Oral Hearing:
August 5, 1999

Paper No. 14
GDH/gdh

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MARCH 3, 00

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Brach Van Houten Holding Inc.

Serial No. 75/175,858
Serial No. 75/292,529

Collette Durst-Barkey and John M. Murphy of Pattishall, McAuliffe, Newbury, Hilliard & Geraldson for Brach Van Houten Holding Inc.

Mitchell Front, Trademark Examining Attorney, Law Office 101 (Jerry Price, Managing Attorney).

Before Cissel, Hohein and Rogers, Administrative Trademark Judges.

Opinion by Hohein, Administrative Trademark Judge:

Brach Van Houten Holding Inc. has filed applications to register "HONEY CORN"[1] and "FRUITY CORN"[2] as trademarks for "candy".

In each case, registration has been finally refused under Section 2(e)(1) of the Trademark Act, 15 U.S.C.

[1] Ser. No. 75/175,858, filed on October 2, 1996, which is based upon an allegation of a bona fide intention to use such term in commerce.

[2] Ser. No. 75/292,529, filed on May 15, 1997, which is based upon an allegation of a bona fide intention to use such term in commerce.

§1052(e)(1), on the basis that, when used in connection with applicant's goods, the terms "HONEY CORN" and "FRUITY CORN" are merely descriptive of them.

Applicant, in each instance, has appealed. Briefs have been filed and an oral hearing was held. Because the issue in each case is substantially the same, the appeals have been treated in a single opinion. We affirm the refusals to register.

It is well settled that a term is considered to be merely descriptive of goods or services, within the meaning of Section 2(e)(1) of the Trademark Act, if it immediately describes an ingredient, quality, characteristic or feature thereof or if it directly conveys information regarding the nature, function, purpose or use of the goods or services. See In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). It is not necessary that a term describe all of the properties or functions of the goods or services in order for it to be considered to be merely descriptive thereof; rather, it is sufficient if the term describes a significant attribute or idea about them. Moreover, 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. See In re Bright-Crest, Ltd., 204 USPQ 591, 593 (TTAB 1979). Consequently, "[w]hether consumers could guess what

the product [or service] is from consideration of the mark alone is not the test." In re American Greetings Corp., 226 USPQ 365, 366 (TTAB 1985).

Applicant, while conceding in its initial brief that it "does not dispute that 'fruity' and 'honey' are descriptive of candy, and would agree to disclaim these terms," argues that the word "'corn,' and hence the marks FRUITY CORN and HONEY CORN taken in their entireties, are at least suggestive as applied to candy." Citing, in particular, the definitions (accompanying its initial brief) of the noun "corn" from Webster's Third New International Dictionary (2d ed. 1981), applicant requests that the Board take judicial notice of the fact that "[n]one of the ... definitions refer[s] to candy." Similarly, applicant points out that "none of the NEXIS excerpts cited by the Examining Attorney use[s] the term 'corn' in such a manner" since, instead, they "use the unitary term 'candy corn.'" Thus, according to applicant, because "[t]here is no evidence that consumers understand 'corn,' by itself, to mean a type of candy," the terms "HONEY CORN" and "FRUITY CORN" are not merely descriptive of applicant's goods.

The Examining Attorney, however, has made of record excerpts from the Nexis computerized database which reveal that there is a type of candy known generically as "candy corn" and that such candy has been produced in several varieties (including those offered by applicant). Among the more pertinent excerpts are the following (**emphasis added**):

"Brach's Hi-C Fruity Corn is 'New!' from Brach & Brock Confections. Promoted in ads captioned, 'Brach's Halloween favorites,' the colorful **candy corn**-shaped pieces are claimed to be made with real fruit juice .... [E]ach 14 oz. bag contains an assortment of flavors like wild cherry, Boppin' Berry(tm), Jammin'; Apple(tm), grape, orange and lemonade." -- Product Alert, November 24, 1997;

"SUE BEE HONEY CORN CANDY .... Brach has extended its cobranding with this newest product -- **candy corn**. It carries the Sue Bee honey label and is sold in 14-oz. bags in supermarkets nationally." -- New Product News, November 1997;

"Similarly, whenever I have a birthday, I remember as a child how much I used to enjoy the **candy corn** I was always provided on that occasion." -- Lewiston Morning Tribune, April 14, 1997;

"To this day, I remember a certain early fall afternoon, a paper bag of **candy corn** and the sun ...." -- Washington Post, March 4, 1997;

"Perfectly excellent confections like **candy corn** (my favorite vegetable) and jellybeans (my favorite legume) are wrapped in a substance that's noisier than a dentist's drill." -- Town & Country Monthly, March 1997;

Supermarkets carry everything kosher - from salsas to duck sauce to **candy corn** and marshmallows." -- Sun Sentinel, February 27, 1997;

"[An]other was called 'Carrot Candy.' These are triangular-shape candy, green on the top, orange on the bottom, that look very similar to the **candy corn** that is sold during Halloween." -- Montachusett T&G, February 26, 1997;

"Around Halloween, it's time for **candy corn** (but, again, harvest early)." -- Indianapolis Star, February 134, 1997; and

> "REINDEER CORN **CANDY CORN** .... This candy is for the Christmas holiday instead of Halloween. Reindeer Corn looks like the Halloween **candy corn** but is red, green, and white in color." -- New Product News, February 10, 1997.

In addition, we judicially notice that The Random House Dictionary of the English Language (2d ed. 1987) at 305 defines "candy corn" as "a small candy shaped and colored to look like a kernel of corn."[3] Plainly, when consumers view the terms "HONEY CORN" and "FRUITY CORN" in connection with packages of candy or candy corn, they will immediately understand, without speculation or conjecture, that those terms merely describe significant characteristics of applicant's goods, namely, that the products respectively include or constitute honey-flavored candy corn and

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[3] It is well settled that the Board may properly take judicial notice of dictionary definitions. See, e.g., Hancock v. American Steel & Wire Co. of New Jersey, 203 F.2d 737, 97 USPQ 330, 332 (CCPA 1953) and University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc., 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983). Accordingly, while we have done so in the case of both the above definition and the earlier noted definition of "corn" submitted by applicant, applicant in its reply brief and at the oral hearing has objected to the Examining Attorney's request that we take judicial notice of the definition, which he states "was found on the world wide web at www.dictionary.com," of "candy corn" as "a small yellow and white candy shaped to resemble a kernel of corn." In particular, applicant asserts that in order for judicial notice of a fact to be proper, Fed. R. Evid. 201(b) requires that the source thereof must be one "whose accuracy cannot reasonably be questioned" and that "www.dictionary.com is not such a source" because:

> It is not one of the published works, such as *Webster's Third New International Dictionary*, which the Board and other tribunals regularly consult and cite in their decisions. The examining attorney has not shown that the definitions contained in www.dictionary.com are subjected to the same level of editorial scrutiny which characterizes printed dictionaries and similar reference works. ....

However, in light of the definition from The Random House Dictionary of the English Language cited above, applicant's objection is considered moot.

fruit-flavored candy corn. See, e.g., Remington Products Inc. v. North American Philips Corp., 892 F.2d 1576, 3 USPQ2d 1444, 1448 (Fed. Cir. 1990) [omission of word "PERSONAL" from phrase "TRAVEL CARE" does not obviate descriptiveness of such phrase for personal travel care products]; and In re Entenmann's Inc., 15 USPQ2d 1750 (TTAB 1990) [term "OATNUT" held merely descriptive of bread containing oats and hazelnuts, since type of nut need not be specified with absolute exactness]. Especially to children, who undoubtedly constitute a substantial portion of the consumers of applicant's goods, there is nothing in either the term "HONEY CORN" or "FRUITY CORN" which, when seen on a bag or package of candy or candy corn, is peculiar, indefinite or susceptible to multiple connotations, nor would any imagination, thinking or gathering of further information be necessary in order to perceive precisely the merely descriptive significance of each such term as it relates to applicant's goods.

Accordingly, because we find that, as applied to applicant's candy, the terms "HONEY CORN" and "FRUITY CORN" forthwith convey that the product is or includes, respectively, a honey-flavored candy corn and a fruit-flavored candy corn, such terms are merely descriptive within the meaning of the statute.

Decision: The refusal under Section 2(e)(1) is affirmed in each case.

R. F. Cissel

G. D. Hohein

G. F. Rogers
Administrative Trademark Judges,
Trademark Trial and Appeal Board