

**THIS DISPOSITION  
IS NOT CITABLE AS  
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TTAB**

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July 28, 2005

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re Country Music Café, Inc.

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Serial No. 75909681

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Joel T. Beres and Jennifer L. Kovalcik of Stites & Harbison, PLLC for Country Music Café, Inc.

Mary Rossman, Trademark Examining Attorney, Law Office 108 (Andrew Lawrence, Managing Attorney).

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Before Quinn, Zervas and Walsh, Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

An application was filed by Country Music Café, Inc. to register the mark COUNTRY MUSIC CAFE for, inter alia, "nightclub and restaurant services" in International Class 42.<sup>1</sup>

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<sup>1</sup> Application Serial No. 75909681, filed February 4, 2000, alleging a bona fide intention to use the mark in commerce. The application originally also included goods in International Classes 14, 18, 21, 25 and 26.

The examining attorney's initial refusal to register under Section 2(e)(1) of the Trademark Act (discussed below) was not limited to the services in International Class 42. She later

The examining attorney refused registration under Section 2(e)(1) of the Trademark Act on the ground that applicant's mark, if applied to applicant's services, would be merely descriptive of them.

Applicant has appealed the final refusal. Both applicant and the examining attorney have filed briefs. Applicant did not request an oral hearing.

Applicant contends that its proposed mark "as a whole ... is not merely descriptive because it does not *immediately* convey knowledge of the ingredients, qualities or other characteristics" of its services. (Emphasis in the original.) Further, applicant maintains that the evidence relied on by the examining attorney confirms that the mark is suggestive and fails to establish that the mark cannot function to distinguish applicant's services. In support of its contention that its mark is suggestive, applicant cites to seventeen registrations "wherein the PTO merely required a disclaimer of the generic term 'café.'"<sup>2</sup>

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withdrew her Section 2(e)(1) refusal with respect to any goods in the application. Thus, on August 23, 2004, applicant filed a request to divide the application, which the Office granted, creating a child application and assigning it application Serial No. 75983517. A notice of allowance has issued in the child application.

<sup>2</sup> The examining attorney has objected to applicant's citation of sixteen of these seventeen registrations because "a list of registrations is not evidence, particularly when the list does not even indicate whether the registrations are on the Principal or Supplemental Register and when the identifications include

The examining attorney maintains that the mark "immediately describes features of nightclub and restaurant services, e.g., they are to [be] provided in a café setting featuring country music." In support of her refusal to register, the examining attorney submitted dictionary definitions of "country music" and "café"; excerpts of articles retrieved from the NEXIS database; articles found on the Internet; disclaimers of "analogous wording, such as COUNTRY ROCK CAFÉ, JAZZ AND BLUES CAFÉ, JAZZ CAFÉ, BLUES CAFÉ, BLUES CENTER, MUSIC PALACE, for nightclub, restaurant, bar and entertainment services in third-parties' registrations"; disclaimers of the term COUNTRY MUSIC in registrations for a wide variety of goods and services; and disclaimers of the term CAFÉ in registrations for nightclub and restaurant services. The examining attorney maintains that such evidence "all support the determination that COUNTRY MUSIC CAFÉ immediately describes

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applicant's gloss." (Applicant did not provide a copy of the sixteen registrations, and the examining attorney introduced the seventeenth registration into the record.) Because these registrations were noted by applicant in its request for reconsideration, and the examining attorney did not advise applicant that the listing is insufficient to make the registrations of record in her denial of the request for reconsideration, see TBMP § 1208.02 (2d ed. rev. 2004), the examining attorney is deemed to have waived the objection. As explained below, however, the disclaimers or lack of disclaimers in third-party registrations are not determinative of the issues before us in this appeal.

a café where COUNTRY MUSIC is featured, be it live COUNTRY MUSIC or pre-recorded COUNTRY MUSIC."

A term is deemed to be merely descriptive of goods or services, within the meaning of Trademark Act Section 2(e)(1), if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services. *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987); and *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215 (CCPA 1978). A term need not immediately convey an idea of each and every specific feature of the applicant's goods or services in order to be considered merely descriptive; it is enough that the term describes one significant attribute, function or property of the goods or services. *In re H.U.D.D.L.E.*, 216 USPQ 358 (TTAB 1982); and *In re MBAssociates*, 180 USPQ 338 (TTAB 1973). Whether a term is merely descriptive is determined not in the abstract, but in relation to the goods or services for which registration is sought, the context in which it is being used on or in connection with those goods or services, and the possible significance that the term would have to the average purchaser of the goods or services 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 (TTAB

1979). 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 (TTAB 2002); see also *In re Home Builders Association of Greenville*, 18 USPQ2d 1313 (TTAB 1990); and *In re American Greetings Corporation*, 226 USPQ 365 (TTAB 1985). As the Board has explained:

... the question of whether a mark is merely descriptive must be determined not in the abstract, that is, not by asking whether one can guess, from the mark itself, considered in a vacuum, what the goods or services are, but rather in relation to the goods or services for which registration is sought, that is, by asking whether, when the mark is seen on the goods or services, it immediately conveys information about their nature.

*In re Patent & Trademark Services Inc.*, 49 USPQ2d 1537 (TTAB 1998).

According to the examining attorney, *The American Heritage Dictionary of the English Language* (1992) defines "country music" as: "popular music based on the folk style of the southern rural United States or on the music of cowboys in the American West." Additionally, "café," which has been disclaimed by applicant, is defined as a "coffeehouse, restaurant, or bar." *Id.* Thus, a "country

music café" immediately describes a coffeehouse, restaurant or bar featuring popular music based on the folk style of the southern rural United States or on the music of cowboys in the American West. When the proposed mark is considered as a whole and used in connection with the identified services, it has a definite, readily identifiable meaning.

Country music "and its associated culture" evidently is a central theme adopted by applicant in rendering its "nightclub and restaurant services." At p. 5 of its brief, applicant acknowledges that the two page article discussing the "Country Music Café" that the examining attorney introduced into evidence, taken from the [www.millcapquest.com](http://www.millcapquest.com) website (dated March 11, 2004), refers to applicant. The article, under the heading "Completed Direct Public Offerings" and the caption "Country Music Café," states:

The Company was incorporated in April of 1996 to develop, own and operat[e] the Country Music Café, casual dining restaurants which will serve moderately priced American style f[ood] and beverages and feature Country Music and its associated culture as its basic theme. The County Music Café restaurant concept is based upon the popularity and appeal of Country Music and the culture and lifestyle it represents. It is designed to provide customers with an opportunity to dine in [an] environment that enables them to experience the look, sound, feel and excitement of the Country M[usic] segment of the entertainment industry. The Company intends to create this environment primarily through the

use of pre-recorded traditional and contemporary County Music, décor which will featu[re] country Music memorabilia, collectibles and art. It is also expected that the Company's restaurants w[ill] feature live musical performances.<sup>3</sup>

Applicant has not contested the accuracy of the description of applicant's nightclub/restaurant in the article.

Further, the record in this case shows descriptive uses of "country music café." Specifically, the examining attorney has noted the following uses of "country music café" taken from the Nexis database:<sup>4</sup>

If it's a sweet tooth you have, try some of the desserts featured at the Millstone Dine and Dessert Café located on the northwest corner of the International Fountain lawn. There you can indulge in a mondo medley of confections and sip gourmet coffee while watching demonstrations at the Blue Ribbon Cooking School. As if the cheap eats weren't enough, there are lots of free food samples to be had at the food-products exhibit, such as sauces, cereals and salsa. For those of you who still claim to come strictly for the entertainment, there are bands, health-care booths, a Flag Pavilion dance palace and a country-music café.

(The Seattle Times, July 20, 2001)

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<sup>3</sup> Several words were cut off or omitted on the copy of the article in the record. The lettering in brackets consists of those letters that were omitted from the copy of the article in the record.

<sup>4</sup> The examining attorney's search for "country music café" located seven hits. Two hits are identified above. The remaining hits show use of COUNTRY MUSIC CAFÉ as a trade name - and hence may be referring to applicant itself - or do not use COUNTRY MUSIC CAFÉ as a unitary term, e.g., "... Great Hill Mountain Band will offer country music. The café is open until 2 a.m. ...." (The Hartford Courant Company, September 2, 1999).

Vanderbilt is an oasis of Southern gentility right in the middle of Nashville, the country-music capital of the world. There's the Grand Old Opry, Dollywood and Barbara Mandrell Land. So while Brendan saw Vanderbilt's campus, I decided to take in the Country Music Hall of Fame. There right before my eyes were Elvis Presley's car, a suit worn by Johnny Cash and a roomful of guitars. Later, sitting in a country music café, listening to country music, Brendan confessed that he was more confused than ever. Where should he go to school? What should he major in? And where would he meet girls?

(The Baltimore Sun, November 9, 1995)

Additionally, the examining attorney has located several articles from the Nexis database showing descriptive use of "music café," including the following excerpts from those articles:

The center, which has been in the planning stages since 1997, would celebrate black contributions to the arts, sports, media, literature and civil rights, and feature a mix of local and national exhibitions and performances. A theater, retail store, music café and restaurant are also envisioned.

(Pittsburgh Post-Gazette, September 13, 2001)

A 300-seat theater is envisioned, as is a restaurant, store and music café. Culture will be brought to life through musical performances, storytelling and hands-on exhibits for children.

(Pittsburgh Post-Gazette, July 28, 2001)

ShowBizCity will also house the 900-seat Broadway Theatre. ShowBizCity will also feature a 230-seat Comedy Store, a music café, a Back to the '60s Café, theaters, restaurants and tours of the

Aalsmeer studios, where many of Holland's more popular TV programs are made.

(Variety, September 1-7, 1997)

One of the most complicated scenes has been saved for the last week – they're shooting the projected revelry of June 30 in Lan Kwai Fong, a small L-shaped street crammed by singles bars, music cafés and trendy restaurants with names like Oscar's and Tokyo Joe.

(Los Angeles Times, June 16, 1997)

Because "country music" is a type of music, the use of "music café" in a descriptive manner is relevant to the question of whether "country music café" is merely descriptive of applicant's nightclub and restaurant services.

From the foregoing, we find that "country music café" is a term which has a definite meaning and that applicant offers country music as a feature or characteristic of its services. We conclude that, when used in connection with applicant's services, the term COUNTRY MUSIC CAFE immediately describes, without conjecture or speculation, a significant characteristic or feature of applicant's services, namely, that country music is a theme of applicant's café.

Applicant has argued that its proposed mark "does not convey ... *immediate knowledge* of the Applicant's services to a potential consumer" because "nothing about the mark

immediately indicates exactly what services the Applicant provides." Applicant points out that:

Applicant's mark could refer to country music related food or favorite foods of country musicians. It could be a facility for live country music, classic country music recorded decades ago, modern country music recorded this year, or even bluegrass country music. Moreover, it could be that country music was not played at all and the only relation to country music is memorabilia on the walls. In fact, the service provided could be a combination of any or more of the above.

Applicant's arguments are not well taken. The mark immediately - and without imagination or thought - conveys the fact that the nightclub and restaurant services provided by applicant have a country music theme. As such, the mark forthwith conveys an immediate idea of a characteristic or feature of applicant's services. See *In re Gyulay*, 820 F.2d at 1217.<sup>5</sup>

Further, we note that both applicant and the examining attorney have made third-party registrations of record in support of their arguments. Our decision is not affected by any of the third-party registrations made of record by either applicant or the examining attorney. Many of these registrations involve services that are not in question in

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<sup>5</sup> We note that this is an instance where consumers do not need to know what services applicant is offering under the mark to determine a feature or characteristic of applicant's services - the descriptive significance is obvious from the mark itself when considered in its entirety.

this case. Also, applicant has not identified the services listed in each of the registrations it has mentioned in its brief.<sup>6</sup> Further, the registrations of record are not determinative of the issues before us in this appeal - each case must be decided on its own merits, and neither the Board nor the examining attorney is bound by the prior actions of the Office. See *In Re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564 (Fed. Cir. 2001). ("Even if some prior registrations had some characteristics similar to [applicant's application], the PTO's allowance of such prior registrations does not bind the Board or this court.")

In view of the foregoing, we conclude that, when used in connection with applicant's services, the term COUNTRY MUSIC CAFÉ immediately describes, without conjecture or speculation, a significant characteristic or feature of the services, namely, that applicant's nightclub/restaurant is a café that features country music.

Decision: The refusal to register is affirmed.

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<sup>6</sup> See e.g., Registration No. 2872532 for FITNESS CAFÉ which applicant states is "presumably registered for a health conscious restaurant."