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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Rodizio Restaurants International, Inc.

Serial No. 75/343,660

Dana H. Cardwell of Sheridan Ross P.C.

Michael Webster, Trademark Examining Attorney, Law Office
102 (Thomas Shaw, Managing Attorney).

Before Hanak, Hairston and Chapman, Administrative
Trademark Judges.

Opinion by Hanak, Administrative Trademark Judge:

Rodizio Restaurants International, Inc. (applicant) seeks to register in typed drawing form RODIZIO GRILL for "restaurant services and restaurant carry-out services." The application was filed on August 19, 1997 with a claimed first use date of December 1995. In the first Office Action, the Examining Attorney stated that the word GRILL was descriptive of applicant's services, and must be disclaimed. In response, applicant submitted a disclaimer of the descriptive word GRILL.

Citing Section 2(e)(1) of the Trademark Act, the Examining Attorney has refused registration on the basis

that applicant's mark is highly descriptive of applicant's services, and that applicant's showing of acquired distinctiveness pursuant to Section 2(f) of the Trademark Act is insufficient. When the refusal to register was made final, applicant appealed to this Board. Applicant and the Examining Attorney filed briefs. Applicant did not request a hearing.

As has been stated repeatedly, "a term is merely descriptive if it forthwith conveys an immediate idea of the ingredients, qualities or characteristics of the goods [or services]." In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978); Abercrombie & Fitch Co. v. Hunting World, Inc., 537 F.2d 4, 189 USPQ 759, 765 (2nd Cir. 1976). Moreover, it should be noted that the descriptiveness of a term is not decided in the abstract, but rather is decided in relationship to the goods or services for which registration is sought. Abcor Development, 200 USPQ at 218.

At the outset, we will deal with "the 'doctrine of foreign equivalents' [where] foreign words are translated into English and then tested for descriptiveness or genericness." 1 J. McCarthy, McCarthy on Trademarks and Unfair Competition Section 11:34 at page 11-58 (4th ed. 2002). In a response dated December 12, 2000, applicant

attached as Exhibit A photocopies of pages from three Portuguese-English dictionaries copyrighted 1958, 1961 and 1964. In not one of these three dictionaries is the Portuguese word "rodizio" defined as a type of restaurant, a manner of cooking or a style of presentation of food. However, this Board has taken judicial notice of two far more recent Portuguese-English dictionaries each of which defines "rodizio" as a type of restaurant. See Harper Collins Portuguese Concise Dictionary (1998) and NTC's Compact Portuguese and English Dictionary (1997). Thus, it is clear that one of the definitions of the Portuguese word "rodizio" is a type of restaurant. Applying the doctrine of foreign equivalents, the word "rodizio," meaning a type of restaurant in English, would be highly descriptive of, and indeed generic for, "restaurant services and restaurant carry-out services."

However, in this case the Board need not rely upon the doctrine of foreign equivalents in order to find that the word "rodizio" is, at a minimum, highly descriptive of applicant's restaurant services and restaurant carry-out services. This is because the Examining Attorney has made of record a plethora of stories from major United States newspapers where the term "rodizio" is used to describe a type of restaurant or a manner of preparing and/or serving

food. In short, the Board finds that the Portuguese word "rodizio" has entered the English language and would be understood as naming a type of restaurant or naming a manner of preparing and/or serving food.

At the outset, we note that applicant readily acknowledges that it is a "Brazilian style steak house" and that "the meat servers [waiters] come to the table with sword like skewers and offer customers a variety of grilled meats, one after the other." (Applicant's brief page 5).

This is precisely the type of restaurant which has been described in numerous United States newspapers. For example, an article appearing in the June 2, 2000 edition of the Pittsburgh Post-Gazette contains the following sentence: "This is the traditional Brazilian rodizio, or a progression of all-you-can-eat barbequed meats served at your table." An article appearing in the April 16, 2000 edition of The New York Times contains the following sentence: "Much of the savory odor comes from the array of skewered morsels being prepared for the rodizio, or meat-centered feast, that is served table-side as it comes off the grill." In an article from the Houston Chronicle of March 31, 2000 there is a review of one of applicant's Rodizio Grills which contains the following sentence: "In the Brazilian rodizio-style, meats are brought to the table

and sliced off the skewers by waiters in gaucho folk costumes." The January 26, 2000 edition of The Arizona Republic describes a rodizio as "a type of Brazilian restaurant that features seemingly endless courses of entertainingly served, all-you-can-eat grilled beef. Over the past few years, the rodizio concept has taken off all over America." The December 8, 2000 edition of The New York Times contains the following sentence: "If you're not hungry, don't bother with Churrascari Platforma, a Brazilian rodizio, the all-you-can-eat restaurant." The December 3, 2000 edition of The Boston Globe contains the following sentence: "Midwest Grill is a rodizio, a Brazilian term for spit-roasted meat." Finally, an article appearing in the October 27, 2000 edition of the Los Angeles Times states that when one craves meat "nothing fills the bill like a Brazilian rodizio, where skewer after skewer of barbequed meat is brought to the table and carved on demand. And it's all-you-can-eat, one price. Rodizio is becoming popular in this country."

Applicant correctly notes that a few of the stories made of record by the Examining Attorney review applicant's Rodizio Grill, and that when they do, they depict Rodizio Grill with initial capital letters. However, this does not establish that the term "rodizio" is not highly descriptive

of (if not generic for) a type of restaurant or a manner of preparing or serving foods. If applicant's restaurant was named simply The Grill, we have no doubt that restaurant reviewers would depict applicant's restaurant as The Grill with initial capital letters. However, this does not establish that applicant has proprietary rights in the word "grill." As for applicant's argument that it was the first to use the term "rodizio" in the United States and that these numerous newspaper stories are simply describing other restaurants which are infringing applicant's service mark, two comments are in order. First, the fact that applicant may have been the first to use a descriptive (or generic) term does not give applicant exclusive rights in that term. Second, it should be noted that the stories made of record by the Examining Attorney which name other restaurants demonstrate that the names of these other restaurants are not the Rodizio Grill, but instead are names such as the Midwest Grill or the Ipanema Grill. In other words, third parties are not attempting to use the word "rodizio" in the manner of a service mark or a trade name.

Having found that the term "rodizio" is highly descriptive of applicant's services, we now turn to a consideration of whether applicant's showing of acquired

distinctiveness pursuant to Section 2(f) of the Trademark Act is sufficient. Before doing so, one point should be clarified. In the final Office Action, the Examining Attorney stated that applicant's mark is highly descriptive of applicant's services and that applicant's showing of acquired distinctiveness was insufficient. In the first page of his brief, the Examining Attorney states that applicant's mark "appears to be the generic name of the applicant's services and is, therefore, incapable of distinguishing applicant's services from others." Because the final refusal was not based upon a claim that applicant's mark was generic, but rather was based on the claim that applicant's mark was highly descriptive, we will treat the refusal as being one that applicant's mark is highly descriptive and that applicant's showing of acquired distinctiveness is inadequate.

In support of its claim that RODIZIO GRILL has become distinctive of applicant's restaurant services, applicant relies upon the fact that (1) it has used the mark for over five years, that (2) its revenue and advertising dollars for its various RODIZIO GRILLS have been extensive; and that (3) applicant's RODIZIO GRILLS have received favorable publicity in various publications where the writers have depicted RODIZIO GRILL with initial capital letters. To be

more precise, applicant has submitted evidence demonstrating that it spends more than \$400,000 annually on advertising its RODIZIO GRILLS, and that its various RODIZIO GRILLS generate well over 13 million dollars in annual revenue. Applicant also notes that the favorable publicity which it has received including being named Hot Concept '99 by Nation's Restaurant News and being named the Best Place to Eat in Denver by The Washington Post.

Our primary reviewing Court has made it clear that as a mark's descriptiveness increases, there is a corresponding increase in the amount of evidence applicant must submit in order to demonstrate that its mark has become distinctive pursuant to Section 2(f) of the Trademark Act. Yamaha International Corp. v. Hoshino Gakki, 840 F.2d 1572, 6 USPQ2d 1001, 1008 (Fed. Cir. 1988). Given the fact that the term "rodizio" is at least extremely highly descriptive of applicant's restaurant services, we find that applicant's showing of acquired distinctiveness, while not unimpressive, is simply insufficient to demonstrate that the term "rodizio" has become associated exclusively with restaurant services provided by applicant.

Decision: The refusal to register is affirmed.

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