

**DECISION
of the Fourth Board of Appeal
of 11 November 2016**

In Case R 1137/2016-4

Think Products Pty Ltd.

F14, 1-15 Barr Street
Balmain NSW 2041
Australia

Applicant / Appellant

represented by LETT LAW FIRM P/S, Raadhuspladsen 4, DK-1550 Copenhagen V,
Denmark

APPEAL relating to international registration designating the European Union
No 1 269 125

THE FOURTH BOARD OF APPEAL

composed of D. Schennen (Chairman), E. Fink (Rapporteur) and L. Marijnissen
(Member)

Registrar: H. Dijkema

gives the following

Decision

Summary of the facts

- 1 On 10/02/2015, the appellant designated the European Union in its international registration No 1 269 125 for the word mark

THINKFOOD

registered on that same day for the following goods:

Class 29 – Fruit based snack foods; snack foods made from dried fruit; snack foods made from dried, extruded or dehydrated vegetables; snack foods made from nuts; snack foods made from seeds; snack foods made from dried fruit and dried, extruded or dehydrated vegetables; snack foods made from dried fruit and nuts; snack foods made from dried fruit and seeds; snack foods made from dried fruit and dried, extruded or dehydrated vegetables and nuts; snack foods made from dried fruit and dried, extruded or dehydrated vegetables and seeds; snack foods made from dried, extruded or dehydrated vegetables and nuts; snack foods made from dried, extruded or dehydrated vegetables and seeds; snack foods made from dried, extruded or dehydrated vegetables and nuts and seeds; snack foods made from nuts and seeds; vegetable chips, vacuum fried vegetable chips; fruit chips, vacuum fried fruit chips; snack foods made from freeze dried vegetables; snack foods made from freeze dried fruits; snack foods made from freeze dried vegetables and fruits; snack foods made from dried edible seaweed; snack foods made from dried edible seaweed and nuts; snack foods made from dried edible seaweed and seeds; snack foods made from dried edible seaweed and nuts and seeds; coconut oil for cooking; coconut milk for cooking; coconut cream for cooking.

Class 30 – Water ices; fruit ices; sugar free confectionary, chewing gum (non-medicated), sugar free chewing gum (non-medicated), sugar free mints, sugar free lollipops; rice based snack foods; cocoa based snack foods; snack foods consisting of chocolate; snack foods made from sesame; popcorn, popped popcorn; non-dairy frozen desserts, non-dairy ice cream; chocolate based products, chocolate coated fruit, chocolate coated grains, chocolate coated cocoa beans, chocolate coated nuts.

Class 32 – Non-alcoholic drinks; fruit juices, fruit drinks, fruit juice blends, fruit based drinks; non-alcoholic cocktail bases, cocktail bases made from fruit; smoothies; coconut milk drinks, coconut milk based drinks; drinks made from coconut milk and fruit juice.

- 2 The examiner issued a provisional total refusal of protection under Article 5 of the Madrid Protocol on the grounds that the mark was descriptive and devoid of any distinctive character for the English-speaking public, Article 7(1)(c) and (b) and Article 7(2) EUTMR. The holder replied and maintained its application.
- 3 By decision of 27/04/2016, the examiner refused the international registration protection in the European Union because she found the sign to be descriptive and non-distinctive within the meaning of Article 7(1)(c), (b) and 7(2) EUTMR. The English-speaking consumer would readily understand the combination of THINK (to be capable of conscious thought) and FOOD (anything that provides mental nourishment or stimulus) with the meaning of ‘nourishment for conscious thought’. Being similar to the term ‘brain food’, the sign would immediately be perceived by the relevant public of end-consumers as describing foodstuffs and beverages that stimulate thinking and intellectual capacity. The fact that certain food could be beneficial for thinking, memory and concentration was well known and confirmed by the internet links attached. All the goods applied for could contain nutrients for stimulating brain activity. The

term was already in use as demonstrated by a book title offered on amazon.com: ThinkFood: Brain Healthy Recipes Paperback 2013.

- 4 The applicant filed an appeal on 22/06/2016, followed by a statement of grounds on 26/08/2016. It requests that the Board annul the contested decision and grant the international registration protection in the European Union.
- 5 The appellant argues that the sign is an invented term which has no meaning in relation to the goods in issue. 'THINK' is not a synonym for 'brain'. The mark was designed to help consumers to make an informed choice about the appellant's products. At best, it means 'to think about food' but such meaning requires an analytical interpretation and will not immediately come to the mind of the English-speaking consumer, who is well aware that the combination of the verb 'think' with the noun 'food' is syntactically incorrect and unusual.

Reasons

- 6 The appeal is well founded. The application is neither descriptive within the meaning of Article 7(1)(c) EUTMR, nor devoid of any distinctive character within the meaning of Article 7(1)(b) EUTMR in respect of the goods applied for.

Article 7(1)(c) EUTMR

- 7 Article 7(1)(c) EUTMR provides that trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or of rendering of the service, or other characteristics of the goods or service are not to be registered. Furthermore, Article 7(2) EUTMR provides that Article 7(1) EUTMR shall apply notwithstanding that the grounds of non-registrability obtain in only part of the EU.
- 8 For a sign to fall within the scope of the prohibition in that provision, it must convey a sufficiently direct and concrete link to the goods or services in question to enable the public concerned immediately, and without further thought, to perceive a description of the goods and services in question or of one of their characteristics (27/02/2002, T-106/00, Streamserve, EU:T:2002:43, § 40; 05/02/2004, C-150/02 P, Streamserve, EU:C:2004:75; 22/06/2005, T-19/04, Paperlab, EU:T:2005:247, § 25).
- 9 The mere combination of elements, each of which is descriptive of characteristics of the goods or services in respect of which registration is sought, remains itself descriptive of those characteristics. Merely bringing those elements together without introducing any unusual variations, in particular as to

syntax or meaning, cannot result in anything other than a mark consisting exclusively of signs or indications which may serve, in trade, to designate characteristics of the goods or services concerned (12/02/2004, C-265/00, *Biomild*, EU:C:2004:87, §§ 39, 43).

- 10 The goods consist of various foodstuffs and beverages that address the general end-consumer who is deemed to be reasonably well-informed and reasonably observant and circumspect. Since the mark is composed of English words, the assessment is to be based on the English-speaking part of the European Union, Article 7(2) EUTMR.
- 11 The mark combines the verb '(to) THINK' and the noun 'FOOD', the meaning of which has been correctly established by the examiner. The dictionary also lists various examples of composite terms where the verb 'THINK' qualifies the subsequent noun, namely: 'think book – a book that challenges the reader intellectually; think factory – a research institution; think group – a group of people that meets to discuss a subject or solve a problem; think piece – an article in a newspaper, magazine, or journal presenting personal opinions, analysis, or discussion, rather than bare facts; think room – a room or apartment set aside for meditation or developing ideas; think tank – a body of experts providing advice and ideas on specific political or economic problems (www.oxforddictionaries.com)'.
- 12 It follows from these examples that the combination is, contrary to what has been claimed by the appellant, syntactically correct but that the meaning of 'THINKFOOD' remains unclear. Unlike books, articles or locations where people meet to interact intellectually, food consumption as such does not trigger any intellectual activity. Whether understood as 'food that makes you think' or, as suggested by the appellant, 'to think about food', the mark considered as a whole does not convey more than a vague allusion to the concepts of thinking and food. There is nothing in the combination that would allow consumers to identify specific characteristics of the goods applied for. To come to the conclusion that the goods contain ingredients that stimulate the brain and that their consumption therefore could induce intellectual activity requires an analytical approach which the average end-consumer is unlikely to perform.
- 13 These findings are not called into question by the book title relied on by the examiner. Apart from the fact that a book title may meet the requirements of trade mark protection (31/08/2015, R 2401/2014-4, *Le journal d' Anne Frank*), the example illustrates the vagueness of the term 'THINKFOOD', because the author obviously felt the need to clarify the meaning by adding 'Brain Healthy Recipes'. In the absence of any clear meaning which the relevant consumer could readily understand, the mark cannot serve in trade to describe the goods applied for under Article 7(1)(c) EUTMR.

On Article 7(1)(b) EUTMR

- 14 Pursuant to settled case-law, the distinctive character of a trade mark must be assessed, firstly, by reference to the goods or services in respect of which registration has been applied for and, secondly, by reference to their perception by the

relevant public, which consists of average consumers of the goods or services in question who are reasonably well informed and reasonably observant and circumspect (22/06/2006, C-24/05 P, Karamelbonbon, EU:C:2006:421, § 23).

- 15 A sign with a descriptive meaning is also devoid of any distinctive character within the meaning of Article 7(1)(b) EUTMR (12/02/2004, C-265/00, Biomild, EU:C:2004:87, § 19; 12/02/2004, C-363/99, Postkantoor, EU:C:2004:86, § 86). If no descriptive meaning of the sign applied for can be established, it must be examined whether there are other grounds that would require the sign to be refused due to a lack of distinctive character.
- 16 The examiner based the refusal of the mark as non-distinctive on its descriptive nature. As explained above, the relevant public will not perceive a descriptive meaning in the mark in relation to the goods applied for.
- 17 Other reasons to deny the sign protection have not been brought forward by the examiner and are not apparent for the Board. In particular, there is no indication that the relevant public would perceive 'THINKFOOD' as a mere laudatory message to highlight the quality of the goods.
- 18 It follows that the decision to refuse protection for the European Union must be annulled. The Office will have to inform the International Bureau of WIPO that the refusal of protection is withdrawn in accordance with Rule 113(2)(a) CTMIR.

Order

On those grounds,

THE BOARD

hereby:

- 1. Annuls the contested decision;**
- 2. Orders that the refusal of protection for the European Union be withdrawn.**

Signed

D. Schennen

Signed

E. Fink

Signed

L. Marijnissen

Registrar:

Signed

H.Dijkema

