

**THIS OPINION IS NOT A
PRECEDENT OF THE TTAB**

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Marino Felice SNC; Di Marino Ferdinando E Flavio

Serial No. 79113793

Marino Felice SNC; Di Marino Ferdinando E Flavio, pro se.

William T. Verhosek, Trademark Examining Attorney, Law
Office 114 (K. Margaret Le, Managing Attorney).

Before Seeherman, Quinn and Hightower, Administrative
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Marino Felice SNC; Di Marino Ferdinando E Flavio, a
general partnership existing under the laws of Italy,
(hereafter "applicant") has appealed from the final refusal
of the trademark examining attorney to register ENKIR, in
standard characters, for the following goods, as amended:

Flour and cereal preparations, namely, biscuits;
puffed cereal based snack foods; cookies; tarts;
cakes; panettone; doughnuts; croissants;
brioches; prepared pizza; pizza dough; pies;
breadsticks; crackers; pasta; dried pasta; fresh
pasta; noodles; breakfast cereals; cereal bars;

high-protein cereal bars; pancakes; pastry; pastry shells; bread; all containing Triticum Monococcum or Einkorn, also known as Enkir (Class 30); and

Beers; mineral and aerated waters and other non-alcoholic beverages, namely, soft drinks; cereal based soft drinks; non-alcoholic malt beverages; energy drinks; sports drinks; fruit beverages and fruit juices; syrups for making beverages; preparation for making beverages, namely, powders used in the preparation of sports and energy drinks and powers used in the preparation of non alcoholic malt beverages; all containing Triticum Monococcum or Einkorn, also known as Enkir (Class 32).¹

Registration has been refused pursuant to Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that the applied-for mark is merely descriptive of the goods.

Applicant and the examining attorney have filed briefs.² We affirm the refusal.

As a preliminary matter, we note that applicant submitted several articles in Italian, without also providing a translation. We have given this material no consideration. See *Hard Rock Café Licensing Corp. v.*

¹ Application Serial No. 79113793, filed March 22, 2012, pursuant to Section 66(a) of the Trademark Act, 15 U.S.C. § 1141f(a), based on International Registration No. 1118565, issued March 22, 2012.

² Applicant's brief has been filed in single space. Applicant is advised that briefs must be double spaced. See Trademark Rule 2.126(a)(1); Trademark Rule 2.142(b)(2). Further, it is not necessary to re-submit with the brief all the papers that were previously submitted during prosecution. The Board considers the application file as part of its review.

Elsea, 48 USPQ2d 1400, 1405 (TTAB 1998) (proffered excerpt from a newspaper or periodical in language other than English is unintelligible and not admissible).

A term is deemed to be merely descriptive of goods or services, within the meaning of Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1), if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services. In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). Whether a term is merely descriptive is determined not in the abstract, but in relation to the goods or services for which registration is sought, the context in which it is being used on or in connection with the goods or services, and the possible significance that the term would have to the average purchaser of the goods or services because of the manner of its use. In re Bright-Crest, Ltd., 204 USPQ 591, 593 (TTAB 1979).

The examining attorney contends that the mark describes an ingredient of applicant's goods, and has submitted evidence showing that enkir wheat or flour is used in pasta, noodles, pizza and beer. There is no disagreement that applicant's goods contain this grain; in

fact, its identification of goods specifically states that its goods all contain Enkir.

Applicant does not disagree that it uses ENKIR to identify a particular type of grain, but asserts that it created this word to identify the grain that it sells, and that the generic binomial or scientific name for the item is *Triticum monococcum*, and that "Einkorn" is the English language term.³ In support, applicant has submitted a printout from Wikipedia⁴ entitled "Einkorn wheat," which states, inter alia:

Einkorn wheat (from German *Einkorn*, literally "single grain") can refer either to the wild species of wheat, *Triticum boeoticum*, or to the domesticated form, *Triticum monococcum*. The wild and domesticated forms are either considered separate species, as here, or as subspecies of *T. monococcum*. Einkorn is a diploid species of hulled wheat, with tough glumes ("husks") that tightly enclose the grains. The cultivated form is similar to the wild, except that the ear stays intact when ripe and the seeds are larger.

³ In its brief, applicant has shifted its argument somewhat, to assert that its flour or grain is a unique blend created from specific qualities and quantities of *Triticum monococcum*. This argument is not persuasive. As detailed infra, the evidence shows that ENKIR has been promoted and viewed as a term that describes a type of grain or flour, rather than as a trademark indicating source in applicant.

⁴ Applicant submitted this material with its response to the first Office action. We consider this evidence because the examining attorney had an opportunity to rebut that evidence if he believed it was inaccurate. See TBMP § 1208.03 (2013) and cases cited therein at n. 14.

The examining attorney has pointed out that, whatever applicant's intention might have been to have ENKIR as a source-identifier or trademark for its grain, consumers will view the term as the name of the ingredient. In this connection, we note that applicant itself uses ENKIR in the same way that it lists other types of grains. On its website, www.mulinomarino.it/eng/cereali.php, applicant discusses its various "cereals," i.e., grains. Each grain is listed in all capital letters, followed by a description. The grains listed are WHEAT MEAL, SPELT, RYE, KAMUT, "8 ROW" MAIZE or "KING'S MAIZE," BUCKWEHAT and ENKIR. In other words, applicant lists and uses ENKIR in the same manner as it lists other clearly generic names of grains. As a result, consumers would understand ENKIR to also be a type of grain.

In addition, the examining attorney has submitted evidence from several third-party websites in which ENKIR is used to identify a type of grain.

San Maurizio Gourmet
Enkir Tagliolini
"Enkir" spelt is the cereal that is best suited
to a high quality menu....
Enkir is the "father of all cereals, and has
spanned the centuries without ever changing its
genetic makeup.
www.sanmauriziogourment.com

Formaggio Kitchen
Mulino Marino Enkir Wheat Flour

Enkir is a type of small spelt and belongs to the diploid species that first appeared in the Middle East approximately 12,000 years ago. As a wild cereal it has a natural resistance to sicknesses and stress and as a result doesn't need fertilization or pesticides. That is why it is considered to be a true organic cereal...
www.formaggiokitchen.com

Parla Food
Mulino Marino and the August Grain Harvest
The grape harvest in Piedmont is nearly upon us and, while nebbiolo, freisa, barbera, arneis, and other native varieties are plucked from the vines, another lesser known harvest is also commencing. In the Alta Langa region of Piedmont, the ancient enkir grain variety is being cultivated in a collaborative effort between Mulino Marino and farmer Massimiliano Romano. In order to maximize aromas and complexities, explains Fulvio Marino, they harvest their enkir quite late.
www.parlafood.com

Travel & Leisure
Italy's Best Pizza Town (from January 2012)
...
His dough embraces such esoteric flours as Kamut and enkir, from the organic Piedmontese mill Mulino Marino.
www.travelandleisure.com.

Applicant has explained that many of these websites, such as the ones set forth above, are referring to applicant's own grain. However, as the term is used on the websites, readers would understand ENKIR to be a type of grain, rather than viewing it as a trademark for applicant's grain.

Moreover, there are several websites where there is no indication whatsoever that ENKIR originates with or is a trademark of applicant's:

JUSTREC healthy living
Gluten-Free Diet, April 8, 2012
What foods contain gluten?
Gluten is found in the grain of wheat, rye, barley and triticale. This includes items made from these grains e.g. rye, bulgur, couscous, enkir flour (*Triticum monococcum*), wheat (*Triticum durum*), emmer wheat (*Triticum dicoccum*), flour (starch) ...
Justrec healthy living, www.justrec.com

PetitChef (blog)
My dear friend Angelica who lives permanently in Turin with her wonderful husband brought me this original kind of pasta (tjarin) made with this strange kind of flour (enkir) and suggested that I should make this great sauce... Enkir is a cereal domesticated in the Near East 10-12000 years ago. It is considered the father of cereals and still grown spontaneously nowadays in some regions... Enkir flour has a natural yellow colour.
<http://en.petitchef.com>.⁵

Another example is the website for Pasta Romanelli, www.pastaromanelli.com, in which, under the title "Pasta Flours,"⁶ is a list of various flours, including Durum Wheat Semolina, Organic Wholewheat Spelt Dococcum, Organic

⁵ Applicant notes that Turin, where the writer's friend lives, is in the region where applicant is located, and assumes that the writer bought the noodles from one of applicant's customers. Clearly this is speculation, but even if the pasta were made of applicant's product, the writer has treated enkir as a type of grain, rather than as a trademark.

⁶ At the end of the list is the statement, "Romanelli is the only Italian pasta maker that uses 11 types of different or combined flours."

Buckwheat Flour, Wholewheat Rye Flour, and Enkir Flour. Each listing is followed by a description, e.g., for Organic Buckwheat Flour it states, "The Buckwheat have high protein content and contains rutin, beneficial to preserve the elasticity of the tissues of blood vessels. *Gluten Free.*" Wholewheat Rye Flour is described, "The Rye flour is rich in protein, iron, phosphorus and vitamin B. Helps to maintain the regular bowel." For Enkir Flour, the description is, "The Enkir is considered the father of cereals. High protein content and high amounts of carotenoids, which are important in cellular function and are effective antioxidants." In other words, the term ENKIR is used in the same way as other terms that identify a type of grain.

Another website treats ENKIR as merely an alternative term for the generic term einkorn:

The Fresh Loaf
News & Information for Amateur Bakers and Artisan
Bread Enthusiasts
Micca di enkir e buratto
...
Searching on TFL yielded Giovanni's amazing post
about this visit to Mulino Marino [applicant],
and finding einkorn (enkir) flour there.
www.thefreshloaf.com

We note that some of the internet evidence appears to originate from foreign countries. We are also aware that foreign website evidence has been given various degrees of

probative value, depending on the circumstances. See TBMP § 1208.03 and cases cited therein at note 4. In this case, we give the articles probative value. First, because the flour in question is said to be not as problematic to sufferers of celiac disease (see Wikipedia "Einkorn" article), people with this health problem looking for products that are compatible with their health issues are likely to encounter websites, including foreign websites, featuring this product. Second, because the grain is touted as being truly organic (see Formaggio Kitchen website, www.formaggiokitchen.com), consumers looking for organic products may also encounter the foreign websites. Finally, the evidence shows that consumers in the United States do, in fact, read these foreign websites, and particularly the cooking blogs. For example, the Pizza Making website, www.pizzamaking.com, has postings from users located in Massachusetts, Maryland, Pennsylvania and New York. In any event, there is also evidence from websites that originate or are directed to consumers in the United States in which ENKIR is used to identify a type of flour. For example, the Travel & Leisure website and the Formaggio Kitchen website, in which the prices for products are shown in dollars.

We recognize that there are some uses of ENKIR that are ambiguous, because of the use of quotation marks or initial capital letters. For example, on the forum of Pizza Making, www.pizzamaking.com, under the topic "Pizzarium," one post uses initial capital letters, i.e.:

The Enkir flour is a much higher protein, but euro flour protein is not the same as North American varieties. The Type 0 refers to the fineness of the grind. I believe that there was a post earlier in the thread about Bonci using a percentage of the Enkir flour in a new recipe he is trying out.
Post No. 601.

However, the following posts use ENKIR without capitalization and in the same manner as other names of grains:

The fifth is made with a mix of type 0 flour, spelt flour and enkir flour,
Post No. 964

My preference so far is for the mix of type 0 flour, spelt and enkir.
Post No. 970

Been at Pizzarium today... They now sell a type of flour called "Pan di sempre" that is a mix of spelt, enkir and wheat and the guy at the cashier told a lady that it's what they use for pizza.
Post No. 973

I found some technical information pertaining to Mulino Marino (MM) flour. ... It appears the average protein content of the Pan di Sempre blended flour is 13.5%. The MM enkir flour has a protein content of 20%, I couldn't find any info about their faro spelt flour. In any case, they must be blending these varieties into lower protein flours in smaller amounts to maintain

13.5% or the pure enkir flour is not sifted and they bolt it into finer particles for the Pan di Sempre.

Post No. 978.

We note that in the last two posts the writers have capitalized Pan di Sempre, thus indicating that they are aware that a trademark is capitalized.

In Biological Cuisine, under the title "Enkir Flat Bread," is the statement, "Enkir is a type of small spelt that belongs to a species that first appeared in the Middle East approximately 12000 years ago." Later in the article it gives a recipe with the phrase "2 cups of Enkir flour," and the directions, "If the dough is too sticky to knead, add more Enkir flour." Although the initial capital for "Enkir" used in the recipe could suggest that Enkir is a trademark, many of those who read the first sentence of the article would understand that enkir is the name of a type of smelt or grain.

We acknowledge that some of applicant's evidence indicates that ENKIR is used as a trademark, specifically the photos of labels for pasta or flour products that are apparently sold in Italy, as these labels are all in Italian. In the response filed December 9, 2012, at TDR p. 27, is a photo of a package of what appear to be cereal cakes, with ENKIR shown in large letters, with the R

registration symbol next to it, the name of the goods is listed as "Galette Di Enkir" with the registration symbol next to "Enkir," and the Ingredient list identifies "Monococco Enkir® integrale Bio." At TDR p. 28 is a package of Atentitca Farina Macinata Petra Naturale, with the word ENKIR and below that, in parentheses, t.monococcum. At TDR p. 29 is a package of noodles with the name "Tajarin di "Enkir,"" listing as the ingredient "Sfarinato tipo 2 di T. Monococcum (frumento) 79% da agricoltura biologica coltivato in Alta Langa macinato a pietra uova da allevamento biologico 21%."

Despite these trademark uses of ENKIR, the evidence shows that applicant and others have used ENKIR to identify a type of grain, and that many writers and consumers treat ENKIR as indicating a type of grain, rather than the source for the grain. Therefore, when consumers see ENKIR used in connection with the food and beverage items identified in applicant's application, the term will directly and immediately convey to them that the goods contain or are made from this grain. In view thereof, we find ENKIR to be merely descriptive of the identified goods.⁷

⁷ We add that we have not based our decision on the fact that applicant has identified its goods as containing enkir, i.e. "all containing Triticum Monococcum or Einkorn, also known as Enkir," and thus indicating that enkir is the name for the grain, in the same way that triticum monococcum or einkorn is the name. We

Decision: The refusal of registration is affirmed.

realize that applicant amended its identification in response to the examining attorney's refusal of registration on the ground of deceptiveness under Section 2(a). The examining attorney stated that "if the goods do contain enkir, applicant must amend the identification of goods to state this fact, and the refusal will be withdrawn." The examining attorney further stated that "applicant may adopt the following identification of goods by adding at the end of the goods statement in Classes 30 and 32, the working "all containing enkir." Office action mailed December 12, 2012. Because the amendment was done as a result of the examining attorney's suggestion/requirement, we do not regard the amendment as a concession by applicant that "enkir" is the generic name of the grain.