

Goodman

**THIS OPINION IS NOT  
A PRECEDENT  
OF THE TTAB**

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451

Mailed: May 24, 2013

Opposition No. 91203236

Opposition No. 91203238

KC Brang's Food & Beverage  
Company LLC

v.

Casella Wines Pty. Limited

**Before Holtzman, Mermelstein, and Lykos, Administrative  
Trademark Judges.**

**By the Board:**

KC Brang's Food & Beverage Company LLC, (hereinafter "opposer") has opposed Casella Wines Pty Limited's (hereinafter "applicant") application Serial Nos. 85331223<sup>1</sup> and 85331226<sup>2</sup> which seek to register the following standard-character mark

[ ]

("double-bracket marks") for Class 33 spirits and Class 33 wines, respectively. As grounds for both oppositions,

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<sup>1</sup> Filed May 26, 2011 under Section 1(b), the subject of Opposition No. 91203236.

<sup>2</sup> Filed May 26, 2011 under Section 1(b), the subject of Opposition No. 91203238.

opposer alleges mere descriptiveness and that the marks constitute "common basic symbols" that are not protectable and inherently distinctive.<sup>3</sup> In its answers, applicant denied the salient allegations of the notices of oppositions and asserted affirmative defenses.

This case now comes up on applicant's motion for summary judgment, filed October 31, 2012, and opposer's cross-motion for summary judgment, filed November 30, 2012, on the pleaded grounds for opposition.<sup>4</sup>

Opposer's evidence on summary judgment consists of the declaration of Brian Y. Boyd, counsel, with accompanying

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<sup>3</sup> We construe opposer's allegations that [] would not be perceived as a mark as a claim that the double-bracket marks fail to function as a trademark.

<sup>4</sup> Opposer states in its cross-motion for summary judgment that applicant's responses to written discovery state that applicant is using "variations of Applicant's Mark" on its webpage but complains that applicant has refused to produce examples of such use because it "takes the position that it has not yet used the '[' marks." Applicant, in its response to opposer's motion, points to its response to opposer's requests for admission where it "has confirmed that it does not intend to use left and right square brackets with any other matter." We further note that applicant's discovery responses submitted in conjunction with opposer's motion for summary judgment, state that the [] marks are presently not in use and it has no documents showing use of the marks.

We construe applicant's marks as simply double-brackets with nothing in between them, or empty brackets, as depicted on the drawing page of the subject applications. We note that, if, upon the filing of the statement of use, the mark is displayed with other matter in between the empty brackets, the drawing might not meet the substantially exact standard and the mark might not be capable of amendment under the material alteration standard. If, as opposer alleges, applicant is using brackets with other matter between them as a mark, such use is beyond the scope of this opposition, which concerns only the mark in the subject applications, *i.e.*, an empty pair of brackets.

exhibits. Applicant's evidence on summary judgment consists of the declarations of Jamie L. Bertha, counsel, with accompanying exhibits.

A party is entitled to summary judgment when it has demonstrated that there is no genuine dispute as to any material fact and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). In reviewing a motion for summary judgment, the evidentiary record and all reasonable inferences to be drawn from the undisputed facts must be viewed in the light most favorable to the nonmoving party. *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1544 (Fed. Cir. 1992).

#### Standing

Although opposer alleged in the notices of opposition that it uses opening and closing square brackets in connection with opposer's spirit and spirit based products, opposer submitted no evidence of standing in connection with its motion for summary judgment.

#### Descriptiveness ground

Turning first to the descriptiveness ground, opposer's evidence of descriptiveness of applicant's double-bracket marks consists of an excerpt from The Chicago Manual of Style Online which states that brackets are used "mainly to enclose material." Opposer's arguments regarding

descriptiveness are based on its own use, namely its use of double brackets in connection with the mark [Krā-zē] to describe how the brand name of its product is pronounced. Opposer submits that because it uses brackets in the context of alcoholic beverages, the brackets have significance to a consumer of alcoholic beverages and "the average consumer understands the use of open and closed brackets describes the pronunciation of that brand name."

Applicant has pointed out in its response to opposer's motion and in its motion for summary judgment, that there is no evidence that the double-bracket marks "immediately describe an ingredient, characteristic or feature of wine or alcoholic beverages." Applicant submits that "[r]egardless of whether left and right square brackets might serve as aids of punctuation or phonetic transcription in other contexts," opposer has failed to show that applicant's double-bracket marks are descriptive of wine or alcoholic beverages or "convey any information to the average purchaser about the nature, function, purpose or use of wine or alcoholic beverages."

A term is merely descriptive if it immediately conveys knowledge of a significant quality, characteristic, function, feature or purpose of the products and services it identifies. *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009,

1009 (Fed. Cir. 1987). Whether a particular term is merely descriptive is determined in relation to the goods and services for which registration is sought and the context in which the term is used, not in the abstract or on the basis of guesswork. *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978); *In re Remacle*, 66 USPQ2d 1222, 1224 (TTAB 2002).

Thus, the question is not whether someone presented only with the mark could guess the products listed in the description of goods. Rather, the question is whether someone who knows what the products are will understand the mark to convey information about them. *In re Tower Tech, Inc.*, 64 USPQ2d 1314, 1316-1317 (TTAB 2002); *In re Patent & Trademark Services Inc.*, 49 USPQ2d 1537, 1539 (TTAB 1998); *In re Home Builders Association of Greenville*, 18 USPQ2d 1313, 1317 (TTAB 1990). Opposer bears the ultimate burden of proving its claim of mere descriptiveness. *Hoover Co. v. Royal Appliance Mfg. Co.*, 238 F.3d 1357, 57 USPQ2d 1720, 1722 (Fed Cir. 2001); *Magic Wand, Inc. v. RDB, Inc.*, 940 F.2d 638, 19 USPQ2d 1551, 1554 (Fed. Cir. 1991).

Because applicant has pointed out that there is no evidence of mere descriptiveness in connection with wine or spirits to prove opposer's case, the burden shifted to opposer to establish that a genuine dispute of material

Opposition Nos. 91203236 and 91203238

fact remains for trial on the question of descriptiveness. See, *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *Sweats Fashions, Inc. v. Pannill Knitting Co., Inc.*, 833 F.2d 1560, 1563, 4 USPQ2d 1793, 1796 (Fed. Cir. 1987).

Opposer has not met its burden, however, as it has simply not presented any evidence that applicant's double-bracket marks are merely descriptive in connection with wine and spirits.

Accordingly, applicant's motion for summary judgment on opposer's claim of mere descriptiveness is GRANTED and opposer's cross-motion on the same claim is DENIED. Opposer's claims of mere descriptiveness in Opposition Nos. 91203236 and 91203238 are hereby DISMISSED WITH PREJUDICE.

Failure to Function as a Trademark

We now turn to opposer's failure to function as a mark claim.

Opposer argues that the double-bracket marks are "functional punctuation" as indicated by their dictionary definition and are "used to enclose words or figures so as to separate them from the context" or to modify a quotation. Opposer submits that both opposer and applicant use brackets with other terms "to separate their name brands from other text on labels, advertising literature,

etc." which demonstrates that the "brackets function as described by their dictionary definition."

Applicant, on the other hand, argues that the double-bracket marks are inherently distinctive because "they do not communicate anything about the goods either directly or indirectly." Applicant further argues that the marks are not functional as "[l]eft and right square brackets, by contrast have no such purpose in relation to Applicant's goods" and that "mere speculation, conjecture, or fantasy" regarding applicant's intended use is insufficient "to support opposer's cross-motion for summary judgment." Lastly, applicant submits that if the Board is unable to make the "ultimate determination of whether the marks are inherently distinctive (or merely descriptive)" it can delay consideration until after use has commenced.

It is well-settled that "not every designation that is placed or used on or in connection with a product necessarily functions ... as a trademark for said product; not every designation adopted with the intention that it performs a trademark function and even labeled as a trademark necessarily accomplishes that purpose; and there are certain designations that are inherently incapable of functioning as trademarks to identify and distinguish the source of the products in connection with which they are

used." *American Velcro, Inc. v. Charles Mayer Studios, Inc.*, 177 USPQ 149, 154 (TTAB 1973).

The critical inquiry in determining whether a designation functions as a mark is how the designation would be perceived by the relevant public. To make this determination we look to specimens and other evidence of record showing how the designation is actually used in the marketplace. *In re Eagle Crest, Inc.*, 96 U.S.P.Q.2d 1227, 1229 (TTAB 2010) (citing *In re Volvo Cars of North America Inc.*, 46 USPQ2d 1455 (TTAB 1998)). Thus, the determinative factor as far as registrability is concerned is the manner in which the mark is actually used, once use commences. *Michael S. Sachs Inc. v. Cordon Art B.V.*, 56 USPQ2d 1132, 1135 (TTAB 2000).

In this case, there is no evidence of applicant's use in the record as the applications were filed under Section 1(b), intent-to-use, and applicant's discovery responses indicate it has not commenced use of the marks.

In the absence of actual use of the double-bracket marks, we are unable to determine whether the double-bracket marks would be perceived by consumers as trademarks or as merely functional symbols of the written language. In view thereof, opposer's motion for summary judgment is DENIED and applicant's motion for summary judgment is



Opposition Nos. 91203236 and 91203238

GRANTED to the extent that Opposition Nos. 91203236 and 91203238 are DISMISSED WITHOUT PREJUDICE to the filing of a petition to cancel the registration after a statement of use has been filed. *Michael S. Sachs Inc. v. Cordon Art B.V.*, 56 USPQ2d at 1132 (dismissing failure to function as a mark claim without prejudice to filing a petition to cancel after a statement of use is filed when no evidence of use in United States commerce existed); *Eastman Kodak Co. v. Bell & Howell*, 23 USPQ2d 1878 (TTAB 1992), *aff'd*, 994 F.2d 1569, 26 USPQ2d 1912 (Fed. Cir. 1993) (on summary judgment, dismissing opposition without prejudice to filing a petition to cancel after a statement of use has been filed as question of descriptiveness could not be resolved until use commenced).