

THIS OPINION IS NOT A
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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Martin

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Serial No. 85501340

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Joan Optican Herman of Hovey Williams LLP for Anthony R. Martin.

Keri-Marie Cantone, Trademark Examining Attorney, Law Office 104 (Chris Doninger, Managing Attorney).

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Before Bergsman, Wellington and Hightower, Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Anthony R. Martin (“applicant”), a citizen of Belgium, filed a use-based application on the Supplemental Register for the mark BOURGOGNE DES FLANDRES, in standard character form, for “beers,” in Class 32. According to applicant, “the English translation of BOURGOGNE DES FLANDRES in the mark is BURGUNDY OF FLANDERS.” Applicant claimed first use of the mark anywhere in 1911 and first use in commerce at least as early as September 2010. The specimen showing the use of the mark is displayed below.



The Trademark Examining Attorney refused to register applicant's mark on the ground that it is generic and thus incapable of identifying applicant's goods. Section 23 of the Trademark Act of 1946, 15 U.S.C. § 1091. The essence of the refusal is that "Burgundy of Flanders" refers to a type of beer that is a "typical and common beer in West Flanders."¹

When a proposed mark is refused registration as generic, the Trademark Examining Attorney has the burden of proving genericness by "clear evidence" thereof. *See In re Hotels.com*, 573 F.3d 1300, 91 USPQ2d 1532, 1533 (Fed. Cir. 2009); *In re Gould Paper Corp.*, 834 F.2d 1017, 5 USPQ2d 1110, 1111 (Fed. Cir.

¹ Trademark Examining Attorney's Brief, p. 3 (unnumbered).

1987); *In re Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987).

The issue before us is to determine whether the record shows that members of the relevant public primarily use or understand the term sought to be registered to refer to the category or class of goods in question. *H. Marvin Ginn Corp. v. International Ass'n of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986); *In re Women's Publishing Co. Inc.*, 23 USPQ2d 1876, 1877 (TTAB 1992). Making this determination “involves a two-step inquiry: First, what is the genus of goods or services at issue? Second, is the term sought to be registered ... understood by the relevant public primarily to refer to that genus of goods or services?” *Ginn*, 228 USPQ at 530. Evidence of the public's understanding of a term may be obtained from any competent source, including testimony, surveys, dictionaries, trade journals, newspapers and other publications. *See Merrill Lynch*, 4 USPQ2d at 1143; *In re Northland Aluminum Products, Inc.*, 777 F.2d 1556, 227 USPQ 961, 963 (Fed. Cir. 1985).

We begin by finding that the genus of the goods at issue in this case is beer. *Magic Wand Inc. v. RDB Inc.*, 940 F.2d 638, 19 USPQ2d 1551, 1552 (Fed. Cir. 1991) (“[A] proper genericness inquiry focuses on the description of [goods or] services set forth in the [application or] certificate of registration.”).

Turning to the second inquiry, how the public understands the term BOURGOGNE DES FLANDRES, the relevant public consists of ordinary consumers who drink beer.

In starting our analysis, we note that the foreign equivalent of a generic English term is no more registrable than the English term itself. “[A] word taken from a well-known foreign modern language, which is, itself, descriptive of a product, will be so considered when it is attempted to be registered as a trade-mark in the United States for the same product.” *In re N. Paper Mills*, 64 F.2d 998, 1002, 17 USPQ 492, 493 (CCPA 1933). *See also Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 1377, 73 USPQ2d 1689, 1696 (Fed. Cir. 2005) (“Under the doctrine of foreign equivalents, foreign words from common languages are translated into English to determine genericness, descriptiveness, as well as similarity of the connotation in order to ascertain confusing similarity with English word marks.”); *Weiss Noodle Company v. Golden Cracknel and Specialty Company*, 290 F.2d 845, 129 USPQ 411, 413 (CCPA 1961) (“Ha-Lush-Ka” is the Hungarian name of noodle products and, as such, it falls within the statutory prohibition of section 2(e) which proscribes registration of merely descriptive words; the name of a thing is the ultimate in descriptiveness; it is immaterial that name is in a foreign language); *In re Oriental Daily News, Inc.*, 230 USPQ 637, 638 (TTAB 1986) (“The foreign equivalent of a merely descriptive or generic English word is no more registrable than the English-language term.”).

In applying the above-noted doctrine of foreign equivalents, we find that the ordinary American purchaser who is knowledgeable in French would translate the term “Bourgogne Des Flandres” into English. *See In re Spirits Int’l, N.V.*, 563 F.3d 1347, 1352, 90 USPQ2d 1489, 1492 (Fed. Cir. 2009) (the “ordinary American

purchaser” includes “all American purchasers, including those proficient in a non-English language who would ordinarily be expected to translate words into English”); *In re Thomas*, 79 USPQ2d 1021, 1024 (TTAB 2006) (“The ‘ordinary American purchaser’ in this context refers to the ordinary American purchaser who is knowledgeable in the foreign language....[defining “ordinary American purchaser” as the “average American buyer”] would write the doctrine out of existence.”). *Compare Palm Bay Imps., Inc.*, 73 USPQ2d at 1696 (“When it is unlikely that an American buyer will translate the foreign mark and will take it as it is, then the doctrine of foreign equivalents will not be applied.”).

The evidence in the application does not support finding that the relevant public, when it considers BOURGOGNE DES FLANDRES used in conjunction with “beers,” readily understands the term to identify a type or style of beer. The following evidence has been made of record in the April 5, 2012 and November 12, 2012 Office actions:

1. Excerpt from the Global Beer Network website (globalbeer.com)

describing Petrus Oud Bruin Ale.² The excerpt provided the following information:

Dark ruby red, as red wine. The style is also called the Burgundy of Flanders, and is a very typical and common beer in West Flanders. A sour-sweet balance is discovered, set off by the underlying bitterness of the hops. Light in alcohol, the alcohol does not hide or

² The Trademark Examining Attorney, in her November 20, 2012 Office action, submitted a second excerpt from this globalbeer.com website, with similar language describing the Petrus Ale beer. Also, in the November 20, 2012 Office action, the Trademark Examining Attorney submitted excerpts posted on the BeerMenus.com, the WineAndCheesePlace.com, 1000Corks.com and ArtisanWineDepot.com websites, with very similar language to describe Petrus Oud Bruin Ale as a “Burgundy of Flanders.” However, the ArtisanWineDepot.com website also identified Petrus Oud Bruin as a brown ale.

overpower the exciting flavors and tastes in this unique beer. Although cold serving is recommended, taking your time to drink it will release more aromas and exciting wooden flavors towards the end of your glass.

2. Excerpt from the BelgianShop website (belgianshop.com) describing BIOS beers.³ The excerpt provided the following information:

Dark ruby red, as red wine. The style is also called the Burgundy of Flanders, and is a very typical and common beer in West Flanders. A sour-sweet balance is discovered, set off by the underlying bitterness of the hops. Light in alcohol, the alcohol does not hide or overpower the exciting flavors and tastes in this unique beer. Although cold serving is recommended, taking your time to drink it will release more aromas and exciting wooden flavors towards the end of your glass.⁴

3. An excerpt from Monterosso on Beer posted on the “WhatzOnTap.tripod.com” website. In writing about the Petrus Old Brown Ale (see No. 1 above), the author writes that the ale “[e]volved from a style referred to as ‘Burgundy of Flanders.’”

4. In an article by Michael Jackson, “Belgians invade France: It’s another beer war altogether,” posted on the BeerHunter.com website, the author writes the following:

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Belgium was once part of Burgundy, and honours that memory. In Belgium, to call someone “a Burgundian” is

³ In the November 20, 2012 Office action, the Trademark Examining Attorney submitted an excerpt from the RateBeer.com website featuring BIOS Old Brown beer that stated that “this beer was the first to be called the Burgundy of Flanders.” However, when this website identified the style of beer, it specifically identified BIOS as a “Sour Ale/Wild Ale” style.

⁴ We note that the description of the BIOS beer is identical to the description of the Petrus Oud Bruin Ale.

an admiring term. When the Flemings and Walloons talk of their most robust beers, they call them: “The Burgundies of Belgium”. These beers are not just high in alcohol, they are also very complex in aroma and flavor, like the wines of Burgundy.

5. An excerpt from the RareBeerClub.com website reviewing Rodenbach Grand Cru written by Michael Jackson (See No. 4 above). The author writes the following:

People from elsewhere in the world are often quite surprised when they see terms like Grand reserve, or Grand Cru, on labels of beer from Belgium. Belgians themselves often refer to a whole range of beers as “the Burgundies of Belgium.”

As noted below, the article notes that competitors of the Rodenbach brewery include Petrus Oud Bruin and Bourgogne des Flandres.

The Rodenbach beers have a distinct passion-fruit character. Rivals include the more chocolatey Petrus Oud Bruin; the tart Bellegems Bruin; the smoother Bourgogne des Flandres; the slightly lactic Bios Vlaamse Bourgogne; the fruity Victhenaar; and the rich Buchesse de Bourgogne.

As noted above, in making the determination of how the public understands the term BOURGOGNE DES FLANDRES when used in connection with “beers,” the evidentiary burden of establishing that a term is generic rests with the USPTO and the showing must be based on clear evidence. *Merrill Lynch*, 4 USPQ2d at 1143. In assessing the evidence, we note the following:

1. The two beers that are identified by the term “Burgundy of Flanders,” Petrus Oud Bruin Ale and BIOS, use the exact same language to describe themselves. This leads us to conclude that the two beers must be somehow related

or associated with each other; that means only one brewer or distributor, not two, refers to BOURGOGNE DES FLANDRES as a type of beer. It is also possible that the distributor of one of the beers or the webmaster for one of the websites is copying the advertising of its competitor. If that is the case, then it is unlikely that the copier believes that “Burgundy of Flanders” is a style of beer.

2. There is one beer reviewer who references the term “Burgundy of Flanders.”

3. There is one reviewer who references the term “Burgundy of Belgium” and who also references BOURGOGNE DES FLANDRES brand beer.

Although the websites advertising the sale of beer referenced BOURGOGNE DES FLANDRES or “Burgundy of Flanders” as a style of beer in advertising text, none of the websites advertising the sale of beer advertised or promoted a “Bourgogne Des Flandres” or “Burgundy of Flanders” style of beer. The Global Beer Network website (globalbeer.com) noted above, listed the following “Beer Styles”:

1. Abbey Ales
2. Amber Ales
3. Bokbier
4. Lambic
5. Pilsner
6. Red & Brown Ales
7. Saison Ales
8. Special Ales
9. Stout
10. Triple Ales
11. Wit

The BelgianShop.com website identified the BIOS beer, along with BOURGOGNE DES FLANDRES, as “Flanders Red.”

The BelgianBeerBoard.com website identified BOURGOGNE DES FLANDRES brand beer as a Belgian beer. It is also referred to as a “Flemish sour ale.”

We acknowledge that a product may be identified by more than one generic term and that the absence of the term BOURGOGNE DES FLANDRES or “Burgundy of Flanders” from a list of categories of beers does not, in and of itself, mean that BOURGOGNE DES FLANDRES may not be a generic term. However, where the record presented to us consists of only two brands [which may be related] and two reviewers that identify BOURGOGNE DES FLANDRES as a type of beer, we find that this evidentiary record falls short of proving that the term BOURGOGNE DES FLANDRES is a generic term for beer or, more precisely under the language of Section 23, that it is not “capable of distinguishing the applicant’s goods or services.” 15 U.S.C. §1091(c).

Decision: The refusal to register is reversed.