

**This Opinion is Not a  
Precedent of the TTAB**

Mailed: July 28, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re D'Avocado, LLC*  
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Serial No. 87704536  
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Courtney A. H. Thompson of Fredrikson & Byron, P.A.  
for D'Avocado, LLC.

David A. Brookshire, Trademark Examining Attorney, Law Office 114,  
Laurie Kaufman, Managing Attorney.

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Before Cataldo, Lynch and English,  
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

I. Background

Applicant, D'Avocado, LLC, seeks registration on the Supplemental Register of D'AVOCADO (in standard characters) as a mark to identify the following goods, as amended: "high pressure pasteurized avocado based chocolate confections, mousses, spreads, puddings and frozen desserts," in International Class 30.<sup>1</sup>

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<sup>1</sup> Application Serial No. 87704536, filed on December 1, 2017 pursuant to Trademark Act Section 1(b), 15 U.S.C. § 1051(b), seeking registration on the Principal Register based upon Applicant's claim of a bona fide intent to use the mark in commerce. On July 24, 2018, Applicant filed an Amendment to Allege Use claiming May 5 2018 as a date of first use

The application indicates that, “[t]he wording ‘D’AVOCADO’ has no meaning in a foreign language.”

The Trademark Examining Attorney has finally refused registration under Sections 23(c) and 45 of the Trademark Act, 15 U.S.C. §§ 1091(c) and 1127, on the ground that D’AVOCADO is generic and thus incapable of distinguishing Applicant’s goods; and based on the requirement under Trademark Rules 2.32(a)(9) and 2.61(b), 37 C.F.R. §§ 2.32(a)(9) and 2.61(b), that Applicant submit a translation of the wording comprising the proposed mark. Applicant has appealed the refusal and requirement. Applicant and the Examining Attorney have submitted briefs.<sup>2</sup>

## II. Evidentiary Issue

Applicant embedded in its appeal brief evidence that is not part of the evidentiary record adduced during prosecution of its application. The Examining Attorney objects to this evidence on the ground that it is untimely.<sup>3</sup> We agree.

Trademark Rule 2.142(d) reads as follows:

The record in the application should be complete prior to the filing of an appeal. Evidence should not be filed with the Board after the filing of a notice of appeal. If the appellant or the examining

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anywhere and in commerce, and further amending the application to seek registration of the proposed mark on the Supplemental Register.

<sup>2</sup> We presume the familiarity of Applicant and the Examining Attorney with the procedural history of the involved application.

<sup>3</sup> 10 TTABVUE 4-5.

Page references herein to the application records refer to the online database of the USPTO’s Trademark Status & Document Retrieval (TSDR) system. All citations to documents contained in the TSDR database are to the downloadable .pdf versions of the documents in the USPTO TSDR Case Viewer. References to the briefs on appeal refer to the Board’s TTABVUE docket system. The number before the designation TTABVUE is the docket entry number; and the numbers after this designation are the page references, if applicable.

attorney desires to introduce additional evidence after an appeal is filed, the appellant or the examining attorney should submit a request to the Board to suspend the appeal and to remand the application for further examination.

The evidence Applicant submitted with its appeal brief was not previously submitted during prosecution, and thus is untimely. *See* Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d); TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 1203.02(e) and § 1207.01 (2019) and authorities cited therein. Further, the webpage from Applicant's internet website, list of third-party registrations, and summary of the results of Applicant's search of the Google search engine<sup>4</sup> are not the kind of facts that may be judicially noticed by this tribunal. *See* TBMP § 1208.04 and authorities cited therein. In addition, the screen captures from Google translation<sup>5</sup> are not the kind of evidence that may be judicially noticed because this reference work is not the electronic equivalent of a print reference work and the source of the translations is unclear, thus rendering their provenance uncertain. *Id.* Accordingly, we give this evidence no consideration. Applicant's assertions in its brief based upon this excluded evidence therefor "are unsupported by sworn statements or other evidence, and 'attorney argument is no substitute for evidence.'" *In re OEP Enters., Inc.*, 2019 USPQ2d 309323, \*14 (TTAB 2019) (quoting *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (internal quotation omitted)).

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<sup>4</sup> 8 TTABVUE 7-8, 11-12.

<sup>5</sup> 8 TTABVUE 13, 16.

### III. Evidence of Record

In support of the refusal and requirement, the Examining Attorney has introduced the following evidence into the record.

A translation of the term “de” – inter alia, “of.”<sup>6</sup>

A definition of “loan word” – “a word adopted, often with some modifications of its form, from one language into another.”<sup>7</sup>

Screenshots from non-English language webpages advertising and reviewing the following goods and restaurant selections: “NaturGreen Huile de d’avocado 250 ml; “Insalata d’avocado con pomodori cigliegni (14 euro); “Huile d’avocado produit cosmetique 30 ml”; “tartare di salmone con crema di robiola e salsa d’avocado”; “On a testé deux recettes d’avocado burgers dans notre ‘crash test’”.<sup>8</sup> These websites appear to be in French or Italian.

Screenshots from the English language websites Chocolate Covered Katie The Healthy Dessert Blog, offering two recipes for Avocado Chocolate Mousse; All Recipes offering a recipe for Chocolate Avocado Pudding; Detoxnista offering a recipe for Easy Dark Chocolate Avocado Truffles; Kitchn offering a recipe for Chocolate Avocado Pudding; and Worth Cooking offering a recipe for Avocado Cream (a Dairy Free Sour Cream Substitute).<sup>9</sup>

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<sup>6</sup> March 17, 2018 first Office Action at .pdf 10; (Collins French – English Dictionary).

<sup>7</sup> April 9, 2019 final Office Action at .pdf 6 (Collins English Dictionary).

<sup>8</sup> March 17, 2018 first Office Action at .pdf 5-9.

<sup>9</sup> September 11, 2018 Office Action responding to Applicant Amendment to Allege Use at .pdf 5-9.

Screenshots from the English and French language versions of the websites Blond Story offering a recipe for Avocado Toast Extra Green Vegetables (Recette D'Avocado Toast Extra Légumes Verts); Chef Simon offering various Avocado Recipes (Recettes D'Avocado); and Recettes De Avocado offering Avocado Recipes (Les Recettes D'Avocado).<sup>10</sup>

In support of its arguments in favor of registration, Applicant introduced the following evidence into the record.

By the declaration of R. John Bartz, one of its former attorneys,<sup>11</sup> photographs of Applicant's goods displayed in a retail store; a point of sale display for Applicant's goods, an advertisement for a Ravak brand, Avocado model, pear shaped bathtub; and an article on the subject of retro avocado-colored bathroom fixtures.<sup>12</sup>

Also by declaration of R. John Bartz, a definition of "avocado" – "the pulpy green or purple edible fruit of various tropical American trees; a tree bearing avocados."<sup>13</sup>

Dictionary definitions of "di" – "twice; twofold; double" and "dy" – "two."<sup>14</sup>

Screenshots for Applicant's website noting, inter alia, "We're now in stores from Fargo to Pittsburgh, including national retailers like Target and Fresh Thyme!"<sup>15</sup>

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<sup>10</sup> April 9, 2019 final Office Action at .pdf 7-14.

<sup>11</sup> Applicant submitted a revocation and appointment of attorney on December 18, 2019.

<sup>12</sup> Applicant's March 11, 2018 Response to the Examining Attorney's September 11, 2018 Office Action at .pdf 8-11, 15-28.

<sup>13</sup> Applicant's March 11, 2018 Response to the Examining Attorney's September 11, 2018 Office Action at .pdf 13-14; October 9, 2019 Request for Reconsideration at .pdf 7-8 (Webster's Ninth Collegiate Dictionary).

<sup>14</sup> Applicant's October 9, 2019 Request for Reconsideration at .pdf 9-10 (Webster's Ninth Collegiate Dictionary).

<sup>15</sup> Applicant's October 9, 2019 Request for Reconsideration at .pdf 11-14.

#### IV. Translation Requirement

Because the meaning of the involved mark has a bearing on our genericness determination, we begin with the requirement that Applicant provide a translation of the putative non-English wording comprising its mark.

Trademark Rule 2.32(a)(9), 37 C.F.R. §2.32(a)(9), provides: “The application must be in English and include the following: If the mark includes non-English wording, an English translation of that wording.” “The translation that should be relied upon in examination is the English meaning that has significance in the United States as the equivalent of the meaning in the non-English language.” TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 809.02 (Oct. 2018).

While all possible translations, and discussions relative to meaning, are useful for informational purposes, not all such matter is appropriate for printing in the Official Gazette or on the certificate of registration. Only a translation that is the clear and exact equivalent should be printed. This normally means only one translation, because the existence of a variety of alternative translations, or the necessity of including explanatory context, usually indicates a lack of a clearly recognized equivalent meaning.

TMEP § 809.03.

Relying on Trademark Rule 2.32(a)(9), the Examining Attorney required Applicant to provide an English translation for “D’AVOCADO.” The Examining Attorney argues that “‘d’ means ‘of’ in compounds in French. ‘AVOCADO has the same meaning in French as it does in English, as it is a common loan word. The

evidence of record shows a number of French speakers using the phrase ‘d’avocado’ as a generic identifier for avocado and products made of avocado.”<sup>16</sup>

Applicant argues that its D’AVOCADO mark is “a compound mark comprising of [sic] the English terms ‘D’ and ‘AVOCADO’ joined by an apostrophe. The mark does not include non-English wording that requires translation.”<sup>17</sup>

TMEP § 809.01(b)(1) provides that “[i]t is generally unnecessary to provide a translation of a foreign term if the term appears in an English dictionary” unless it is “part of a foreign idiomatic phrase or other unitary expression” that appears in the mark. Here, the Examining Attorney did not submit a definition or translation of “d’avocado,”<sup>18</sup> but rather a definition of the term “de”. Nor did the Examining Attorney submit a French dictionary or French-English dictionary entry for “avocado” that might establish it as a French language word joined in this mark with “d” to form a unitary foreign language expression. The small number of foreign language webpages display the term “d’avocado” in French and Italian. Nonetheless, these websites are not in English and translations thereof are not in the record. With regard to the webpages made of record in both English and French, the term “d’avocado” in French, e.g., “recettes d’avocado,” appears as “avocado” in English, e.g., “avocado recipes.” However, it is not clear from these webpages whether the term “d’avocado”

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<sup>16</sup> Examining Attorney’s brief; 10 TTABVUE 10.

<sup>17</sup> 8 TTABVUE 15.

<sup>18</sup> According to TMEP § 809.01, “[i]f the applicant disputes a translation obtained through online resources, the examining attorney should supplement the record with evidence from the Trademark Librarian and/or the Translations Branch.” However, no such evidence was supplied in this case.

translates to “avocado” or whether the French language webpages simply adopt the English word “avocado.” As a result, the nature of this record is ambiguous as to whether “d’avocado” is a French term or represents French language usage of the English term “avocado.”

On this sparse record, largely presented in French or Italian which greatly limits its probative value, we find insufficient support for the Examining Attorney’s contention that the proposed mark D’AVOCADO has an accepted meaning in a foreign language. On this record, even if we consider “d” as a French language preposition, we lack convincing evidence that “avocado” is a French language term requiring a translation. *See* TMEP § 809.01(b)(ii). The inconsistent treatment of the term D’AVOCADO in the record simply does not support the Examining Attorney’s position.<sup>19</sup>

In view thereof, and pursuant to Trademark Rule 2.32(a)(9), the requirement to provide a translation is not appropriate.

## V. Genericness

“At the lowest end of the distinctiveness scale is the generic name for the goods or services. *United States Patent and Trademark Office v. Booking.Com B. V.*, 591 U.S. \_\_\_, Slip Op. at 4 (2020). “The name of the good itself ... is incapable of ‘distinguish[ing] [one producer’s goods] from the goods of others’ and is therefore

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<sup>19</sup> We note that Applicant argues in its brief (8 TTABVUE 15) that a translation is unnecessary but offers, in the alternative, “to the extent the translation requirement is not reversed by this Board,” (*Id.*) a translation of D’AVOCADO to “avocado.” Because, as discussed above, we find the record does not support the translation requirement, no such translation is necessary.



ineligible for registration.” *Id.* “Indeed, generic terms are ordinarily ineligible for protection as trademarks at all.” *Id.* “A generic term ‘is the common descriptive name of a class of goods or services.’ [citation omitted]. A generic mark, being the ‘ultimate in descriptiveness,’ cannot acquire distinctiveness.” *Royal Crown Co. v. Coca-Cola Co.*, 892 F.3d 1358, 127 USPQ2d 1041, 1045 (Fed. Cir. 2018) (quoting *H. Marvin Ginn Corp. v. Int’l Ass’n of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528 (Fed. Cir. 1986)).

Whether a particular term is generic is a question of fact. *In re Hotels.com LP*, 573 F.3d 1300, 91 USPQ2d 1532, 1533 (Fed. Cir. 2009). Resolution of that question depends on the primary significance of the term to the relevant public. *Booking.Com*, Slip Op. at 6 (“[T]he relevant meaning of a term is its meaning to consumers.”). We resolve reasonable doubt in favor of the applicant. *In re Merrill Lynch*, 828 F.2d 1567, 4 USPQ2d 1141, 1144 (Fed. Cir. 1987). To resolve reasonable doubt in an applicant’s favor, however, that doubt must be based on the record evidence to determine whether the proposed mark in question is perceived by the relevant public as a generic name for those services, based on our review of the evidence as a whole. *In re Country Music Ass’n Inc.*, 100 USPQ2d 1824, 1833 (TTAB 2011).

“The critical issue in genericness cases is whether members of the relevant public primarily use or understand the term sought to be protected to refer to the genus of goods or services in question.” *Princeton Vanguard, LLC v. Frito-Lay N. Am., Inc.*, 786 F.3d 960, 114 USPQ2d 1827, 1830 (Fed. Cir. 2015) (quoting *Marvin Ginn*, 228 USPQ at 530). 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?” *Marvin Ginn*, 228 USPQ at 530; *see also Royal Crown*, 127 USPQ2d at 1046. A term also can be considered generic if the public understands the term to refer to a part of the genus, “even if the public does not understand the term to refer to the broad genus as a whole.” *In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1637-38 (Fed. Cir. 2016).

#### A. The Genus

Because the identification of goods in an application defines the scope of rights that will be accorded the owner of any resulting registration under Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b), generally “a proper genericness inquiry focuses on the description of [goods] set forth in the [application or] certificate of registration.” *Cordua Rests.*, 118 USPQ2d at 1636 (quoting *Magic Wand, Inc. v. RDB, Inc.*, 940 F.2d 638, 19 USPQ2d 1551, 1552 (Fed. Cir. 1991)). Based on Applicant’s identification, the Examining Attorney has opined that the genus is “high pressure pasteurized avocado based chocolate confections, mousses, spreads, puddings and frozen desserts.”<sup>20</sup>

#### Applicant argues

The goods set forth in the Application are “*high pressure pasteurized avocado based chocolate confections, mousses, spreads, puddings and frozen desserts*” in Class 30. Class 30 includes “mainly foodstuffs of plant origin, except fruit and vegetables.” This classification, undisputed by the Examining Attorney, indicates that the dominate [sic] feature of the relevant goods for consumers is its chocolate nature, not the fact that one ingredient is a fruit (namely, avocado, which belongs in Class 31). Thus, the goods at issue are plant-based chocolate.<sup>21</sup>

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<sup>20</sup> 10 TTABVUE 5-6 (Examining Attorney’s Brief).

<sup>21</sup> 8 TTABVUE 6. Emphasis provided by Applicant.

Applicant cites to no authority for its position that we should construe the genus of goods at issue as “plant-based chocolate,” which is broader than the scope of the goods for which Applicant seek registration. We understand that Applicant emphasizes its goods are chocolate desserts made with plants, not the plants themselves, and attempts to support its argument by pointing to the classification of its goods. Trademark Act Section 30 provides in pertinent part that “The Director may establish a classification of goods and services, for convenience of Patent and Trademark Office administration, but not to limit or extend the applicant’s or registrant’s rights.” 15 U.S.C. § 1112. Classification serves a purely administrative purpose, and there is no dispute that the current identification of Applicant’s goods accurately and succinctly reflects their nature, regardless of classification. Further, Applicant’s identification of goods is not so complex that we must interpret it for purposes of our determination. *Cf. In re Empire Tech. Dev. LLC*, 123 USPQ2d 1544, 1548 (TTAB 2017) (“distillation of a complicated or lengthy description of goods/services into a clear, more succinct genus greatly facilitates the determination of whether a term is generic”) (quoting *In re ActiveVideo Networks, Inc.*, 111 USPQ2d 1581, 1600 (TTAB 2014)). We therefore agree with the Examining Attorney that the identification of goods adequately defines their genus.

**B. The Relevant Public’s Understanding of “D’AVOCADO”**

**i. The Relevant Public**

Once the genus of the goods is determined, we next must determine whether the relevant public understands the proposed mark primarily to refer to “high pressure

pasteurized avocado based chocolate confections, mousses, spreads, puddings and frozen desserts.” The Examining Attorney argues that the relevant public consists of “ordinary consumers who purchase applicant’s foods, because there are no restrictions or limitations to the trade channels or classes of consumers.”<sup>22</sup> Applicant argues that the “relevant public consists of English speakers in Midwest supermarkets “from Fargo to Pittsburg” (as shown below on Applicant’s English-only website).”<sup>23</sup> However, we find no legal support for Applicant’s contention that the relevant consumers of its goods should be restricted based upon trade channel and geographic restrictions that are not present in its involved application. We thus agree with the Examining Attorney that the relevant public consists of ordinary US consumers of the identified goods.

**ii. Assessing the Relevant Public’s Perception**

“Evidence informing [the] ... inquiry [whether a term is generic] can include not only consumer surveys, but also dictionaries, usage by consumers and competitors, and any other source of evidence bearing on how consumers perceive a term’s meaning.” *Booking.Com*, Slip Op. at 11 n.6; *see also Continental Airlines Inc. v. United Air Lines Inc.*, 53 USPQ2d 1385, 1395 (TTAB 1999) (use of term “e-ticket” by media and competitors indicates term is generic for electronic tickets).

In assessing the primary significance of Applicant’s proposed mark to the relevant public, we also must consider Applicant’s use thereof. *In re Gould Paper Corp.*, 834

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<sup>22</sup> 10 TTABVUE 6.

<sup>23</sup> 8 TTABVUE 6.

F.2d 1017, 5 USPQ2d 1110, 1112 (Fed. Cir. 1987) (“Gould’s own submissions provided the most damaging evidence that its alleged mark is generic and would be perceived by the purchasing public as merely a common name for its goods rather than a mark identifying the good’s source.”); *In re Empire Tech.*, 123 USPQ2d at 1553 (“While it uses ‘coffee flour’ in prominent stylized lettering, in the position and manner of a trademark, no separate generic term for the product accompanies the putative mark.”).

Turning first to Applicant’s use of its mark, the specimens of record and other evidence introduced by Applicant do not show any generic use of D’AVOCADO or other indicia to suggest the purchasing public would perceive it as a common name for the goods rather than a mark.<sup>24</sup> For example, Applicant’s specimen of record is reproduced below.



<sup>24</sup> Specimen of record submitted by Applicant with its July 24, 2018 Amendment to Alleged Use; Applicant’s March 11, 2019 Response to Office Action at .pdf 11; Applicant’s October 9, 2019 Request for Reconsideration at .pdf 11-14.

Similarly, the Examining Attorney's evidence of record shows use of "d'avocado" in context in French and Italian language websites, along with, in certain instances, their English language equivalent, but does not clearly indicate that consumers view "d'avocado" as a generic term for goods such as Applicant's. Specifically, none of the Examining Attorney's evidence showing the term "d'avocado" discusses goods related to those identified in the involved application, but rather involve oils, salads, and other food items, none of which contain chocolate or appear to be desserts. The Examining Attorney's evidence showing use of avocado-based desserts does not use the term "d'avocado" in relation thereto. Further, and as discussed above, the dictionary definitions are inconclusive on the question of whether "d'avocado" is a foreign language term or how "avocado" translates between English and foreign languages. The evidence, viewed as a whole, tends to show at worst mixed usage of the term "d'avocado" in various contexts.

The facts of this case are reminiscent of those in *In re Johanna Farms Inc.*, 8 USPQ2d 1408, 1410 (TTAB 1988) (Use of the French article combined with the English generic changes the commercial impression of the mark LA YOGURT as a whole); *see also In re Sweet Victory, Inc.*, 228 USPQ 959, 960-1 (TTAB 1986) (juxtaposition of French term GLACÈ with English term LITE in GLACÈ LITE mark creates incongruity, and does not describe ice creams, sherbets, frozen yogurts, and nondairy frozen desserts); *In re Universal Package Corp.*, 222 USPQ 344, 347 (TTAB 1984) (LE CASE registrable on Principal Register for jewelry cases and gift boxes with a disclaimer of "case.>"). In the present case, the sparse and inconsistent record

of any meaning of “d’avocado” in a foreign language or English, as well as the very limited evidence of consumer perception of the term, does not point to the mark as a generic name of the class of goods.

We find, based on the limited evidence of record, that the Office has not met its burden of establishing that D’AVOCADO, as a whole, is generic for the identified goods. Genericness is a fact-intensive determination, and the Board’s conclusion must be governed by the record that is presented to it. Although we understand the Examining Attorney’s concerns, it is the record evidence bearing on purchasers’ perceptions that controls the determination, not general legal rules or subjective opinions.

***Decision:*** We reverse the refusal to register Applicant’s mark on the Supplemental Register on the ground that it is the generic designation of the identified goods, and we reverse the requirement for Applicant to submit a translation of foreign wording in the mark.