

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Mailed:  
April 15, 2014

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re N2Wines LLC*

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Serial No. 85680969

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Barry Strike of Strike & Techel for N2Wines LLC.

Robert Clark, Trademark Examining Attorney, Law Office 101 (Ronald R. Sussman, Managing Attorney).

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Before Taylor, Wellington, and Gorowitz, Administrative Trademark Judges.

Opinion by Gorowitz, Administrative Trademark Judge:

N2Wines LLC (applicant) filed an application to register the mark N2WINES in standard character format for “wine sold in kegs” in Class 33.<sup>1</sup> Registration was refused pursuant to Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1), on the ground that applicant’s mark is merely descriptive. The examining attorney

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<sup>1</sup> Application Serial No. 85680969 filed July 18, 2012, pursuant to Section 1(a) of the Trademark Act, based on use in commerce, alleging first use anywhere and first use in commerce at least as early as January 1, 2011.

issued a final refusal of registration, to which applicant requested reconsideration. This appeal follows the denial of the request.

A term is deemed to be merely descriptive of goods or services, within the meaning of Section 2(e)(1) of the Trademark Act, if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services. *DuoProSS Meditech Corp. v. Inviro Medical Devices Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1755 (Fed. Cir. 2012); *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012); *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; that a term may have other meanings in different contexts is not controlling. *The Chamber of Commerce of the U.S.*, *supra*, citing *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 963-64, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007); *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979).

A mark is suggestive if, when the goods or services are encountered under the mark, a multistage reasoning process, or the utilization of imagination, thought or perception, is required in order to determine what attributes of the goods or services the mark indicates. *See, e.g., In re Abcor*, 200 USPQ at 218 and *In re Mayer-Beaton Corp.*, 223 USPQ 1347, 1349 (TTAB 1984).

Applicant's goods consist of wine that is sold in kegs. Since "wine" is the generic term for these goods, we first need to determine whether the term "N<sub>2</sub>," which is the symbol for nitrogen,<sup>2</sup> is descriptive of a feature of applicant's goods.

The examining attorney submitted evidence to establish that nitrogen is an inert gas used in connection with wine tapping systems. The evidence includes a page from applicant's website entitled "Rethink Your Wine Bottle Habit," which states:

N<sub>2</sub>wine or 'wine on tap' is a simple and practical way of dispensing wine from a faucet in a restaurant or wine bar, rather than pouring from a bottle. N<sub>2</sub>wine is packaged in bulk format, usually in reusable stainless steel barrels and is an efficient way to serve wine by the glass or carafe in a high volume food service setting. In addition to the time and cost efficiencies of buying and serving wine in bulk format, N<sub>2</sub>wine is never exposed to air, and therefore will not oxidize or deteriorate in flavor the way that wines poured from a bottle are prone to do.

N<sub>2</sub>wine is pushed through a tap system similar to draft beer, by an inert nitrogen (N<sub>2</sub>) based gas blend. This practical method for serving wine is considered by many to be the best way to serve wine-by-the-glass in restaurants [sic] and wine bars.

Wines packaged in stainless steel barrels and dispensed by inert gas pressure have many advantages over traditional bottled wines.

- Fresh wine from the time the barrel is tapped to the very last glass served – inert gas protects the wine in the barrel from oxidation and spoilages.

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<sup>2</sup> Applicant and the examining attorney agree that N<sub>2</sub> is the symbol for "nitrogen." Appeal Brief, p. 7, 12 TTABVue, 8 and Examining Attorney's Brief, p. 4, 14 TTABVue, 5.

- By eliminating the costs of glass, labels, corks and spoilage, savings can be significant for the restaurant operator, as well as the clientele [*sic*].
- The barrels are reusable and help reduce environmental impact.

www.n2wines.com. Office action dated February 28, 2013. The examining attorney also submitted internet articles and advertisements which refer to other wine tapping systems that use nitrogen to preserve and dispense wine. The following are excerpts from the articles and advertisements that relate to the use of nitrogen:<sup>3</sup>

- By far and away the best way to preserve wine ... is a commercial style nitrogen wine tap system ... Disposable nitrogen systems to put your wine on tap are wonderful www.wineeducation.com – Office action dated November 9, 2012.
- Wineplease is a device for dispensing wine by the glass. It uses a nitrogen system for saving the organoleptic properties of both red and white wines for up to 4 weeks. www.wine-please.com - Denial of Request for Reconsideration dated August 30, 2013.
- A wine keg will use nitrogen gas to dispense wine. Tanks of nitrogen gas can be found at any store that sells compressed gas. www.winemaking.com - Denial of Request for Reconsideration dated August 30, 2013.
- NitroTap Single Bottle Wine Service & Preservation System - Instant wine service! Keep your favorite bottle on tap at all times, sealed fresh by the inert nitrogen gas system.

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<sup>3</sup> The examining attorney also submitted an article from WineWisdom entitled “Wines by the glass –keeping them fresh,” which first appeared in Drinks Magazine in 2008. The prices indicated in this article are in British pounds. There is no evidence that the article is geared towards customers in the United States. Moreover, the only reference to “nitrogen” is a quote by Peter Godden, group manager of the Australian Wine Research Institute, who recommends evacuating the air and replacing it with pure nitrogen to slow down oxidation.

www.wineenthusiast.com - Denial of Request for  
Reconsideration dated August 30, 2013.

Based on the above-mentioned evidence, it is obvious that nitrogen has some significance with respect to wine sold in kegs since nitrogen gas may be used for tapping and preserving wine. However, applicant's mark does not include the word "nitrogen." While applicant and the examining attorney are seemingly in agreement that N<sub>2</sub> is a recognized symbol for nitrogen (see footnote 2), we further consider the possibility that this symbol takes on a different meaning and will be perceived by consumers in a manner that is not descriptive of the goods. In this regard, we find that the record supports applicant's assertion that "N<sub>2</sub> when used in N<sub>2</sub>WINES is a double entendre meaning 'into wines'." Appeal Brief, p. 10, 12 TTABVue, 11.

"A 'double entendre' is a word or expression capable of more than one interpretation. For trademark purposes, a 'double entendre' is an expression that has a double connotation or significance *as applied to the goods or services*. The mark that comprises the 'double entendre' will not be refused registration as merely descriptive if one of its meanings is not merely descriptive in relation to the goods or services." TMEP § 1213.05(c) (Oct. 2013). Examples of marks that the Court of Appeals for the Federal Circuit, our primary reviewing court, its predecessor, the Court of Customs and Patent Appeals, and the Board have found to be registrable double entendres are: **SUGAR AND SPICE** for bakery products (*In re Colonial Stores Incorporated*, 394 F.2d 549, 157 USPQ 382 (CCPA 1968)); **SHEER ELEGANCE** for pantyhose (*In re Symbra'ette*, 189 USPQ 448 (TTAB 1975));

**SHEER PERFECTION** for makeup for legs (*In re Conti*, 220 USPQ 745, 746 (TTAB 1983)); **FAST'N EASY** for pre-cooked meats (*In re Geo. A. Hormel & Co.*, 218 USPQ 286 (TTAB 1983)); and **HAY DOLLY**-for self-loading trailers for hauling bales (*In re Priefert Mfg. Co.*, 222 USPQ 731 (TTAB 1984)).

Applicant has submitted evidence of both use of domain names and marks, and registrations of marks in which the term N2 means “into,” examples of which include:

- **Dance N2 Shape** – offers the “best dance-based fitness for women – [www.dancen2shape.com](http://www.dancen2shape.com);
- **N2 Pottery** – “are you N2it? – pottery classes – [www.n2pottery.com](http://www.n2pottery.com);
- **N2 The Blue Diving Adventures** - scuba diving tours of St. Croix - [www.n2theblue.com](http://www.n2theblue.com); and
- **N2 Learning** – craft processes that map the transformation of organizations to future-focused learning communities operating at their most creative and productive best - [www.n2learning.org](http://www.n2learning.org)’
- **N2 Eyes** – N2 Eyes Comprehensive Optometry – [www.n2eyes.com](http://www.n2eyes.com);
- **N2 Graphics** – “N2 Graphics is INTO Graphics” – [www.n2graphics-pasadena.com](http://www.n2graphics-pasadena.com); and
- **N2sleep** – “The trusted resource for everything sleep.” – [www.n2sleep.com](http://www.n2sleep.com);

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- Reg. No. 4204981 for the mark **N2IT** for, inter alia, containers manufacture and distribution of containers;
- Reg. No. 4134885 for the mark **N2WIN** for watches; necklaces; jewelry; and

- Reg. No. 4030879 for the mark **N2TOUCH** for massage therapy services.

Request for Reconsideration dated August 27, 2013.

“Into” is defined as “involved with or interested in <into hard drugs> <into Latin epigrammatists>.”<sup>4</sup> As such, N2WINES is a double entendre meaning “into wines.” The unitary phrase “into wines” implies that consumers of applicant’s goods are interested in wine. It does not immediately convey an idea of any ingredient, quality, characteristic, feature, function, purpose or use of the goods, and thus is not merely descriptive of applicant’s goods. Accordingly, we find that the unitary phrase, N2WINES, creates a double entendre and thus is not merely descriptive, as defined by Section 2(e)(1) of the Trademark Act.

*Decision:* The refusal to register is reversed.

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<sup>4</sup> We take judicial notice of the definition of “into” from Merriam-Webster Online Dictionary, [www.merriam-webster.com/dictionary/into](http://www.merriam-webster.com/dictionary/into); © 2014 Merriam-Webster, Incorporated.

The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or have regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).