

JOHNSONVILLE SAUSAGE LLC.,
Opposer,
- versus -

IPC 14-2007-00024

Opposition to:
TM Application No. 4-2003-009327
(Filing Date: 09 October 2003)

HORMEL FOOD CORPORATION
Respondent-Applicant.

TM: "BRAT"

x-----x

Decision No. 2007-44

DECISION

Before this Bureau is an Opposition filed by Johnsonville Sausage LLC, a corporation organized and existing under and by virtue of the laws of Delaware, U.S.A. with principal offices at 950 Woodlake Road Kohler, Wisconsin 53044 U.S.A., against the application for registration of the trademark "BRAT" for fresh or cured pork, beef, processed meats, poultry, sausage, soups and entrees consisting primarily of vegetables and/or meat, chilli with beans, beef stew, corn dogs, meat and poultry stocks under Class 29, with Application Serial No. 4-2003-009327 and filed on 09 October 2003 in the name of Respondent-Applicant, Hormel Foods Corporation with business address at 1 Hormel Place, Austin, Minnesota 55919, U.S.A.

The grounds for the opposition to the application for registration of the trademark BRAT are as follows:

"1. The trademark "BRAT" consists exclusively of signs or of indication that have become customary or usual to designate the kind, quality, quantity, intended purpose, value, geographical origin, time or production of the goods or rendering services, or other characteristics of goods or services and it is thus prohibited under Sec. 123 (j) of Republic Code, which state:

"Section 123. Registrability. – 123.1. A mark cannot be registered if it:

xxx

(f) Consists exclusively of signs or of indications that may serve in trade to designate the kind, quality, quantity, intended purpose, value, geographical origin, time or production of the goods or rendering of the services or other characteristics of the goods or services;

xxx

"2. The registration of the trademark "BRAT" is also prohibited under Article 6quinquies of the Paris Convention for the Protection of Industrial Property, which provides:

B- Trademarks under present Article may not be denied registration or invalidated except in the following cases:

x x x

2. When they are devoid of any distinctive character, or consist exclusively of signs or indications which may serve in trade to designate the kind, quantity, intended purpose, value, place of origin of the goods or time production, or have become customary in the current language or in the bona fide and established practices of the trade of the country where protection is claimed.

“3. The registration of respondent-applicant’s trademark “BRAT” will cause grave and irreparable injury and damage to the business of the opposer within the meaning of Section 134 of Republic Act No. 8293.

Opposer relied on the following uncontroverted facts to support its contentions in this Opposition:

“1. The word “BRAT” has been constantly and commonly used in the trade in connection with bratwurst or other similar sausage products. The respondent-applicant is devoid of any right under law or equity to the appropriation of the word “BRAT” as his exclusive trademark. Since the word has been customarily and commonly used in the trade in connection with the above products, the word “BRAT” is generic and descriptive of sausages and of sausage-derived or related products.

“2. Respondent-applicant cannot appropriate the word “BRAT” as their exclusive trademark because the said word is synonymous to the noun “BRATWURST”. The same is mentioned in the webpage <http://www.bartleby.com>. Attached as Annex “A” is a printout of the aforesaid webpage. “Bratwurst” is a sausage composed of pork, beef and sometimes veal as may be found in the webpage <http://en.wikipedia.org>. Attached as Annex “B” is a printout of the aforesaid webpage. The same webpage states that bratwurst is colloquially known as “brats” in the United States.

“3. “BRAT” is known internationally as the shorter term for “BRATWURST” as may be verified from the definition found in the webpage <http://dictionary.reference.com>. Attached as Annex “C” is a printout of the aforesaid webpage. The same result was found in the webpage <http://www.freedException.com>. Attached as Annex “D” is a printout of the aforesaid webpage wherein one of the search result for the word “BRAT” is the noun “BRATWURST”.

“4. Various websites in the worldwide web identify the word “BRAT” as referring to “BRATWURST” and sausage. In the webpage <http://www.starassenfest.org> the annual event celebrating the tradition of German Gemutlichkeit states “Don’t forget there’s plenty of . . . BRATS, Beer, Wine, Potato Pancakes, Hotdogs, pork Steaks, Roasted Corn, Pretzels, Funnels, Cakes, Lemonade & Bloomin’n Onions to go around along with many other great Food Choices . . .” Attached as Annex “E” is a printout of the aforesaid webpage.

In the webpage <http://www.germandeli.com/sw152.html>, the Schaller and Webber Numburger brand of new pork sausage is described a Schaller & Webber Numberger BRATS. Attached as Annex “F” is a printout of the aforesaid webpage. Nueske Smoked BRAT is defined as fresh ground beef and pork kissed with the unique flavour of Wisconsin Applewood smoke, and wrapped in tender, natural casings (<http://www.wisconsinmade.com>). In the same website, Bavaria Smoked Beer BRAT was described as “The party BRAT for all occasion! Made from select pork and beef, mixed with natural spices and smoked for a robust outdoor flavour. Approximately 5 brats equate to one pound” whereas the Oktoberfest BRAT Samplers was comprised of “Bavaria’s Oktoberfest BRATWURSTS Sampler includes Kackwurst, Smoked Kaisier, BRATS, Numberger BRATWURSTS, Munich Weisswurst and Smoked Beer BRATS.” Attached as Annex “G” is a printout of the aforesaid webpage.

The following advertisements “World’s Largest BRAT Fest Madison Wisconsin.” “BRATS consumed New Record 189, 432,” “Our BRATS make you smile” may be found in the webpage <http://www.bratfest.com>. The said advertisements clearly show that the word “BRAT” is used as a generic and descriptive word. Attached as Annex “H” is a printout of the aforesaid webpage.

“5. The word “BRAT” is not only known to be synonymous to “BRATWURST” in the worldwide web but also in newspapers and news reports. The announcement “The Berghoff Restaurant, a Chicago institution known for its beer and brats, is closing after 107 years” is found in the online news <http://chicagobusiness.com> Attached as Annex “I” is a printout of the aforesaid newspaper.

The announcement “Kobayashi sets BRAT-eating record” may be found in <http://www.boston.com>. In the same news report, “BRAT” was used another three times: “Brats are little harder to eat”. “Thomas couldn’t even match her record of last year, with just 34 BRATS”, “After the contest ended; Kobayashi flexed his arm and pulled up his shirt to reveal his BRAT –filled stomach.” Attached as Annex “J” is a printout of the aforesaid online newspaper.

“6. Opposer has several trademark registrations in the United States that include the word “BRAT” or “BRATS” as part of the mark. A copy of the search for BRAT BITES in the USPTO with registration No. 3092527 is enclosed as Annex “K”. A copy of the search results for Johnsonville BRATS with Registration No. 2320819 is enclosed as Annex “L”. A copy of the search for Johnsonville Beer ‘N BRAT with registration no. 1384528 is enclosed as Annex “M”.

The Notice to Answer dated 18 January 2007 was sent to Respondent through their Counsel, Allado Mendoza & Associates, which was received on 26 January 2007, directing it to file their Verified Answer within thirty (30) days from receipt. For failure of Respondent to file the required Answer within the prescribed period, this Bureau resolved to submit the case for decision.

Considering that the case was mandatorily covered by the Summary Rules under Office Order No. 79, this Bureau directed Opposer to file all evidence in original and duplicate copies, and in compliance with said Order, Opposer through Counsel filed its evidence on February 16, 2006.

In support of its prayer for the rejection of Application Serial No. 4-2003-009327 for the mark BRAT, Opposer’s evidence consisted, among others, of the Affidavit of a member of the law firm, Roanne Alfredo P. Lopez III (Exhibit “A”); Legalized Special Power of Attorney appointing the law firm, Ortega, Del Castillo, Bacorro, Odulio, Calma & Carbonell, and signed by Ralph C. Stayer (Exhibit “B”); Original signed Consent of the Manager of Johnsonville Sausages, LLC. Technology Transfer (Exhibit “C”); Legalized Assistant Secretary’s Certificate (Exhibits “D”); Legalized Opposition with Verification and Certification and attachments consisting of Annexes “A” to “M” (Exhibits “E”);

Tersely, the issue for this Bureau’s disposition is the propriety of Application Serial No. 4-2003-009327; whether or not Respondent-Applicant is entitled to register the trademark BRAT covering goods in Class 29 more specifically fresh or cured pork; beef; processed meats; poultry; sausage; soups and entrees consisting primarily of vegetables and/or meat; chilli beans; beef stew; corn dogs; meat and poultry stocks.

After close scrutiny and careful evaluation of the records and evidence presented this Bureau finds substantiation on the grounds relied upon to sustain this instant Opposition.

In the case at bar, Respondent-Applicant seeks to register a word-mark BRAT which is not registrable, therefore, not appropriable to be used exclusively, simply for being descriptive of the goods to which the mark pertains. It is descriptive if it describes the nature or identity of the goods or services for which it is used.

Worth mentioning at this point is the definition of generic and descriptive terms propounded and/or offered in the case of SOCIETE DES PRODUITS NESTLE vs. COURT OF APPEALS, ET. AL G.R. No. 112012, April 04, 2001, where the court said:

“Generic terms are those which constitute “the common descriptive name of an article or substance” x x x or “refer to the basic nature of the wares or services provided rather than to the more idiosyncratic characteristics of a particular product,” and are not legally protectable. On the other hand, a term is descriptive and therefore invalid as a trademark if, as understood in its normal and natural sense, x x x if it clearly denotes what goods or services are provided in such a way that the customer does not have to exercise powers of perception or imagination”

The word BRAT as used by Respondent-Applicant is generic and/or descriptive with a plain import indicative of meat or sausages in trade. The word BRAT as can be gleaned from various websites herein offered as evidence is susceptible of several meanings as referring to the noun BRATWURST with specific connotation of meat sausages. On the other hand, when it is used to describe a particular behaviour, it refers to a “child, especially a spoiled or ill-mannered one” (Annex “C”, Opposer); its equivalent in the Webster International Dictionary refers to “a coarse outer or work garment or an offspring whose father was a colonel or an ill-mannered or annoying child”. BRATWURST as a term is described in the dictionary with a root word BRAT meaning meat without waste and WURST as sausages or in combination connotes “fresh pork sausage for frying”. Given this circumstance, we can deduce that BRAT as a term is likewise referred generally as meat sausages.

A cursory reading of paragraphs (h), (i), (j) of R.A. 8293 with emphasis on generic and/or descriptive words involving same or similar goods state that:

“Section 123. Registrability. – 123.1 A mark cannot be registered if it:

x x x

(h) Consist exclusively of signs that are generic for the goods or services that they seek to identify;

(i) Consist exclusively of signs or of indications that have become customary or usual to designate the goods or services in everyday languages or in bona fide and established trade practice;

(j) Consist exclusively of signs or of indications that may serve in trade to designate the kind, quality, quantity, intended purpose, value, geographical origin, time or production of goods or rendering of the services, or other characteristics of the goods or services.

x x x

In the preceding section, well-settled is the rule that a generic or descriptive term cannot be appropriated, as it is in this case for the word-mark BRAT which has a generic sense and meaning in trade to refer to meat sausages. Necessarily with the aforementioned section, the word BRAT cannot be appropriated by Respondent-Applicant when used on goods of the latter namely fresh or cured pork; beef; processed meats; poultry; sausage; soups and entrees consisting primarily of vegetables and/or meat; chilli with beans; beef stew; corn dogs; meat and poultry stocks.

The Court in Etepha vs. Director of Patents, (G.R. No. L-20635, March 31, 1966) had this to say in word-combination:

“Tussin” is merely descriptive; it is generic; it furnishes to the buyer no indication of the origin of the goods; it is open for appropriation by anyone...xxx... While “tussin” by itself cannot thus be used exclusively to identify one’s goods, it may properly become the subject of a trademark “by combination with another word or phrase”

Similarly, in *Philippine Nut Industry, Inc. vs. Standard Brands Incorporated*, G.R. No. L-23035, July 31, 1975 the Court ruled that:

While it is true that PLANTERS is an ordinary word, nevertheless it is used in the labels not to describe the nature of the product, but to project the source of origin of the salted peanuts contained in the cans.

In the instant case, from an array of words or terms that Respondent-Applicant may appropriate, why would it choose to adopt or use a generic term when standing alone, it merely describes the product/s it pertains, hence, descriptive and is therefore part of the public domain. Necessarily, it is free to use by anyone and no one may claim exclusive ownership thereof. At this juncture, we take note of Opposer’s registered marks using the word BRAT in combination with other words such as the trademark BRAT BITES (Annex “K”, Opposer) and Johnsonville BRATS (Annex “L”, Opposer). The use thereof is not proscribed simply because the marks are either a word-combination, BRAT BITES, or have provided an indication or the origin or source of the products, Johnsonville BRATS, thus, satisfying the elements under the trademark law that for a mark to be registrable, it should be distinctive and not deceptive. Opposer’s registered marks BRAT BITES and Johnsonville BRATS are affirmative and definite, significant and distinctive, capable to indicate the origin. “BRAT” forming part of Opposer’s trademark as its first word in the word-combination is a generic term not capable of appropriation, which resulted in having this word disclaimed by the Opposer in the process to gain registration (Annex “k”, Opposer).

Moreover, it may well be worthy to note that as early as the year 1998 (Annex “L”, Opposer), Opposer obtained registrations of these aforementioned registered trademarks. These registrations are subsisting and have not been abandoned. Hence, Respondent-Applicant, by any parity of reasoning, cannot be considered an originator, prior registrant nor a prior applicant of the subject or questioned mark.

The Opposer have sufficiently corroborated its claim, having presented substantial evidence to convince this Bureau that Opposer first adopted and use in commerce the subject mark. Necessarily therefore, the inevitable conclusion, given all the foregoing, and considering that BRAT is declared to be generic and/or descriptive, the mark BRAT bearing Application Serial No. 4-2003-009327 is therefore proscribed for use on fresh or cured pork; beef; processed meats; poultry; sausage; soup and entrees consisting primarily of vegetables and/or meat; chilli with beans; beef stew; corn dogs; meat and poultry stocks.

WHEREFORE, premises considered, the Notice of Opposition is, as it is hereby SUSTAINED. Consequently, application bearing Serial No. 4-2003-009327 filed by Hormel Food Corporation on 09 October 2003 for the registration of the mark “BRAT” for use on goods falling under class 29 is, as it is hereby REJECTED.

Let the filewrapper of BRAT, subject matter of this case together with a copy of this Decision be forwarded to the Bureau of Trademarks for appropriate action.

SO ORDERED.

Makati City, 04 April 2007.

ESTRELLITA BELTRAN-ABERLARDO
Director, Bureau of Legal Affairs
Intellectual Property Office