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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re The New Zealand MicroCreamery, Inc.

Serial No. 76/397,967

Stanley B. Kita of Howson and Howson for The New Zealand
MicroCreamery, Inc.

Steven Foster, Trademark Examining Attorney, Law Office 106
(Mary Sparrow, Managing Attorney).

Before Seeherman, Walters and Drost, Administrative
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

The New Zealand MicroCreamery, Inc., a Delaware
corporation, has appealed from the final refusal of the
Trademark Examining Attorney to register KIWI'S for
"restaurant services featuring non-alcoholic beverages and
dessert products." The application, which was filed on
April 19, 2002, is based on an asserted bona fide intention
to use the mark in commerce.

Registration has been refused pursuant to Section 2(e)(1) of the Trademark Act, 15 U.S.C. 1052(e)(1), on the ground that applicant's mark is merely descriptive of its services. Specifically, the Examining Attorney asserts that KIWI'S is a mere misspelling of "kiwis," and this term describes items available as part of applicant's restaurant services.

Both applicant and the Examining Attorney have filed briefs. An oral hearing was not requested.

A mark is merely descriptive if it immediately conveys information concerning a quality, characteristic, function, ingredient, attribute or feature of a product or service. It is sufficient if it describes a single, significant quality, feature, function, etc. In re Venture Lending Associates, 226 USPQ 285 (TTAB 1985).

Applicant has explained that kiwi fruit will not be a significant ingredient in menu selections in its restaurants. Although acknowledging that kiwi fruit may be used as an ingredient, a topping or a flavoring, in the same manner as any other fruit, "such availability will be incidental." Response filed October 14, 2002.

Based on applicant's explanation of its services, we cannot say that the Office has established that kiwi fruit describes a significant feature of applicant's services.

In this respect, the situation resembles that in *In re The Registry Hotel Corporation*, 216 USPQ 1104 (TTAB 1983), in which LA CHAMPAGNE was found to be not merely descriptive of restaurant services because it did not serve to inform customers that champagne was served in that applicant's restaurants. And this situation differs from that in *In re Pencils*, 9 USPQ2d 1410 (TTAB 1988) because kiwi fruit is not a specific item that will be sold by applicant in its restaurants, compared to the pencils that were a product line of a stationery and office supply store.

More importantly, we do not believe that the mark KIWI'S will be viewed by consumers as the equivalent of "kiwi fruit." KIWI'S, of course, is the possessive form of the word "kiwi." The reference to a fruit in a possessive form is certainly an odd usage. However, the term "Kiwi" also refers to "flightless, ratite birds of the genus *Apteryx*, of New Zealand," and to "a New Zealander."¹ The latter meaning also appears in one of the NEXIS excerpts submitted by the Examining Attorney, which mentions "celebrating her first birthday with the famous Kiwi dessert, Pavlova." "Contra Costa Sun," January 23, 2002.

¹ These definitions, from the Random House Unabridged Dictionary, 2d ed. © 1987, were made of record by the Examining Attorney.

Because either of the latter meanings make more sense for the possessive form of KIWI'S, consumers are likely to ascribe such meanings to applicant's mark, rather than the meaning of kiwi fruit. Further, although not part of applicant's trademark, we note that applicant's corporate name is The New Zealand MicroCreamery, Inc., and that its corporate logo features a picture of a kiwi bird. This gives further support to our view of the meaning of applicant's mark with respect to the identified services.

We agree with the Examining Attorney that one cannot register a merely descriptive term simply by misspelling it. However, in this case, consumers will not regard KIWI'S as a mere misspelling of KIWIS; rather, the possessive form of the term changes its meaning, so that it will not be perceived as a reference to the fruit.

Finally, to the extent that there is any doubt on the issue of whether applicant's mark is merely descriptive of its identified services, it is well established that such doubt must be resolved in favor of applicant. See *In re The Gracious Lady Service, Inc.*, 175 USPQ 380 (TTAB 1972).

Decision: The refusal of registration is reversed.

Ser No. 76/397,967