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THIS DISPOSITION
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Paper No. 16
RLS/RR

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Craftwood Inn, Inc.

Sams
Serial No. 74/604,882

Donald E. Martin for Craftwood Inn, Inc.

David H. Stine, Trademark Examining Attorney, Law Office 103
(Michael Szoke, Managing Attorney)

Before Sams, Simms and Seeherman, Administrative Trademark Judges.

Opinion by Simms, Administrative Trademark Judge.

Craftwood Inn, Inc. (applicant), a Colorado corporation, has appealed from the final refusal of the Trademark Examining Attorney to register the words COLORADO CUISINE for "restaurant services, i.e., providing prepared meals to the public."

The Examining Attorney initially refused registration on two grounds. that the term COLORADO CUISINE was

[1] Application Serial Number 74/604,882, filed November 30, 1994, based upon use in commerce since January 1, 1989 Pursuant to a request of the Examining Attorney, applicant submitted a disclaimer of the word "CUISINE," apart from the mark as a whole

primarily geographically descriptive [Section 2(e)(2)] and that the term COLORADO CUISINE did not function as a service mark to identify and distinguish applicant's restaurant services (i e., that applicant had not used COLORADO CUISINE in the manner of a service mark) [Sections 1, 2, 3 and 45]. In his first office action, the Examining Attorney invited applicant to submit a claim of distinctiveness under Section 2(f), accompanied by an affidavit or declaration attesting to applicant's substantially exclusive use of the mark in commerce for at least five years, in order to overcome the refusal under Section 2(e)(2). In response to this office action, applicant submitted a Section 2(f) claim, along with an appropriate supporting declaration. The Examining Attorney thereafter entered a final refusal of registration under Sections 1, 2, 3 and 45, reiterating his finding that the term COLORADO CUISINE did not function as a service mark but, instead, functioned only to "specify the type of food being offered. . " [Office Action 12/04/95].

In entering his final refusal of registration, the Examining Attorney made no reference to either the Section 2(e)(2) refusal or applicant's Section 2(f) claim, the logical inference being that the Examining Attorney accepted applicant's claim that its mark has become distinctive of its services in commerce. Now, there would seem to be a fundamental contradiction between the Examining Attorney's

acceptance of applicant's Section 2(f) claim (an apparent concession by the Examining Attorney that COLORADO CUISINE is a distinctive trademark by which purchasers identify and distinguish applicant's restaurant services) and the Examining Attorney's position on this appeal that COLORADO CUISINE does not function as a mark because, as used, it would be perceived by purchasers not as applicant's service mark but merely as a phrase denoting the type of food served in applicant's restaurant.

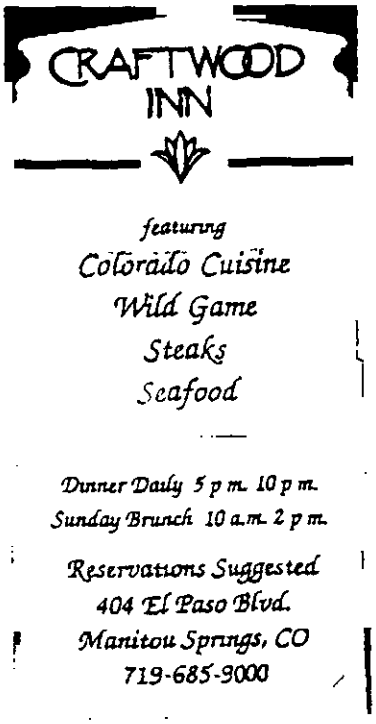
The only way to resolve this apparent contradiction is to treat the Examining Attorney's acceptance of the Section 2(f) claim as contingent -- to find that the Examining Attorney would accept the Section 2(f) claim of distinctiveness to overcome the Section 2(e)(2) refusal only if the Board were to find that the mark was being used in the manner of a mark Indeed, both the Examining Attorney and applicant, in discussing the issue on appeal, appear to have assumed that applicant's Section 2(f) claim was contingent. Therefore, for purposes of our analysis of the correctness of the refusal under Sections 1, 2, 3, and 45, we will not treat as a conceded point that COLORADO CUISINE is a distinctive trademark within the meaning of Section 2(f).[2]

[2] Also, while acquired distinctiveness evidence is generally relevant to a refusal that an asserted mark does not function as a mark (see, for example, In re Owens-Corning Fiberglas Corp , 774 F 2d 1116, 227 USPQ 417, 422 (Fed Cir 1985)), and while

Applicant and the Examining Attorney have submitted briefs but no oral hearing was requested.

We affirm

Briefly, the Examining Attorney argues that the purchasing public will not recognize the words sought to be registered as an indication of origin, given the nature of the asserted mark and the subordinate manner of use by applicant on signs, menus and in advertisements. See below.



the Examining Attorney issued a final refusal in the very next office action after the submission of applicant's Section 2(f) evidence, under the peculiar circumstances of this case we do not find that the Examining Attorney's final refusal was premature for its failure to allow applicant an opportunity to supplement its Section 2(f) evidence. See TMEP Sections 1105.04 [illegible] and 1105.04 e.

It is the Examining Attorney's position that these words are used merely as an informational designation indicating the type of food served in applicant's restaurant. The Examining Attorney argues that the words "COLORADO CUISINE" are similar in nature to such other informational terms as "Vietnamese cuisine" or "Homestyle Food," also shown in the Yellow Pages advertisement of record.[1]

> The specimens of record clearly use the proposed mark in an informational manner. The original specimens display the designation "Colorado Cuisine" only as parts [sic] of the phrases "Serving Colorado Cuisine" (supplemented by a specific listing of items presumably included in such cuisine) and "Colorado Cuisine in a Setting of Casual Country Elegance." It is respectfully submitted that these usages would be perceived solely as informational indications of the type of food served by the applicant, particularly since the informational phrases are subordinate to the prominently displayed name of applicant's restaurant, the "Craftwood Inn" Moreover, all of these designations appear in the same general location and style of other menu or food type listings appearing in other restaurant ads on that same page, such as "Featuring the Finest Vietnamese Cuisine," "Exotic Thai Food," "Fresh Home-Style Cuisine"
>
> [T]he designation "Colorado Cuisine" is presented within the specimens in subordinate, non-distinctive fashion, and almost invariably as an integral portion of a merely informational phrase or listing

[1] Given the Examining Attorney's position with respect to the nature and use of these words (i e , their inherently informational function), it is somewhat surprising that the Examining Attorney was willing to accept, even contingently, the statement of five years' substantially exclusive and continuous use as a sufficient showing of acquired distinctiveness to overcome the Section 2(e)(2) refusal

Applicant, on the other hand, argues that it is seeking to create something heretofore unknown and that it has created a service (and a service mark) unique to its own restaurant. Brief, 3.

Upon careful consideration of this record, we agree with the Examining Attorney that the words COLORADO CUISINE used by applicant do not function as a service mark to identify and distinguish applicant's restaurant services. Of course, not all words, designs or slogans used in the sale or advertising of goods or services function as trademarks or service marks. A term does not function as a trademark or service mark unless it is used in a manner which clearly projects to purchasers its use as an indication of origin. In re Morganroth, 208 USPQ 284 (TTAB 1980) As used by applicant, these words function merely to give information about the type of cuisine served in applicant's restaurants and do not serve to distinguish its restaurant services from those of others. In this regard, we agree with the Examining Attorney that the fact that the term sought to be registered may, as argued by applicant, lack precise meaning, is not likely to change the public's perception of this informational term as a designation of the type of cuisine served in applicant's restaurant. These words are likely to be perceived merely as an indication

that the food served in applicant's restaurant is prepared using local or regional recipes or methods of preparation.

Decision: The refusal of registration is affirmed.

J. D. Sams

R. L. Simms

E. J. Seeherman
Administrative Trademark
Judges, Trademark Trial
and Appeal Board

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