORN) in the mark HARRY & DAVID POP! POPCORN is unnecessary.

Decision: The refusal to register Applicant's mark based on the requirement, made under Trademark Act Section 6(a), to disclaim POP! POPCORN is reversed.¹⁸

¹⁸ The Application will proceed to publication in its current state, with a disclaimer of POPCORN.