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**THIS DISPOSITION
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Paper No. 5
TEH

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Ralph S. Gray

Serial No. 75/725,201

James C. Wray, P.A. for Ralph S. Gray.

Karanendra S. Chhina, Trademark Examining Attorney, Law Office
101 (Jerry Price, Managing Attorney).

Before Wendel, Holtzman and Drost, Administrative Trademark
Judges.

Opinion by Holtzman, Administrative Trademark Judge:

The Board, on April 11, 2002, issued a decision affirming the refusal to register HEMP BURGER for "sandwiches" under Section 2(e)(1) of the Trademark Act. Applicant filed a timely request for reconsideration of that decision. In this request, applicant argues that the Examining Attorney's NEXIS search only retrieved ten relevant articles; that "out of the over 1 trillion references contained in Lexis Nexis" those ten articles represent a miniscule percentage of the total number of documents and

therefore "does not suggest generic use"; and that the NEXIS articles are all "several years old and thus outdated."

Applicant contends that the website printouts are also outdated and, moreover, that the websites "are not self-proving" and therefore cannot be used as evidence of descriptiveness.

To begin with, we note that applicant never previously argued that the NEXIS evidence represented an insignificant percentage of the entire database or that the Internet evidence is not "self-proving" (to the extent we can understand that argument). It is inappropriate for applicant to use a request for reconsideration as an opportunity to present new arguments that should have been raised before we issued our decision.

Furthermore, none of the arguments raised in the request for reconsideration have merit. Rather than a contention that the selected articles are not representative of the whole of the search results, applicant argues instead that they are not representative of the whole of the entire database, a matter of no importance. As in surname cases, there is no "magic number" of articles which would be required to establish that a term is descriptive.¹ The important consideration is the quality and character of the evidence which is of record, that is, whether

¹ See *In re BDH Two Inc.*, 26 USPQ2d 1556 (TTAB 1993) ["There is no magic number of listings which is probative to show that a term is primarily merely a surname."] and *In re Industrie Pirelli Societa per Azioni*, 9 USPQ2d 1564 (TTAB 1988).

the articles which are selected contain clear references of descriptive usage of the term.² In this case, the evidence shows clear and unambiguous use of the words "hemp burger" to identify a type of sandwich known as a "hemp burger." The Examining Attorney obtained the evidence from a variety of Internet websites and from NEXIS articles published in such general circulation newspapers as *The San Francisco Chronicle*, *The Denver Post*, and the *Los Angeles Times*. This evidence is sufficient overall to establish that HEMP BURGER is descriptive of applicant's sandwiches and makes it clear that HEMP BURGER would be perceived by the relevant public, that is, the segment of the public who will be purchasing applicant's sandwiches, as a type of sandwich offered by applicant rather than a mark for applicant's sandwiches. The fact that applicant itself chose to describe its goods in the original application as "hemp burgers, to eat that look like regular burgers, made from hemp seed" reinforces the meaning of HEMP BURGER as a descriptive term.

Applicant's assertion that the evidence is "outdated" is not understood. The NEXIS articles are in fact relatively current, appearing in publications dating from 1998 to 2000, and the website printouts include posting dates of June 1998, July 27,

² Moreover, contrary to applicant's apparent contention, the Examining Attorney was not required to establish that HEMP BURGER is generic.

1999, August 2, 1999 and July 2001. The Internet printouts also show, for example, that hemp burgers were available for purchase on YAHOO and other of the selected websites at least as of the date those sites were accessed by the Examining Attorney. More importantly, however, there is nothing in the record to suggest that the meaning conveyed by the term in those web pages has changed over time or that the information contained in the articles is no longer accurate.

Finally, it is not clear what applicant means by evidence that is not "self-proving." If applicant means that the website articles are hearsay, that argument was previously addressed in the decision (page 6, n.4) and applicant has made no contention that the decision is deficient in that regard. If applicant means that the articles are not self-authenticating, we would point out that the source of each website has been identified as well as the date the pages from those sites were printed out by the Examining Attorney, and applicant was free to check the websites for accuracy or misleading context or to see if the websites were still active, if applicant had chosen to do so.³

Applicant's request for reconsideration is denied.

³ Evidentiary requirements in an ex parte proceeding are less formal than in an inter partes proceeding. See TBMP § 1208 and In re Urbano, 51 USPQ2d 1776 (TTAB 1999).