

This Opinion is a
Precedent of the TTAB

Mailed: November 22, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re International Fruit Genetics, LLC

Serial No. 88711192

Kimberlee A. Boyle of Richard Law Group, Inc.,
for International Fruit Genetics, LLC.

Beniam Biftu, Trademark Examining Attorney, Law Office 117,
Cynthia Tripi, Managing Attorney.

Before Lykos, Goodman, and Coggins,
Administrative Trademark Judges.

Opinion by Lykos, Administrative Trademark Judge:

On December 1, 2019, International Fruit Genetics, LLC (“Applicant”) filed an application to register on the Principal Register the standard character mark IFG for goods ultimately identified as “Fresh fruits and vegetables; live plants; live trees; live grape vines; live plant material, namely, live grape vine material, live plant material and live tree material” in International Class 31.¹ In its application, Applicant claims

¹ Application Serial No. 88711192, originally filed under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), claiming June 3, 2009, as the date of first use anywhere and January 8, 2010, as the date of first use in commerce for International Class 31. To obviate a specimen refusal, Applicant amended the filing basis for its International Class 31 goods to intent-to-

ownership of Registration No. 3771967 for the same standard character mark IFG on the Principal Register for “Live plants, namely, table grape vines, cherry trees” in International Class 31. The registration was issued on April 6, 2010, based on an application filed November 7, 2006, and has been renewed.

Registration was refused under Trademark Act Sections 1, 2, and 45, 15 U.S.C. §§ 1051, 1052, 1127, on the ground that the proposed mark identifies the prominent portion of a varietal name for the identified goods and, thus, does not function as a trademark to indicate the source of Applicant’s goods and to identify and distinguish them from others.

Applicant timely filed a notice of appeal. The appeal is fully briefed. For the reasons explained below, we affirm the refusal to register.

I. Preliminary Issues

A. Material Attached to Applicant’s Brief

Applicant attached to its main brief a photocopy of the entirety of the INTERNATIONAL CONVENTION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS OF DECEMBER 2, 1961, AS REVISED AT GENEVA ON NOVEMBER 10, 1972, ON OCTOBER 23,

use under Trademark Act Section 1(b), 15 U.S.C. § 1051(b). *See* September 9, 2020 Response to Office Action, pp. 4-5. The application originally included services which eventually were the subject of a divisional request in International Classes 44 and 45 in “child” Application Serial No. 88983999. *See* “Request to Divide” dated December 16, 2021 and “Notice that Processing of Request to Divide Application is Completed” dated March 29, 2022. The services in Classes 44 and 45 are not part of this appeal.

Citations to the prosecution file refer to the USPTO’s Trademark Status & Document Retrieval (“TSDR”) case viewer format. Citations to briefs refer to actual page number, if available, as well as TTABVUE, the Board’s online docketing system. The number preceding “TTABVUE” corresponds to the docket entry number; the number(s) following “TTABVUE” refer to the page number(s) of that particular docket entry. *See Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014).

1978, AND ON MARCH 19, 1991 (hereinafter referred to as the “UPOV Convention” or “Convention”).² The Examining Attorney objects to the submission as untimely “new evidence” under Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d).³

We need not rule on the objection because the Board may sua sponte take judicial notice of international conventions and treaties. *See, e.g., In re Int’l Watchman, Inc.*, 2021 USPQ2d 1171, at *4 n.5 (TTAB 2021) (Board took judicial notice of the text of the North Atlantic Treaty). The UPOV Convention is an international convention and is publicly available at various sources, including the UPOV website at <https://upovlex.upov.int/en/convention>.⁴ We therefore take judicial notice of the text of the 1991 Act of the Convention and its Explanatory Notes, as well as the publicly available facts on the UPOV website at <https://www.upov.int> about the Convention and its administration. *Cf. Fed. R. Evid. 201(b)(2)* (“The court may judicially notice a fact that is not subject to reasonable dispute because it ... can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.”). *See, e.g., In re tapio GmbH*, 2020 USPQ2d 11387, at *13 n.46 (TTAB 2020) (Board took judicial notice of 2010 U.S. Census records for the top 1,000 surnames); *see also, United States v. Garcia*, 855 F.3d 615 (4th Cir. 2017) (taking judicial notice of facts on U.S. Citizenship and Immigration Services’ (“USCIS”) website because it is a

² Applicant’s Appeal Brief, 4 TTABVUE 15-38.

³ Examining Attorney’s Brief, 6 TTABVUE 4. The Examining Attorney mischaracterized the material attached to Applicant’s brief, calling it “Chapter VI of Article 20 of the 1991 International Convention for the Protection of New Varieties of Plants Act, Publication No: 221(E).” The attachment is a reprint of the 1991 Act of the Convention in its entirety.

⁴ The International Union for the Protection of New Varieties of Plants (UPOV) is an intergovernmental organization with headquarters in Geneva, Switzerland.

governmental source whose accuracy cannot be questioned); *Daniels Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998-99 (9th Cir. 2010) (taking judicial notice of information on two school districts' websites because they were government entities); *Hong v. Rec. Equip., Inc.*, 2019 USPQ2d 410124, at n.3 (W.D. Wash. 2019) (the court may take judicial notice of information published on government website). In view thereof, the Examining Attorney's objection is moot.

B. Length of Applicant's Appeal Brief

The Examining Attorney also objects to Applicant's main appeal brief, claiming that it is 38 pages in length, thereby exceeding the 25 page limitation as set out in Trademark Rule 2.142(b)(2), 37 C.F.R. § 2.142(b)(2). The Rule provides in pertinent part:

Without prior leave of the Trademark Trial and Appeal Board, a brief shall not exceed twenty-five pages in length in its entirety, including the table of contents, index of cases, description of the record, statement of the issues, recitation of the facts, argument, and summary.

A review of Applicant's main brief shows that it totals only 13 pages, including the table of authorities, summary of the procedural history, and arguments. The remaining pages consist of a photocopy of the UPOV Convention as discussed above. This extraneous submission does not count against the page limitation as set forth in Trademark Rule 2.142(b)(2). Accordingly, the Examining Attorney's objection is overruled.

II. Background

Before discussing the varietal name refusal, we provide some background on the UPOV Convention, U.S. patent law, and other statutory frameworks for the

protection of varietal names.

A. The UPOV Convention⁵

The UPOV Convention was adopted on December 2, 1961, at a diplomatic conference in France, but did not come into force until 1968, following ratification by the United Kingdom, the Netherlands and Germany.⁶ The Convention was subsequently revised in 1972, 1978, and 1991 to reflect technological advances in plant breeding.⁷ The United States is a signatory to the 1991 Act of the Convention.⁸ UPOV's stated mission "is to provide and promote an effective system of plant variety protection, with the aim of encouraging the development of new varieties of plants, for the benefit of society."⁹ As per the terms of the Convention, its permanent administrative bodies are the Council and Office of the Union, headquartered in Geneva, Switzerland,¹⁰ which receive guidance from various technical,

⁵ The United States is also obligated to protect plant varieties under Article 27.3(b) of the AGREEMENT ON TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY ("TRIPs"), which states, in relevant part, that "Members shall provide for the protection of plant varieties either by patents or by a sui generis system or by a combination thereof." The United States implemented the TRIPs agreement with the passage of the Uruguay Round Agreements Act ("URAA"), Pub.L. No. 103-465, 108 Stat. 4809 (1994).

⁶ UPOV website, <https://upovlex.upov.int/en/convention>. See also MANUAL OF PATENT EXAMINING PROCEDURE ("MPEP") § 1612 ("UPOV Convention") (June 2020 Publication of Revision 10.2019).

⁷ UPOV website, <https://upovlex.upov.int/en/convention>. See also MPEP § 1612.

⁸ MPEP § 1612.

⁹ UPOV website, <https://www.upov.int/portal/index.html.en>. See also UPOV Convention, Preamble, March 19, 1991, https://www.upov.int/edocs/pubdocs/en/upov_pub_221.pdf.

¹⁰ UPOV Convention, Ch. VIII ("The Union"), art. 24(3), art. 25, art. 26 and art. 27, March 19, 1991, https://www.upov.int/edocs/pubdocs/en/upov_pub_221.pdf.

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