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Mailed: September 30, 2005

Hearing: July 13, 2005

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Sazerac Company, Inc.

Serial No. 76328505

James V. Callahan and Jason S. Shull of Banner & Witcoff,
Ltd. for Sazerac Company, Inc.

Samuel E. Sharper, Jr., Trademark Examining Attorney, Law
Office 108 (Andrew Lawrence, Managing Attorney).

Before Quinn, Chapman and Zervas, Administrative Trademark
Judges.

Opinion by Zervas, Administrative Trademark Judge:

Sazerac Company, Inc. has appealed from the final
refusal of the examining attorney to register on the
Principal Register FRENCH KISS (standard character drawing)
as a trademark for the following goods, as amended:

Serial No. 76328505

alcoholic beverages, namely, bottled liqueurs, namely vanilla flavored schnapps."¹

The trademark examining attorney has refused registration under Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1), on the grounds that, when used on applicant's goods, the mark FRENCH KISS would be merely descriptive of such goods, or, alternatively, the mark would be deceptively misdescriptive of such goods.

Both applicant and the examining attorney have fully briefed the case. An oral hearing was held before the Board on July 13, 2005.

The examining attorney maintains that the mark is merely descriptive because the evidence of record demonstrates that "FRENCH KISS describe[s] a type of alcoholic beverages [sic] [and] Applicant's goods consist of a type of alcoholic beverage." He also maintains:

... a single producer often sells pre-mixed cocktails in the alcoholic beverage industry in bottles. For example, daiquiri, whiskey sour, bloody Mary or margarita are types of alcoholic beverages sold in bottles. ... The examiner contends that people familiar with the alcoholic beverage, "FRENCH KISS" will assume that applicant's beverage is merely a pre-mixed version of a FRENCH KISS, such as many other popular cocktails.

¹ Application Serial No. 76328505 was filed on October 22, 2001, based on applicant's assertion of its bona fide intention to use the mark in commerce.

With respect to his alternative refusal on the basis of deceptive misdescriptiveness, the examining attorney maintains that the evidence shows that FRENCH KISS is the name of an alcoholic beverage; that applicant's identification of goods includes "vanilla f[l]avored schnapps"; that "schnapps" is defined in *The American Heritage Dictionary of the English Language*, Third Edition (1992) as "[a]ny of various strong, dry liquors, such as a strong Dutch gin"; and that consumers "confronted with the term 'FRENCH KISS' for alcoholic beverages would assume that the applicant's goods are pre-mixed alcoholic cocktails, not schnapps"

Applicant has argued against both of the examining attorney's refusals. With respect to the refusal of the mark as being merely descriptive, applicant maintains:

Applicant's FRENCH KISS mark is not descriptive of any of the various alcoholic beverages that are found in the wide variety of individually prepared concoctions made from the myriad [of] recipes found on the web and cited during the prosecution of this application. The recipes vary greatly and have a multitude of ingredients (about thirty different ingredients) mixed in numerous combinations. No member of the purchasing public could reasonably expect to receive the same cocktail when ordering a "french kiss" at any given drinking establishment because the recipes, when known at all, vary from establishment to establishment.

Applicant concludes that an "individual who encounters Applicant's FRENCH KISS mark would be unable to immediately determine that applicant's goods are bottled vanilla liqueur [and] would require imagination and luck ... to draw the conclusion that the goods are bottled vanilla liqueur." Thus, according to applicant, "[w]hile the FRENCH KISS mark may suggest or hint at the nature of Applicant's goods, it does not in any clear or precise way, serve to describe Applicant's goods and, when used in the context of bottled vanilla liqueur, the FRENCH KISS mark does not describe any ingredient, quality, function, feature, or use of the goods."²

With respect to the examining attorney's deceptively misdescriptive refusal, applicant maintains that even if "the FRENCH KISS mark is found to be descriptive of a mixed drink (which it is not), T.M.E.P. §1209.04 makes clear that "[t]he examining attorney must consider the mark in

² As evidence in support of its arguments, applicant submitted a copy of the following dictionary definition of "french kiss," identified as having been taken from *Webster's Ninth New Collegiate Dictionary*: "an open-mouth kiss usu. involving tongue-to-tongue contact." Applicant points out that "[t]his definition has no relationship whatsoever to an alcoholic beverage, namely, a liqueur."

In view of the evidence submitted by the examining attorney and the involved goods, applicant's dictionary definition is not particularly relevant. Also, we are not persuaded that "french kiss" is not a cocktail simply because it does not appear in the dictionary definition of "french kiss."

Serial No. 76328505

relation to the applicant's goods or services to determine whether a mark is deceptively misdescriptive'"; and that "the Examining Attorney has only shown examples of the term 'french kiss' in reference to cocktails and has not shown any evidence of the term 'french kiss' used in reference to a liqueur, specifically a bottled vanilla flavored schnapps." Also, applicant argues that it "clearly mark[et]s its bottled FRENCH KISS product with a label stating that it is a 'Vanilla Liqueur'"; and "[t]here is nothing deceptive to a purchaser of Applicant's bottled FRENCH KISS product with a clearly stated label."

Merely Descriptive Refusal

A term is deemed to be merely descriptive of goods or services, within the meaning of 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).

The evidence of record introduced by the examining attorney includes several excerpts from the Nexis database which clearly identify "French Kiss" as a cocktail and which list the ingredients thereof. Some examples are as follows:

1. "... includes a French Kiss, vodka with Chambord and pineapple juice" (*The New York Times Company*, February 11, 2001).
2. "... the French Kiss (dark cream cocoa, vanilla ice cream and a swirl of chocolate sauce)" (*Chicago Sun-Times*, December 13, 2000).
3. "For example: ... French Kiss (Tanqueray gin, white Lillet and orange twist)" (*Chicago Sun-Times*, May 31, 1996).
4. "Selections will include a French Kiss (champagne and Chambord)...." (*Los Angeles Times*, December 20, 1993).
5. "You'll find Champagne drinks in jewel tones at Narcisse in River North, and 'French Kiss' -- Champagne, with pineapple juice, vodka and Chambord" (*Chicago Tribune*, December 27, 2000).
6. "... and the French Kiss - cognac, a sugar cube and champagne." (*Investor's Business Daily*, February 25, 2000).
7. "... the French [K]liss (cognac with champagne and a sugar cube)." (*The San Francisco Chronicle*, March 26, 1998).

Serial No. 76328505

The examining attorney also introduced into the record several recipes for "French Kiss" cocktails taken from the Internet, examples of which follow:

1. chambord, peach schnapps, vodka, orange juice, pineapple juice and cranberry juice (www.cocktail.com).
2. raspberry liqueur, crème de cassis, champagne and ice cream (www.bhg.com).
3. vodka, chambord, creme de cacao and cream or half and half (www.drinkoftheweek.com).
4. vodka, raspberry schnapps, creme de cacao and cream (www.partyschool.com).
5. vodka and chambord (www.geocities.com).
6. vodka, raspberry schnapps and white creme de cacao (www.okliquor.com).
7. strawberry liquor and vodka with a strawberry (www.thecreperie.com).

Several of the recipes on the Internet include raspberry schnapps or peach schnapps, but none includes vanilla flavored schnapps. Also, none of the lists of ingredients in the Nexis evidence includes schnapps.

From the foregoing, we find that the examining attorney has established that there is an alcoholic beverage known by the name of "French Kiss," and that the "French Kiss" beverage is composed of a mixture of alcoholic beverages, and sometimes includes a non-alcoholic beverage.

The examining attorney, however, has not made a prima facie case that the mark FRENCH KISS is merely descriptive of applicant's goods, i.e., "alcoholic beverages, namely, bottled liqueurs, namely vanilla flavored schnapps." The record only contains a handful of recipes calling for schnapps, and there are far more "French Kiss" recipes in the record that do not call for schnapps than list schnapps as an ingredient. Further, although several of the recipes for a "French Kiss" cocktail include raspberry or peach schnapps, none of the recipes of record call for just any flavor of schnapps or specifically for vanilla flavored schnapps.

Moreover, the examining attorney's argument that the mark is merely descriptive because "FRENCH KISS describe[s] a type of alcoholic beverages [sic] [and] Applicant's goods consist of a type of alcoholic beverage" is unpersuasive. From the record before us, vanilla flavored schnapps is not called for as any ingredient in a "French Kiss" cocktail.

Similarly, the examining attorney's argument that applicant's mark, as applied to its goods, describes a "pre-mixed FRENCH KISS," such as "other popular cocktails," e.g., daiquiris, whisky sours, bloody marys or margaritas, is unpersuasive. There simply is no evidence in the record that applicant's identified goods, i.e., bottled vanilla

flavored schnapps, would be considered a necessary ingredient of a "French Kiss" cocktail.

In view of the foregoing, we find on this ex parte record that applicant's mark "FRENCH KISS" is not merely descriptive of a function, feature, characteristic, quality, ingredient, purpose or use of applicant's identified goods. The examining attorney's refusal to register under Section 2(e)(1) on the basis of mere descriptiveness is reversed.

Deceptively Misdescriptive Refusal

The test to be applied in determining whether or not a mark is deceptively misdescriptive under Section 2(e)(1) is set forth as follows: (1) whether the term misdescribes a characteristic, quality, function, composition or use of the goods, and (2) if so, whether prospective purchasers are likely to believe the misdescription actually describes the goods. See *In re Berman Bros. Harlem Furniture Inc.*, 26 USPQ2d 1514 (TTAB 1993); and *In re Quady Winery, Inc.*, 221 USPQ 1213 (TTAB 1984). In the context of the mark in issue here, we must determine whether FRENCH KISS misdescribes a use of the goods, i.e., "bottled liqueurs, namely vanilla flavored schnapps," and if so, whether prospective purchasers are likely to believe the misdescription actually misdescribes the goods.

Applicant contends that the examining attorney has not established what the specific ingredients of a "French Kiss" beverage are, and that the recipes of record "have a multitude of ingredients (about thirty different ingredients) mixed in numerous combinations." The examining attorney essentially maintains that "French Kiss" drinks are "mixed alcoholic cocktails" and applicant's goods are simply one liqueur, specifically schnapps, which, according to the dictionary definition of record, is defined as "[a]ny of various strong, dry liquors, such as a strong Dutch gin."

The record indeed reflects that a "French Kiss" cocktail is made from a combination of ingredients. The photocopy of the three pages from *BIN, Beverage Industry News Magazine*, April 2004 edition, introduced into the record by the examining attorney, shows that pre-mixed alcoholic cocktails are sold to the consuming public. See p. 83 of April 2004 edition of *BIN* ("By introducing new flavors, promotions and packaging, mix marketers are seeking fresh ways to solve old problems. The resurgence of the cocktail culture has sparked new interest in the pre-mixed category, as retailers who stock them will testify.") We find that the mark misdescribes applicant's goods for two reasons. First, a "French Kiss" is a

Serial No. 76328505

cocktail made up of multiple ingredients, and the record does not reflect that "vanilla flavored schnapps" is one of the ingredients of a "French Kiss" beverage. Second, a "French Kiss" beverage is a mix of ingredients, and applicant's "vanilla flavored schnapps" is not a mix of ingredients.

Based on the evidence of record, we find that prospective purchasers are likely to believe the misdescription. As the pages from *BIN* establish, mixes of alcoholic beverages are available for sale on the retail level. Purchasers who know of a "French Kiss" cocktail will believe that applicant's goods are the "French Kiss" cocktail containing a mix of ingredients, when applicant's goods are not a complete "French Kiss" cocktail, but are instead vanilla flavored schnapps.

As noted above, applicant has argued that applicant "mark[et]s its bottled FRENCH KISS product with a label stating it is a 'Vanilla Liqueur'"; and "[t]here is nothing deceptive to a purchaser of Applicant's bottled FRENCH KISS product with a clearly stated label." However, it is well established that the mere fact that the nature of the goods is revealed by matter on labels on the goods themselves does not preclude a determination that a mark is deceptively misdescriptive. See *Tanners' Council of*

Serial No. 76328505

America, Inc. v. Samsonite Corporation, 204 USPQ 150 (TTAB 1979) ("We are not persuaded, therefore, that the labels identifying the material as 'urethane vinyl' dispel the impression that respondent's goods are made of leather."), citing *R. Neumann & Co. v. Overseas Shipments, Inc.*, 326 F.2d 786, 140 USPQ 276 (CCPA 1964). Thus, applicant's argument is not well taken.

We find that the phrase FRENCH KISS is deceptively misdescriptive of applicant's goods.

Decision: The refusal to register the mark as merely descriptive under Section 2(e)(1) of the Trademark Act is reversed, and the refusal to register the mark as deceptively misdescriptive under Section 2(e)(1) of the Trademark Act is affirmed.