

The Eastern Script

Shameless self-promotion since 2011

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GUMMY BEARS



We had another head-scratcher recently, it had to do with Gummy Bears. You know them. Vibrantly colored translucent miniature bears, a pop of fruity flavor, then it's a lot of chewing.

Here's what had us confused: why are there trademark registrations for “gummy bears” (and “gummi bears”) but the owner of the marks are disclaiming any exclusive right to use that name for their gummy bear candies?



Word Mark	GUMMY BEARS
Goods and Services	IC 030. US 046. G & S: VARIOUS SOFT CANDIES OF DIFFERENT FLAVORS AND COLORS, INCLUDING GUMMY BEARS. FIRST USE: 19830823. FIRST USE IN COMMERCE: 19830823
Mark Drawing Code	(3) DESIGN PLUS WORDS, LETTERS, AND/OR NUMBERS
Design Search Code	03.01.14 – Bears other than Panda bears; Bears, koala; Bears, polar; Black bears; Grizzly bears; Koala bears; Polar bears 21.01.11 – Animals, stuffed; Stuffed animals; Teddy bears
Serial Number	73485901
Filing Date	June 18, 1984
Published for Opposition	July 23, 1985
Registration Number	1386950
Registration Date	March 18, 1986
Owner	(REGISTRANT) FOREIGN CANDY COMPANY, INC., THE CORPORATION IOWA 451 BLACK FOREST ROAD HULL IOWA 51239 (LAST LISTED OWNER) FERRARA CANDY COMPANY CORPORATION ILLINOIS 1 TOWER LANE SUITE 2700 OAKBROOK TERRACE ILLINOIS 60181
Disclaimer	NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "GUMMY BEARS" APART FROM THE MARK AS SHOWN
Type of Mark	TRADEMARK

To the rescue: once again, Justin Clark Managing Attorney of J. Clark Law Firm in Phoenix Arizona. When you have a question these days you go to the internet and you start asking around. We contacted him a few newsletters ago (see [September 2014](#) newsletter article: "Is It a Brand Name?") and turned to him again to help us out here.

Eastern Script: Wondering if I can bother you again with a question related to gummi bears as trademarks; are you perhaps already familiar with the trademark history of this product?

I've looked at USPTO and see 19 "Gummy Bear" registrations, 8 of which are live/current. All 8 are owned by Ferrara and yet each one of them disclaims the right to use "gummy bears" apart from the mark as shown, including a registration for those exact 2 words (see below my signature for the registration). My main question here is why you would register the words if you also disclaim right to using the words? Is it just the artwork that they are laying claim to?

There are also registrations by the different spelling "Gummi Bears" with 3 different owners. Each of them also disclaims part of the full name (disclaimed are "Gummi Bear," "Gummi," and "Gummi-Bears").

We are mainly looking into this to try to decide if the language is generic and if our clients can say "gummi bears" without fear of getting a letter from one of these companies. But now I'm also curious about how the generic determinations are made, as I was 3 years ago when I contacted you.

Justin Clark: In reviewing the registration you provided and the details surrounding the mark, you are indeed onto something with bringing up the disclaimer of words in the mark that are merely descriptive, or generic, or a feature of the underlying product. In this case, "gummy" describes the texture or consistency of the candy, and "bear" literally describes the shape of the candies. Combining the words together does little to allay this literal description of the underlying goods and their features. Therefore, these words had to be disclaimed.

The reason to register the mark lies in the arrangement of the words with the overall design. Here, the owner of the registration could stop other people from using a similar design in their mark. However, the owner could not stop a third party from using the phrase “gummy bears”.

The generic determinations in the U.S. are made based on the interplay between the words in the mark and the underlying goods/services. If the words in the mark are the product names or describe features of the goods/services that the marks are attached to, then the words are most likely generic and no one can assert exclusive rights to use those words and enforce use against third parties.

Despite the simplicity of the idea of trademarks and their function, there are a lot of nuances about trademark law. I find myself learning something new everyday!

Although “gummi” is not the standard spelling of “gummy”, it still looks and sounds similar to “gummy”. Moreover, it has the same meaning as gummy, much the same as “cheez” is the equivalent of “cheese”. Because “gummi” is an analog of “gummy”, a trademark owner could not overcome a rejection of a trademark application on the basis of descriptiveness of the underlying product/service or if the word is generic.

...Long story short, the term “gummi bears” is generic language, even though we typically think of the term as a brand name. Unless the styling of words on your art department's packaging matches that of an existing gummi bear trademark — just as you would avoid using Coca-Cola's distinctive font on a fake beverage brand — you can use the name for your movie's own candy package creation. And that is probably more than you wanted to know about the trademark status of a childhood favorite.

SURPRISING BRAND NAMES LIST

Speaking of terms you typically think of as trademarks... this next piece looks at the opposite situation.

For the full story, read on at: mentalfloss.com/article/56667/41-brand-names-people-use-generic-terms

Here are selected items from the full list of forty-one brand names “that people use as generic terms.” I was familiar with many of the other brand names on the full list but these elicited a “Really – ! ? ”

- Bubble Wrap
- Crock-Pot
- Dumpster
- Fluffernutter
- Formica
- GED
- Onesies
- Plexiglas
- Realtor
- Rollerblades
- Seeing Eye Dog
- Styrofoam
- Windbreaker



Photo by: Michael Prewett

NOT CLEAR

Clearance report clients hire us to read their scripts and use our experience to tell them that story elements are “clear” or “not clear.” Seeing the words “Consider clear for use” throughout the report means no clearance-triggered revisions, no permission requests, no conversations with your lawyer. Smooth sailing. A report seldom has 100% good news, though. What happens when something *doesn't* clear?

Any clearance company you work with should provide clear alternatives that you can use instead. The cost of clear alternatives is a factor to consider when hiring your clearance company. We try to provide (free of charge) 2 clear alternatives for each NOT CLEAR cast name; if we are banging our heads against the wall and coming up with little to nothing, though, we'll give you what we have been able to clear and we will consult with you on what you want to do next.

We look to the script for clues about how to come up with these names. Is the male lead referred to mainly by his first name? If so, we'll look for some alternatives to the surname. We'll try to find surnames that match the flavor of the scripted name, i.e. Jack Murphy won't become Jack Van Damme but rather something along the lines of Jack Murray, Jack Moriarty, etc.

Our alternatives or yours? Some clients take every suggestion we offer. Others: not so much. For that reason, we started asking on our order forms whether you the client want to come up with the alternatives — or should we? That way, we are not wasting time and effort trying to clear numerous alternatives for Jack Murphy at a number of sources. The process can be quite time-consuming depending on the character's attributes.

Over the years I have seen productions that are intent on using a scripted name that is not clear. They decide to contact the person/people who might be an issue and try to get him/them to sign off on name use. We'll provide contact info in that situation. But if your Jack Murphy character is a doctor by day and serial killer by night, you're not going to have

much luck getting the only Jack Murphy m.d. we find in your setting to grant you permission to use his name. That's where the cleared alternatives come in handy.

Once shooting is complete, that “not clear” story element puts you in an unfavorable negotiating position. Writer-director Edgar Wright whose 2017 movie Baby Driver featured large amounts of music speaks of his own recent experience with this scenario. Talking with Chris Willman of Variety in an interview published on June 29 2017, Wright said, “Even before the movie was at Sony, we had sort of quietly started clearing the tracks. Because, you know, if you're going to do a movie called *Baby Driver* and try and use that song, you should approach them way ahead of time to make sure that that's okay. You don't want to be in a situation where you've made the movie and Simon & Garfunkel are saying, ‘Come on, pay up. We know you want this.’” The name clearance situation is the same; if you are approaching Dr. Jack Murphy to request permission once shooting on your serial killer movie has wrapped, you're in a tough spot.

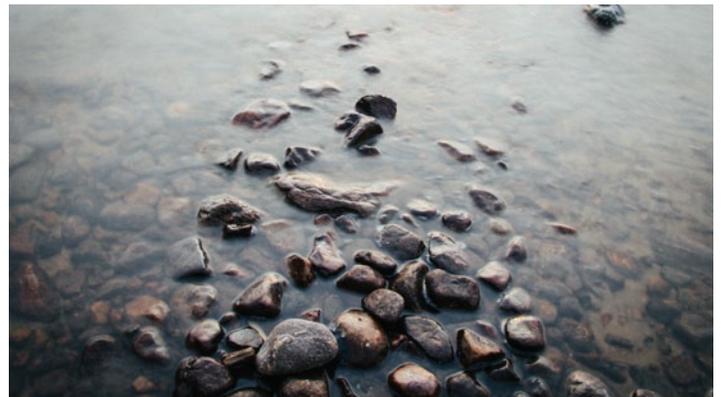


Photo by: Ryan McGilchrist

GET THE BASICS



We started offering a reduced price, reduced source list title search in October 2014 and we call it our “Basics” title search. Since that first year, the number of Basics title searches that have been ordered has more than tripled. It has taken a few years to get the word out but we are glad to see that the product is helping in the way we had intended.

Bottom line: not all projects need a 75-source research document. For projects with limited distribution plans, a 25-source document can be just enough. And we are quite aware of the “are you kidding?” factor when a producer gets to what he/she thinks is the end of the spending only to find out that another research document is needed that will cost high up into the 3-digits. Being able to offer a lower-priced alternative — especially to lower-budgets projects — was our idea from the start.

Speaking of the start, when we first offered Basics searches, the handful of clients who wanted to take us up on them ended up advocating with insurance companies and for that we thank them. One of the very first clients for a Basics told me he had caused “quite a stir” in the insurance industry with his request to have it approved and it took him weeks to get a yes/no answer on their acceptance. An underwriter from one of the major film insurers contacted me at that time to ask a series of questions about the reports, their sources, etc. As is often the case when a new product arrives, it can be a challenge for people to trust it.

I recently contacted a colleague on the insurance side of the media industry to get her thoughts on the Basics searches. Here are a few questions/answers with Judi Heron, Vice President of Arthur J. Gallagher Canada Limited.

www.ajgcanada.com

Eastern Script: How often do you see a producer change the project title because of findings in a title search report?

Judi Heron: “Not often, although it has happened a bit more frequently in the last two years. There have been a few situations involving trademark issues. There was also a situation where another title was just too similar.”

Eastern Script: When producers ask you about getting a title search, what kinds of questions do you ask them in order to figure out how broad the search needs to be?

Judi Heron: “I don’t need to ask them anything. I always tell them to ask for the Basics search. Our underwriters have approved it and we have had no issues with its scope.”

Eastern Script: Can you think of any situations in which the underwriters would ask for a broader scope of search?

Judi Heron: “I can’t think of any situation where that would be required.”

Every insurance company has its own guidelines on what will be needed, though, so if a client is unsure as to which scope of search to order we send them to their broker for clarification. The scope you need will be determined by various factors but mainly by your distribution plans. When in doubt, ask your insurer. If you can go with a Basics, we are happy to help.

STATUTE OF ANNE (THE OTHER ANNE)



I didn't go to law school. My degree was in English literature with a later degree in film studies. So, please safely conclude that my academic background included zero coursework in intellectual property law. I learned what I needed to know at work, through colleagues, and from my own reading.

Nowadays they have this online learning thing where you turn on a computer, type in a few words, then find videos to explain to you all the things you missed along the way. It's great — no more of those slimy messes you get from opening books!

Here's a good example of what's out there in book avoidance land. My workmate Jamie came across a nice little online primer called “The History and Philosophy of Copyright.” Here's the link: www.youtube.com/watch?v=4b_5M004qGg

Synopsis (from that page): “We explore perhaps the earliest example of a copyright case in Medieval Ireland, the rise of copyright in England with Statute of Anne and its influence on the U.S. Constitution, the rise of novelists and the push for the Berne Convention before looking at the philosophical basis of Copyright itself.” — John P. Hess

It's an interesting piece, not long (less than 30 minutes) and it's jazzed up with a lot of images to lighten the intensity of a 25 minute discourse on the history of copyright. They describe it as being part of a “Filmmaker IQ course on copyright.” It's worth your time if you have some interest in the subject matter.

Here's more about the Statute of Anne which I learned about for the first time in that YouTube video. It puts our work into a more historical context; copyright issues can be a big part of the script clearance process.

“an act of the Parliament of Great Britain passed in 1710, which was the first statute to provide for copyright regulated by the government and courts, rather than by private parties.”

Source: Wikipedia
en.wikipedia.org/wiki/Statute_of_Anne

“a milestone in the history of copyright law. It recognized that authors should be the primary beneficiaries of copyright law and established the idea that such copyrights should have only limited duration (then set at 28 years), after which works would pass into the public domain.”

Source: Britannica.com
www.britannica.com/topic/copyright#ref157947

“short title Copyright Act 1709 8 Anne c.19; long title An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or purchasers of such Copies, during the Times therein mentioned, was the first copyright law in the Kingdom of Great Britain ... (it) was primarily legislation to regulate the book trade, intended to separate rights in copies from censorship. While its rationale was not to protect authors, the statute thought to encourage public learning and provide a structure to the book trade that would limit the Stationers' Company's economic monopoly.”

Source: Thefullwiki.org
www.thefullwiki.org/Statute_of_Anne

“America's first federal copyright enactment — the 1790 Copyright Act — is the Statute of Anne phrased in somewhat more modern language and featuring a few omissions, additions, and modifications.”

Oren Bracha, *The Adventures of the Statute of Anne in the Land of Unlimited Possibilities: The Life of a Legal Transplant* from Berkeley Technology Law Journal

RECENT PROJECTS

ANNE WITH AN E “The adventures of a young orphaned girl living in the late 19th century. Follow Anne as she learns to navigate her new life on Prince Edward Island, in this new take on L.M. Montgomery’s classic novels.”

Source: www.imdb.com/title/tt5421602/combined

CRAZY BEAUTIFUL WEDDINGS “Lynzie Kent—the self-described ‘anti-wedding’ wedding planner—takes inspiration in a couple’s love story and creates unique and jaw-dropping celebrations, where the room can feel like an art installation or the party like performance art. Each episode will reveal the execution of one amazing wedding and bring viewers to tears as they marvel in an event designed around a great love story.”

Source: blueantmedia.com/portfolio/crazy-beautiful-weddings

FRANKIE DRAKE “Starring Lauren Lee Smith (*The Listener*, *This Life*), **FRANKIE DRAKE MYSTERIES** (11x60) follows Toronto’s only female private detective in the 1920s as she takes on the cases the police don’t want or can’t handle. Her gender is her biggest advantage – who would ever think a woman could be a detective?”

Source: www.cbc.ca/mediacentre/program/frankie-drake-mysteries

HIGH HOPES: THE BUSINESS OF MARIJUANA “Legalization is expected to add up \$22.6 Billion a year to the Canadian economy. As with most new growth industries, everyone is trying to get in on the action.

High Hopes delves into the evolving climate surrounding marijuana in Maritime Canada. The film follows the stories of activists, consumers and entrepreneurs as they attempt to carve out a place for themselves in the new marijuana frontier.”

Source: www.rubytreesfilms.com/portfolio/high-hopes-the-business-of-marijuana/

I FEEL PRETTY Starring Amy Schumer, Michelle Williams. “In the comedy, an ordinary woman who struggles with feelings of insecurity and inadequacy on a daily basis wakes from a fall believing she is suddenly the most beautiful and capable woman on the planet. With this newfound confidence she is empowered to live her life fearlessly and flawlessly.”

Source: variety.com/2017/film/news/stx-amy-schumer-pic-i-feel-pretty-1202445182/

LOCKE & KEY “The award-winning, fan-favorite property *Locke & Key* is being developed as a television series with author/creator Joe Hill set to write the pilot and serve as an executive producer on the series. *Locke & Key* tells the story of the Locke family and their journey into Keyhouse, an unlikely New England mansion with fantastic doors that transform all who dare to walk through them, and home to a hate-filled and relentless creature that will not rest until it forces open the most terrible door of them all!”

Source: www.superherohype.com/news/373569-joe-hill-and-idw-entertainment-bringing-locke-key-to-television



Photo by: Ryan James Christopher

RIOT GIRLS “Set in a world where adults have mysteriously died and resources are scarce with a teenage girl called to action when her brother is captured by rivals and set to be executed.”

Source: www.movieinsider.com/m14772/riot-girls#plot

UPSTAIRS AMY “The 20-episode show, *Upstairs Amy*, is produced by Toronto’s Shaftesbury and will be housed on Walmart and Interac’s YouTube channels. The comedy depicts the misadventures of an accountant forced to move a few stories up after her condo floods. Once settled, she meets an intriguing neighbour who, unlike Amy, seems to have it all together.”

source: mediaincanada.com/2017/10/25/walmart-and-interac-use-influencers-for-new-webseries

YOU ARE CORDIALLY INVITED “The new television series *You Are Cordially Invited* extends an engraved invitation to viewers, welcoming them as guests in masterpiece houses containing distinguished collections of artwork. For thirty minutes viewers will explore these extraordinary houses firsthand, as they stroll the grounds, walk the halls, and sip champagne with the owners and experts.”

source: www.invited.tv



Photo by: Matthew Henry