

Cookinpellets.com and Pretzel Crisps Make Bids for Acquired Distinctiveness, Judges Find Facts Undercooked

Snyders Lance, Inc. v. Frito-Lay, Inc., 2021 WL 2322931 (W.D.N.C. June 7, 2021)
In re GJ & AM, Serial No. 86858003 (TTAB June 8, 2021)

By Lisa Holubar & Daniel Zhang | June 14, 2021

No luck this week for food-related marks. The United States District Court for the Western District of North Carolina (“District Court”) and the Trademark Trial and Appeal Board (“TTAB”) each refused registration of marks “COOKINPELLETS.COM” and “PRETZEL CRISPS,” respectively. Each proceeding considered the “primary significance” of the mark to the “relevant public” in making determinations of whether a mark is generic. Although the TTAB found “COOKINPELLETS.COM” was not generic for “processed wood fuel in the nature of pellets for use in barbecue grills,” it found the claimed mark highly descriptive without sufficient acquired distinctiveness. The District Court held “PRETZEL CRISPS” generic for “pretzel crackers,” and therefore it did not even address acquired distinctiveness.

Both opinions relied heavily on Supreme Court opinion *Booking.com B.V.*, 140 S. Ct 2298 (2020), in which addition of “.com” to an otherwise generic term *could* transform it into a protectable mark. Here, each proponent argued, in part, that addition of “.COM” to “COOKINPELLETS,” and “CRISPS” to “PRETZELS” was sufficient to render the claimed marks not generic. The TTAB found that “.COM when added to COOKINPELLETS as signifying that Applicant is a commercial entity with an online presence and does not have source identifying significance in relation to the goods.” Accordingly, “COOKINPELLETS.COM” indicates a source for a website, rather than a source for “processed wood fuel in the nature of pellets for use in barbecue grills.” However, the District Court found that both “PRETZEL” and “CRISPS” as a source for “pretzel” were individually generic terms and their combination “yields no additional meaning to consumers capable of distinguishing the goods.”

Both proceedings addressed similar evidence. Applicant for “COOKINPELLETS.COM” presented evidence including (1) length of continuous use, (2) \$3,000,000 in revenue, (3) \$25,000 expended in advertising, (4) social media presence, and (5) its “best-selling” market hold. The TTAB found these facts insufficient in part because the advertising expenditures and sales were both too “modest,” and expressed annoyance with the “partially legible evidence” provided. Proponent of “PRETZEL CRISPS” presented evidence for non-genericness including (1) consumer surveys, (2) social media presence, (3) media references and press releases, and (4) industry usage. The District Court found these facts insufficient to overcome a generic label: “no matter how much commercial success the product enjoys, Plaintiffs are not entitled to monopolize the common name of the product being sold.” The District Court ordered “PRETZEL CRISPS” cancelled from the Supplemental Register.

Overcoming genericness and showing acquired distinctiveness can be significant barriers to overcome, and the *Booking.com* case did not hold otherwise. Companies hoping to make this leap should keep “clear and legible” records about its commercial presence and successes, as well as contextual information about its competitive marketplace.