

This Opinion is Not a  
Precedent of the TTAB

Mailed: January 6, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Whole Foods Market IP, L.P.*  
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Serial No. 85820807  
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Christopher L. Graff of Pirkey Barber PLLC,  
for Whole Foods Market IP, L.P.

Jessica Ellinger Fathy, Trademark Examining Attorney, Law Office 110,  
Chris A. F. Pedersen, Managing Attorney.

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Before Bucher, Mermelstein and Shaw,  
Administrative Trademark Judges.

Opinion by Shaw, Administrative Trademark Judge:

Whole Foods Market IP, L.P. (“Applicant”) seeks registration on the Principal  
Register of the mark COLLECTIVE CHEESE (in standard characters) for

Cheeses; dips and cheese spreads; confit in the nature of a  
cooked fruit, meat, seafood, fish, poultry, or vegetable  
based spread; dairy-based spreads; fruit spreads; fruit-  
based spreads; garlic-based spread; hazelnut spread;  
meat-based spreads; nut-based spread; peanut spread;  
sandwich spread, namely, salty, sweet, vegetarian, fruit,  
vegetable, meat, fish, herbal, spiced; vegetable-based  
spreads; jellies and jams; butter; yogurts; edible oils and  
fats, preserves and pickles; dairy products excluding ice

cream, ice milk and frozen yogurt, in International Class 29.<sup>1</sup>

The Trademark Examining Attorney has refused registration of Applicant's mark under 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 of the goods.<sup>2</sup> The Examining Attorney also issued a requirement to clarify the identification of goods on the ground that the goods, as recited, are indefinite and may encompass goods in more than one class contrary to statutory requirements and the rules governing examining of applications. 15 U.S.C. §§ 1051(a)(2) and 1051(b)(2); 37 C.F.R. § 2.32(a)(6).

After the refusal was made final, Applicant appealed. The case is fully briefed. For the reasons discussed below, we affirm the refusal to register and affirm the requirement for a more definite identification of goods.

### Mere Descriptiveness

#### I. Applicable Law

"A term is merely descriptive if it immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used." *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed.

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<sup>1</sup> Application Serial No. 85820807 was filed on January 11, 2013, based upon Applicant's allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act.

<sup>2</sup> The Examining Attorney initially refused registration under Section 2(d), 15 U.S.C. § 1052(d), citing Registration No. 4263101 for the mark THE COLLECTIVE GREAT DAIRY with a cow's head design for "Dairy products, namely, milk, cheese, yogurt, crème fraîche," in International Class 29. Registrant disclaimed "COLLECTIVE GREAT DAIRY." The Examining Attorney withdrew the Section 2(d) refusal in her November 18, 2013 Office Action which also made final the Section 2(e)(1) refusal.

Cir. 2012) (quoting *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)); *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1009-10 (Fed. Cir. 1987). Whether a particular term is merely descriptive is determined in relation to the goods for which registration is sought and the context in which the term is used, not in the abstract or on the basis of guesswork. *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978); *In re Remacle*, 66 USPQ2d 1222, 1224 (TTAB 2002). In other words, the question is whether someone who knows what the goods are will understand the mark to convey information about them. *DuoProSS Meditech Corp. v. Inviro Medical Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012); *In re Tower Tech, Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002); *In re Patent & Trademark Servs. Inc.*, 49 USPQ2d 1537, 1539 (TTAB 1998). “On the other hand, if one must exercise mature thought or follow a multi-stage reasoning process in order to determine what product or service characteristics the term indicates, the term is suggestive rather than merely descriptive.” *Coach Servs. Inc. v. Triumph Learning LLC*, 96 USPQ2d 1600, 1616 (TTAB 2010) (quoting *In re Tennis in the Round, Inc.*, 199 USPQ 496, 497 (TTAB 1978)), *vacated-in-part on other grounds*, 668 F.3d 1356, 101 USPQ2d 1713 (Fed. Cir. 2012).

## II. Evidence and Arguments

The Trademark Examining Attorney placed into the record the following dictionary definitions and excerpts from third-party websites showing use of the term “collective” in connection with dairy farms.

- A dictionary definition of “collective” from the *Merriam-Webster Online Dictionary* ([merriam-webster.com](http://merriam-webster.com)):<sup>3</sup>

**collective** *adjective*

- 1 : denoting a number of persons or things considered as one group or whole <*flock* is a *collective* word>
- 2 **a** : formed by collecting : AGGREGATED  
**b** of a fruit : MULTIPLE
- 3 **a** : of, relating to, or being a group of individuals  
**b** : involving all members of a group as distinct from its individuals <a *collective* action>
- 4 : marked by similarity among or with the members of a group
- 5 : collectivized or characterized by collectivism
- 6 : shared or assumed by all members of the group <*collective* responsibility>

**collective** *noun*

- 1 : a collective body : GROUP
  - 2 : a cooperative unit or organization; *specifically* : COLLECTIVE FARM
  - 3 : a helicopter control system governing lift
- A dictionary definition of “collective” as “a farm or business owned by the government and run by a group of workers.” *Macmillan Dictionary* ([macmillandictionary.com](http://macmillandictionary.com)).<sup>4</sup>
  - An online dictionary definition of “collective” as “[o]f, relating to, characteristic of, or made by a number of people acting as a group” and “[a]n undertaking, such as a business operation, set up on the principles or systems of collectivism.” *Yahoo! Education* ([education.yahoo.com](http://education.yahoo.com)).<sup>5</sup>
  - A dictionary definition of “collective farm” as “a farm operated collectively.” *Datasegment.com Online Dictionary* ([onlinedictionary.datasegement.com](http://onlinedictionary.datasegement.com)).<sup>6</sup>
  - A November 2, 2010 article on cheesemaking from [seriouseats.com](http://seriouseats.com) titled *The Future of American Cheesemaking Is in Vermont* and stating in part,

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<sup>3</sup> Examining Attorney’s Office Action of November 18, 2013, pp. 4-6.

<sup>4</sup> Examining Attorney’s Office Action of May 1, 2013, p. 5.

<sup>5</sup> Examining Attorney’s Office Action of November 18, 2013, pp. 2-3.

<sup>6</sup> Examining Attorney’s Office Action of May 1, 2013, pp. 6-7.

“[T]he Kehlers’ best known cheese, Cabot Clothbound Cheddar, doesn’t even bear their name. It was the result of a collaboration with the **Cabot dairy collective**, whose products are nearly ubiquitous in finer retailers.”<sup>7</sup>

- An October 25, 2007 article from [newsreview.com](http://newsreview.com) titled *Climate Counts* discussing an environmental consumer-advocacy group called ClimateCounts.com. The group states it is sponsored by Stonyfield Farm which is described as an **organic dairy collective**.<sup>8</sup>
- A National Park Service online article at [www.nps.gov](http://www.nps.gov) about the Point Reyes National Seashore discussing the history of the Shafter **dairy collective** which marketed butter and cheese products to the San Francisco market during the 19<sup>th</sup> century.<sup>9</sup>
- An article from [greendiningalliance.org](http://greendiningalliance.org) titled *Prairie farms: A friendly locally-sourced collective* describing the operations of a “local **dairy collective**, Prairie Farms.” The article claims that “Milk from healthy, comfy cows tastes better, too, which is why the farmers in the **collective** are guided by [National Dairy Farm Program] F.A.R.M. standards for animal welfare and receive regular audits and check-ups.”<sup>10</sup>

Applicant placed into the record the following dictionary definitions and excerpts from third-party websites showing use of the term “collective” in connection with a variety of goods and services. Applicant also included excerpts from several websites to rebut the Examining Attorney’s showing that Stonyfield Farm and Cabot are collectives, rather than cooperatives.

- The dictionary definition of “collective” from the *Merriam-Webster Online Dictionary*, described above.<sup>11</sup>
- A dictionary definition from the *Oxford Dictionaries* (US English 2013) defining “collective” as:<sup>12</sup>

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<sup>7</sup> *Id.* at 10.

<sup>8</sup> *Id.* at 11.

<sup>9</sup> *Id.* at 14.

<sup>10</sup> Examining Attorney’s Office Action of November 18, 2013, pp. 9-10.

<sup>11</sup> Applicant’s correspondence of October 23, 2013, pp. 46-47.

<sup>12</sup> *Id.* at 42.

*adjective*

done by people acting as a group:

*a collective protest*

- Belonging or relating to all the members of a group:

*ministers who share collective responsibility*

*a collective sigh of relief from parents*

- Taken as a whole; aggregate:

*the collective power of the workforce*

*noun*

a cooperative enterprise.

- a collective farm.
- An Internet webpage from a retail cheese store called “The Cheese Board Collective” in Berkeley, California. The webpage notes that the store is a “100% worker owned business.” ([cheeseboardcollective.coop](http://cheeseboardcollective.coop)).<sup>13</sup>
- An Internet webpage from the “Richmond Food Collective” offering “humane meat and dairy products” from “local meat, egg, and dairy farms.” ([richmondfoodcollective.blogspot.com](http://richmondfoodcollective.blogspot.com)).<sup>14</sup>
- An Internet webpage from “The Full Plate Farm Collective” offering a “Finger Lakes Dairy Share” consisting of “11 deliveries of delicious dairy products throughout the June-November season.” The webpage lists nine New York state dairies participating in the collective and providing products such as milk, cheese, and yogurt. ([fullplatefarms.webs.com](http://fullplatefarms.webs.com)).<sup>15</sup>
- An Internet webpage from the “Curd Collective” an online store offering “cheese of the world.” ([curdcollective.com](http://curdcollective.com)).<sup>16</sup>
- An Internet webpage offering for sale the “Collective Tools” brand cheese slicer. ([google.com](http://google.com)).<sup>17</sup>
- Internet webpages from the Agri-Mark dairy farmer cooperative ([agrimark.coop](http://agrimark.coop)) reciting the history of the cooperative and the ways in which the cooperative benefits its members.<sup>18</sup>

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<sup>13</sup> *Id.* at 22.

<sup>14</sup> *Id.* at 24.

<sup>15</sup> *Id.* at 31-33.

<sup>16</sup> *Id.* at 34-36.

<sup>17</sup> *Id.* at 37.

<sup>18</sup> *Id.* at 51-54.

- Internet webpages from the Cabot dairy cooperative ([cabotcheese.coop](http://cabotcheese.coop)) touting the quality of its dairy products, including cheese.<sup>19</sup>
- Internet webpages from [stonyfield.com](http://stonyfield.com) reciting the history of Stonyfield Farm, a New Hampshire dairy cooperative and producer of yogurt.<sup>20</sup>

According to the Examining Attorney, the dictionary definitions “support[ ] the position that no significant imagination is needed to understand a feature or characteristic of the Applicant’s goods, namely, that the assorted products, including cheese, originate from a collective farm.”<sup>21</sup> Additionally, the Examining Attorney argues that the Internet evidence “demonstrates that it is common in the industry for such products to originate from farm collectives.”<sup>22</sup>

While the Examining Attorney’s evidence is somewhat limited, it nevertheless establishes that the term “collective” is defined as a type of farm that is run as “a cooperative unit or organization; *specifically* : COLLECTIVE FARM.” The Examining Attorney’s Internet evidence is consistent with these dictionary definitions and demonstrates that consumers are exposed to stories and articles describing some dairy farms or dairy-product producers which are organized as collectives. Moreover, the [greendiningalliance.org](http://greendiningalliance.org) article suggests that dairy products from locally-sourced “collective” farms may be desirable to consumers seeking organic, animal-friendly, or sustainable products. Based on this evidence, we find that consumers, upon seeing the term “collective” in COLLECTIVE CHEESE are likely

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<sup>19</sup> *Id.* at 56-57.

<sup>20</sup> *Id.* at 59-63.

<sup>21</sup> Examining Attorney’s Br. at 4.

<sup>22</sup> *Id.* at 5.

to think the cheese products come from, or are associated with, dairy farms or dairy product producers organized as collectives.

Applicant's Internet evidence supports the conclusion that consumers increasingly seek dairy products from organic or local dairy farms such as collectives. For example, the Full Plate Farm Collective website lists nine dairy farms making up the collective and providing consumers with locally made dairy products, including cheese. Similarly, the stonyfield.com website proclaims "[w]e are proud that because of our company and your support, we are able to keep hundreds of organic farmers in business, and over 100,000 acres managed with organic practices." Thus, Applicant's evidence merely confirms the popularity of organic and locally-sourced dairy products provided by farms organized into groups, including collectives. The fact that the term "collective" is used on other products such as cheese slicers or that retail stores also may be organized into collectives does not rebut the finding that "collective" is descriptive of the source of the goods when applied to cheese.

Applicant argues that COLLECTIVE CHEESE is suggestive because "collective" has multiple meanings relevant to Applicant's goods:

[T]he term "COLLECTIVE" lacks a definitive meaning when used in connection with the Applicant's goods. Rather, a consumer considering the mark COLLECTIVE CHEESE in the context of Applicant's goods will interpret the term COLLECTIVE in Applicant's Mark to present several different nondescriptive meanings. Thus, the term has a more nebulous meaning and, as such, falls short of describing Applicant's goods in any one degree of particularity.<sup>23</sup>

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<sup>23</sup> Applicant's Br. at 3.



This argument is unpersuasive. If a term has a primary significance that is descriptive in relation to at least one of the recited goods or services, and does not create any double entendre or incongruity, then the term is merely descriptive. Here, the term “collective” has been shown to refer to a type of farm or a dairy products producer which makes cheese. “Cheese” is the generic name of at least some of the identified goods. Taken together, COLLECTIVE CHEESE merely describes a cheese that has been produced by a dairy collective. The fact that “collective” may have different meanings in different contexts is not controlling. See *In re RiseSmart Inc.*, 104 USPQ2d 1931, 1933 (TTAB 2012); *In re Chopper Indus.*, 222 USPQ 258, 259 (TTAB 1984); *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979). Moreover, the fact that some dairy product producers refer to themselves as “dairy cooperatives,” rather than “dairy collectives,” does not diminish the descriptiveness of “collective” when used on cheese. The evidence of record shows that consumers have been exposed to articles about cheese and other dairy products available from “collectives.”

Applicant also argues that COLLECTIVE CHEESE does not “describe a feature or characteristic of Applicant’s goods with the degree of particularity required for a refusal on the grounds of mere descriptiveness.”<sup>24</sup> We disagree. The Internet evidence of record is sufficient to demonstrate that consumers are exposed to articles about dairy collectives and the perceived benefits of purchasing these locally-sourced dairy products. Accordingly, we find COLLECTIVE CHEESE

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<sup>24</sup> *Id.* at 6.

describes the goods with sufficient particularity so as to inform consumers of the likely source of the goods, namely a dairy collective or collective farm.

Lastly, Applicant argues that any doubt regarding the mark's descriptiveness should be resolved on the Applicant's behalf. However, in the present case, the evidence of record leaves no doubt that the mark is merely descriptive.<sup>25</sup>

#### Identification of Goods

In order to comply with statutory and regulatory requirements for filing an application, the wording of the identification must be clear and complete. 15 U.S.C. §§ 1051(a)(2) and 1051(b)(2); 37 C.F.R. § 2.32(a)(6). The USPTO has discretion to require the degree of particularity deemed necessary to identify with specificity the services covered by the mark. *See In re Omega SA*, 494 F.3d 1362, 83 USPQ2d 1541, 1544 (Fed. Cir. 2007).

Applicant first argues that the requirement for a more definite identification is a “new issue unfit for appeal” because the Examining Attorney waited until her brief to highlight the “specific phrase considered to be objectionable.”<sup>26</sup> We disagree. The Office Action of November 18, 2013 maintained and made final the requirement for an acceptable identification of goods and stated, *inter alia*, “[t]he wording ‘spreads’

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<sup>25</sup> Although not argued by the Examining Attorney, three of the five third-party registrations made of record by the parties have disclaimed the term “collective.” Registration No. 4263101 for the mark COLLECTIVE GREAT DAIRY and design for dairy products disclaimed “collective great dairy”; Registration No. 3966644 for the mark NEST COLLECTIVE for food products disclaimed “collective”; and Registration No. 4241261 for the mark FATBACK COLLECTIVE and design for food preparation services disclaimed, *inter alia*, “collective”. Our decision is consistent with the treatment of “collective” in these three registrations.

<sup>26</sup> Applicant's Reply Br. at 2.

in the identification of goods needs clarification because it is too broad and could include goods classified in other international classes.”<sup>27</sup> The fact that the same Office Action incorrectly stated that Applicant “did not address the requirement for amendments to the identification of goods”<sup>28</sup> when Applicant did amend the identification of goods, does not make the requirement a new issue on appeal.<sup>29</sup>

The Examining Attorney argues that the wording “sandwich spread, namely, salty, sweet, ... herbal, spiced” from the listing “sandwich spread, namely, salty, sweet, vegetarian, fruit, vegetable, meat, fish, herbal, spiced” in the identification of goods in International Class 29 is indefinite and must be clarified because it is too broad and could include goods in other classes.<sup>30</sup> In particular, the Examining Attorney notes that the *U.S. Acceptable Identification of Goods and Services Manual* (“ID Manual”) lists “chocolate-based spread also containing nuts,” “cocoa spreads,” and “spreads consisting primarily of emulsified biscuits or cookies” as properly classified in International Class 30.

The ID Manual lists various types of edible spreads in both International Classes 29 and 30, with classification appearing to depend primarily on the composition of the spreads. Thus, for example, cheese spreads, fruit spreads, meat-based spreads, and nut-based spreads are all classified in International Class 29. Conversely, chocolate-based and cocoa spreads are classified in International Class

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<sup>27</sup> Examining Attorney’s Office Action of November 18, 2013.

<sup>28</sup> *Id.*

<sup>29</sup> The better practice would have been for the Examining Attorney to explain which instance of “spreads” in the amended identification of goods was indefinite.

<sup>30</sup> Examining Attorney’s Br. at 8.

30. Applicant's use of the wording "salty, sweet ... herbal, [and] spiced" provides only information as to the taste of the spreads, rather than information as to the composition of the spreads. Accordingly, the wording used by Applicant is indefinite because it could describe goods in more than one international class.

Applicant nevertheless argues that the same wording was previously accepted by the same Examining Attorney in two other applications owned by the same applicant and approved for publication: Serial Nos. 85820814 and 85820798.<sup>31</sup> Although consistency is desired in the examination of trademark applications, each case must be must be decided on its own facts and the fact the same identification was previously accepted, even by the same examining attorney in a related case, does not compel the USPTO to accept an identification of goods that is indefinite. *See In re Omega SA*, 83 USPQ2d at 1544 (upholding examining attorney's requirement for a more definite identification, notwithstanding applicant's ownership of several registrations in which the term "chronographs" appeared without further qualification in the identification).

Finally, Applicant offers to amend the identification of goods via a proposed amendment made in its reply brief. Such an amendment amounts to a request to remand the application to the Examining Attorney for review of the amended identification. It is too late in these proceedings to request a remand to amend an indefinite identification of goods. *See In re Thomas White Int'l Ltd*, 106 USPQ2d 1158, 1160 n.2 (TTAB 2013) (in determining whether good cause has been shown,

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<sup>31</sup> Applicant's Reply Br. at 2.

the Board will consider both the reason given and the point in the appeal at which the request for remand is made).

For the foregoing reasons, the requirement for a more definite identification of goods is affirmed.

***Decision:*** The refusal to register Applicant's mark COLLECTIVE CHEESE under Section 2(e)(1) of the Trademark Act is affirmed. The requirement for a more definite identification of goods also is affirmed.