Mailed: March 31, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Finca La Celia S.A.

Serial No. 86130560

Leigh Ann Lindquist of Sughrue Mion PLLC,
for Finca La Celia S.A.

Sharon A. Meier, Trademark Examining Attorney, Law Office 112,
Angela Bishop Wilson, Managing Attorney.

Before Taylor, Gorowitz and Heasley,
Administrative Trademark Judges.

Opinion by Taylor, Administrative Trademark Judge:

Finca La Celia S.A. ("Applicant") seeks registration on the Principal Register of the designation LA FINCA (in standard characters) as a mark for "wines" in International Class 33, and with a claim of acquired distinctiveness pursuant to Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f). The application includes the following translation statement: "The English translation of the word 'LA FINCA' in the mark is 'the estate or the farm.'"

The involved application, Serial No. 86130560, was filed on November 27, 2013 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), alleging a bona fide intention to use the mark in commerce. The Examining Attorney initially refused registration under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that the mark is merely descriptive of a feature or characteristic of the goods.[1] In addition, the Examining Attorney advised Applicant of a prior pending application and required Applicant to respond to certain informalities. In response, Applicant addressed the informalities and argued against both the potential likelihood of confusion and mere descriptiveness refusals.[2]

Applicant filed a response on September 22, 2014. Thereafter, on September 24, 2014, Applicant filed an amendment to allege use (which was accepted by the Office on January 20, 2016) in which it claimed July 2009 as the date of first use of the mark anywhere and in commerce. The Examining Attorney then issued a Final Office Action, indicating that the informalities had been satisfied and that the Section 2(e)(1) refusal was made final. Applicant responded with its first request for reconsideration, amending the application to claim acquired distinctiveness based on five years' use pursuant to Trademark Act Section 2(f), 15 U.S.C § 1052(f). The Examining Attorney next issued an Office Action refusing registration on the ground that the applied-for mark is generic and, alternatively, maintaining the merely descriptive refusal and finding the evidence of acquired distinctiveness insufficient.

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[1] The Office Action issued on March 21, 2014. It superseded an action issued earlier in the day.

[2] Response to Office Action, September 22, 2014.

After the Examining Attorney made the refusals final, Applicant appealed and filed a second request for reconsideration, which included further arguments against the genericness refusal and additional evidence supporting its acquired distinctiveness claim. The second request for reconsideration was denied on January 19, 2016 and this appeal was resumed.

Applicant and the Examining Attorney filed briefs, and Applicant filed a reply brief.

As a preliminary matter, Applicant indicates in its brief that one of three issues on appeal is "Whether Applicant's applied for mark, LA FINCA, for wines is merely descriptive under Trademark Act Section 2(e)(1)."[3] Applicant is mistaken. By seeking registration of LA FINCA on the Principal Register under Trademark Act Section 2(f),[4] Applicant has effectively conceded that the mark is descriptive. *See Cold War Museum, Inc. v. Cold War Air Museum, Inc.* 586 F.3d 1352, 92 USPQ2d 1626, 1629 (Fed. Cir. 2009) ("where an applicant seeks registration on the basis of Section 2(f), the mark's descriptiveness is a nonissue; an applicant's reliance on Section 2(f) during prosecution presumes that the mark is descriptive"). *See also In re Country Music Association Inc.*, 100 USPQ2d 1824, 1827 (TTAB 2011).

Accordingly, the issues on appeal are whether the designation LA FINCA is generic for wine and, if found not to be generic, whether Applicant has made a sufficient showing of acquired distinctiveness under Section 2(f).

[3] Applicant's brief p. 4, 11 TTABVUE 5.

[4] We point out that the Section 2(f) claim was not filed in the alternative.

The Examining Attorney maintains that wines are categorized by their type of grapes, origination of the grapes or other factors and, in this case, as estate wine; that Finca is synonymous with the term "estate"; and that the term "LA FINCA" is the Spanish equivalent of the term estate, denoting the type of wine and/or the provider of the goods and, thus, the designation LA FINCA is essentially the apt or common name for the genus of goods. More specifically, the Examining Attorney argues:[5]

> since, as translated by the applicant, the term "LA FINCA" means "estate," and the specimen identifies the goods as coming from Finca La Celia, customers would understand the word to describe the type of wine or the provider of the wine manufactured and produces by the applicant. Further, because of the prevalence of estate wines and wines produced by vineyards on estates or referred to as estates, the relevant public would understand this designation to refer primarily to that genus of goods because it understands the term "FINCA," or "estate," when used in relation to the identified goods, to identify a type of wine or the provider of the wine that is comprised of grapes from that estate. Accordingly, because the term "FINCA" in the instant case, identifies a key characteristic or feature of the wine goods, the relevant consumers would view the mark to indicate the type of wine and that it refers to estates that specialize in a specific type of wine, namely, estate wines or estate bottled wines.

In the event LA FINCA is determined not to be generic, the Examining Attorney alternatively maintains that it is merely descriptive of wines and that Applicant's evidence of acquired distinctiveness is not sufficient.

[5] Examining Attorney's brief, 13 TTABVUE 11.

Applicant conversely maintains that the Examining Attorney has not met her burden; that LA FINCA is not generic for wines; and that it has established acquired distinctiveness in LA FINCA.

I. Genericness

Whether a particular term is generic, and therefore cannot be a trademark or service mark, is a question of fact. *In re Hotels.com LP*, 573 F.3d 1300, 91 USPQ2d 1532, 1533 (Fed. Cir. 2009). When a proposed mark is refused registration as generic, the Examining Attorney has the burden of proving genericness by "clear evidence" thereof. *Id. See also In re Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987); *In re Gould Paper Corp.*, 834 F.2d 1017, 5 USPQ2d 1110, 1111 (Fed. Cir. 1987). "[D]oubt on the issue of genericness is resolved in favor of Applicant." *In re DNI Holdings Ltd.*, 77 USPQ2d 1435, 1437 (TTAB 2005).

The test for determining whether a mark is generic is its primary significance to the relevant public. *In re American Fertility Society*, 188 F.3d 1341, 51 USPQ2d 1832, 1836 (Fed. Cir. 1999); *Magic Wand Inc. v. RDB Inc.*, 940 F.2d 638, 19 USPQ2d 1551 (Fed. Cir. 1991); *H. Marvin Ginn Corp. v. Int'll Ass'n of Fire Chiefs, Inc.,* 782 F. 2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986). 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.

A. The genus of Applicant's goods

The genus of the goods, the first part of the genericness inquiry, is often defined by an applicant's identification of goods, which in this case is "wines." *See e.g., In re Trek 2000 Int'l Ltd.*, 97 USPQ2d 1106, 1112 (TTAB 2010) ("the genus of goods at issue in this case is adequately defined by applicant's identification of goods…"). Both Applicant and the Examining Attorney state that the genus of the goods is "wine." However, Applicant takes issue with the Examining Attorney's position that "wine" is a broad term such that "estate wines and estate bottled wines are a more narrow category of the broader genus of wine." Applicant contends that there is no evidence of record that shows that the Trademark Office or the relevant public view "estate wine" as the genus of any goods, specifically arguing that:[6]

> … all of the third party registrations and applications of record identify the goods as "wine." This is how the consuming public views the goods at issue. There are 1000s of federal trademark registrations that cover "wine", and "wine" is listed in the ID Manual.

The Examining Attorney requests and we take judicial notice of the dictionary definition of "wine,"[7] which in relevant part is "an alcoholic drink made from the juice

[6] Applicant's brief p. 5, 11 TABVUE 6. Applicant supported this argument with various third-party registrations and excerpts from the Trademark ID Manual. Request for Reconsideration, December 15, 2015, Trademark Status and Document Retrieval ("TSDR") 32-36; 44-138.

[7] The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or have regular fixed editions. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014); *Threshold.TV Inc. v. Metronome Enters. Inc.*, 96 USPQ2d 1031, 1038 n.14 (TTAB 2010); *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

of grapes."[8] (http://merriam-webster.com/dictionary/wine) In addition, and as more fully discussed *infra*, the terms "estate wine" and "estate-bottled wine" refer to an alcoholic drink made of grapes, made from start to finish at the same winery. Accordingly, we find the Examining Attorney's position that the genus is wine and her narrower interpretation of that term accurate. A generic term can encompass a range of products or a particular product that may be categorized under an all-encompassing term. *See, e.g., In re Greenliant Sys. Ltd.,* 97 USPQ 2d 1078, 1082 (TTAB 2010) (NANDRIVE found generic for "electronic integrated circuits" because NAND drives were types of solid state flash drives, a subcategory of applicant's broadly worded "electronic integrated circuits"); *In re Analog Devices Inc.*, 6 USPQ2d 1808 (TTAB 1988), *aff'd*, 10 USPQ2d 1879 (Fed. Cir. 1989) (ANALOG DEVICES held generic for a wide range of electronic products in International Class 9). Here, the genus of goods is properly identified as wines, but could, by definition, encompass more-narrowly defined goods such as "estate" or "estate-bottled" wines.

B. Primary Significance to the Relevant Public

The second part of the genericness inquiry is whether the relevant public understands the designation to primarily refer to that class of goods. The relevant public for a genericness determination is the purchasing or consuming public for the identified goods. *Magic Wand*, 19 USPQ2d at 1553. We agree with Applicant and find the relevant is are people who buy and drink wine.

[8] 13 TTABVUE 18, 21.

Prior to considering the evidence of record bearing on the public's understanding of LA FINCA, we address whether the doctrine of foreign equivalents is applicable in this case. In response to a query by the Examining Attorney, Applicant proffered a translation of "LA FINCA" as "the estate or the farm." Although acknowledging that the doctrine of foreign equivalents is relevant to determine genericness, Applicant, citing *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1696 (Fed. Cir. 2005), asserts that the doctrine should be viewed as merely a guideline. According to Applicant, here, "ordinary purchasers would not stop and translate LA FINCA into 'the farm' or 'the estate' when they encounter Applicant's mark on wine."[9] Applicant further opines:[10]

> … LA FINCA and "the estate" have different commercial impressions …: LA FINCA is viewed as a mark for wine while the estate is likely to be viewed as a home or a rural property. … The Spanish generic word for "wine" is "vino", not "la finca" just as the generic word for "wine" in English is "wine." [citations omitted]

As the Board noted in *In re Highlights for Children, Inc.* 118 USPQ2d 1268, 1270 (TTAB 2016):

In descriptiveness [or genericness] cases:

> It is a well[-]established principle of trademark law in this country that the foreign equivalent of a merely descriptive English word is no more registrable that the English word itself despite the fact that the foreign word term may not be commonly known to the general public. That is, normally no distinction can be made between English terms and their foreign equivalents with respect to registrability.

[9] 11 TTABVUE 6-7.

[10] *Id.*

In re Optica International, 196 USPQ 775, 777 (TTAB 1977).

In *Palm Bay* v. *Veuve Clicquot*, 73 USPQ2d at 1696, the Federal Circuit stated:

> Under the doctrine of foreign equivalents, foreign words from common languages are translated into English to determine genericness, descriptiveness, as well as similarity of connotation in order to ascertain confusing similarity with English word marks. [citations omitted]
>
> * * *
>
> The doctrine should be applied only when it is likely that the ordinary American purchaser would "stop and translate [the term] into its English equivalent." *In re Pan Tex Hotel Corp.*, 190 USPQ 109, 110 (TTAB 1976).

We find the doctrine applicable here because the record reflects that the translation of LA FINCA is literal and direct, and the word comes from Spanish, a common, modern and widely spoken language in the United States. Indeed, the Board has routinely applied the doctrine of foreign equivalents to Spanish language marks. *See Highlights for Children*, 118 USPQ2d at 1271, n.7 ("Spanish is a modern language that is widely spoken in the United States"); *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1127 (TTAB 2015) ("after English, Spanish is the most commonly spoken language in the United States")[11]; *In re La Peregrina Ltd.*, 86 USPQ2d 1645, 1648 (TTAB 2008) ("there is no question that Spanish is a common, modern language"). We thus find that ordinary consumers familiar with the Spanish language upon viewing the

[11] In coming to that conclusion, the Board in *Aquamar* took judicial notice of the August 2013 United States Census Bureau's "Language Use in the United States: 2011" report, which additional indicated that over 12% of the United States population speaks Spanish. 115 USPQ2d at 1127.

designation LA FINCA on Applicant's wines will immediately recognize and translate the term.

There is simply nothing in the record that would lead us to believe that Spanish speaking consumers would attribute different connotations to the English wording "the estate" and its Spanish translation "LA FINCA," as opposed to translating the clearly Spanish wording. It is not whether consumers will "stop and translate" the term; rather, it is how that translation is perceived by consumers of wine, *i.e.*, as a generic designation, a descriptive term or as a source indicator in connection with Applicant's wines that is at the heart of the matter before us.

Having determined that the doctrine of foreign equivalents applies to this proceeding, we now focus on the public's understanding of LA FINCA and turn to the evidence of record. Evidence of the relevant public's understanding of a term may be obtained from any competent source, including dictionary definitions, trade journals, newspapers, websites, and other publications. *See In re Reed Elsevier Props.*, 482 F.3d 1376, 82 USPQ2d 1378, 1380 (Fed. Cir. 2007) (*LAWYERS.COM* is generic for providing an online interactive database featuring information exchange in the fields of law, legal news, and legal services, citing to Applicant's website, third-party websites and numerous URLs containing the letter string "lawyers.com"); *In re Northland Aluminum Products, Inc.*, 777 F.2d 1556, 227 USPQ 961, 963 (Fed. Cir. 1985) (*BUNDT* is not registrable for "ring cake mix," citing numerous cookbook recipes and newspaper articles).

To demonstrate that the relevant public understands "La Finca" to primarily refer to "estate wines," the Examining Attorney has made of record the following evidence:

1. Definitions of "finca":[12]

> A rural property, especially a large farm or ranch, in Spanish America.
> [http://education.yahoo.com/reference/dictionary/entry/finca]
>
> Spanish
> 1. farm
> 2. estate
> [http://en.wiktionary.org/wiki/finca]

2. Definition of "estate":[13]

> a large area of land where a particular crop is grown
> tea/coffee/wine estates
> [http://www.macmillandictionary.com/dictionary/American/estate]

3. Third-party registrations that include the term FINCA for "wine(s) where the word "finca" has been disclaimed, a representative sampling shown below:

Reg. No.	Mark	Goods/Services	Disclaimer	Translation
4003460	FINCA LALANDE	wine	FINCA	The English translation of "FINCA LALANDE" is "land estate."
4102886	FINCA ROSA	wine	FINCA	The English translation of "FINCA ROSA" is "rose estate."
4254585	FINCA LA ESCONDIDA	wines	FINCA	The English translation of "FINCA LA ESCONDIDA" is "ESTATE THE HIDDEN."
4365303	FINCA LA COLONIA	wines	FINCA	The English translation of "FINCA LA COLONIA" is "FARM THE COLONY."
4213240	FINCA MONTUIRI	wines	FINCA	The English translation of "FINCA" is "ESTATE."

[12] Office Action, June 15, 2015, TSDR 30-40. The Examining Attorney also made of record a definition taken from the *Collins Dictionary* online. However, because the definition is from "British English" as opposed to "American English," it has little probative value.

[13] Office Action, October 20, 2014, TSDR 98.

3006513	FINCA URQUIZA	wines	FINCA	The foreign wording in the mark translates into English as FINCA, meaning either ESTATE or VINEYARD
4129021	FINCA Don Gerónimo	Grape wine	FINCA	The foreign wording in the mark translates into English as "Estate Sir Gerónimo".
3755557		Grape wine	FINCA and PRODUCTO ARGENTINO	The English translation of "Producto, Dona, Finca" in the mark is Product, The Lady, Farm
3236252	FINCA ALTAMIRA	Wines	FINCA	The foreign wording in the mark translates into English as Altamira Estate
4458846	FINCA FLICHMAN	wines	FINCA	The English translation of "FINCA" in the mark is "ESTATE".

4. Internet excerpts and articles discussing the meaning of "estate wine" or "estate bottled wine." The most pertinent portion from each of the website excerpts follow:[14]

http://wine.lovetoknow.com/wiki/What Is an Estate Wine[15]

Review: What is an Estate Wine?

… "Estate" means the winery and vineyards have to be in the same AVA [American Viticulture Area], have to be controlled or owned by the winery, and the wine has to be made from start to finish at the winery.[16]

[14] Some of the entries appear to be educational blogs hosted by nationally known enterprises, such as Wine Spectator, while others appear to be postings of individuals or business concerns located in a particular geographic region, such as Napa Valley Wineries. Although we are mindful that the blogs are publically available, the probative value of those hosted by individuals, and catering to a particular geographic area, are limited insofar as we do not know the extent of the reach to the public.

[15] Office Action, December 15, 2014, TSDR 5-7.

[16] Notably, the comment section of the article includes the query: "Do the same rules apply to foreign countries? I just purchased an estate bottled 2012 Tempranillo from Yecla, Spain and was curious." Karen Frazier, LoveToKnow Wine Writer responded:

> "What's more important in Spain labeling is the classification. Your wine label should have one of the following terms: DOCa

http:// *kenswineguide.com/wine.php?word=115*[17]

Definition: Estate Bottled

Estate bottled wines must come strictly from grapes that are either owned by the winery or under its direct vinicultural control through a long[-]term lease. And the wine must be completely produced, aged, and bottled at the winery. The winery itself, as well as all of the grapes used, must be from the same appellation of origin and that appellation must be designated on the wine's label. On a French wine the analogous term **mise en boutelle** au chateau means "bottled at the winery." In German the word for estate bottled is **gutsabfullung**. And in Italian you'll see the phrase **imbottigliato all'origine**.

*http://www.w*inespectator.com.drvinny/show/id/5169[18]

Wine Spectator, ask dr. vinny --------

Dear Dr. Vinny,

What is the difference between an estate and a single-vineyard wine?

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An estate wine can come from many vineyards, as long as all are owned or controlled by the "estate" winery, while a single-vineyard wine may be made from a vineyard that's not owned by the winery that bottles it.

(or Denominaćion de Origen Calificado), DO (or Denominaćion de Origen), VP (Vino de Pago), VC (or Vino de Calidad con Indiacion Gegrafica, or VT (Vino del la Tierra)."

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If I had to guess without knowing anything about your wine other than what you mentioned in your comment, I'd guess it might be a VP classification, which indicates a quality wine from a single estate without a geographical classification.

[17] *Id*. at 10.

[18] *Id*. at 13-14.

> ***
>
> An estate-bottled wine is made entirely from grapes owned by the winery, and the wine is made entirely on the winery's property – it doesn't ever leave the property during fermentation, aging, or bottling. The winery and vineyards don't have to be contiguous, but they have to be located in the same appellation. In the U.S., the "estate" term had been expanded to include not only vineyards owned by a wine label, but also ones that are managed or controlled by the winery, even if they're actually owned by someone else.
>
> To list a vineyard or ranch on a label, laws vary slightly, but the grapes must come entirely (or nearly entirely – U.S. law is 95 percent) from that single property. There are no rules governing which vineyards qualify for designation on a label; that's up to the winery. And many wineries produce wines from vineyards they neither own nor control, these could be single-vineyard wines, but they couldn't be estate wines.
>
> -- Dr. Vinny

http://culinarytravel.about.com/od/wineryreviews/qt/What-Is-Estate-Wine.htm[19]

What is Estate Wine?

> When you hear a wine described as "estate bottled" or see "estate" on a wine label in the United States, it means something very specific – and actually something pretty special.
>
> The U.S. federal government, through the Alcohol, Tobacco, Tax and Trade Bureau (known as the TTB) sets these requirements for wineries that wish to use the word "estate" on their labels:
>
> - 100 percent of the wine must be from grapes either grown on land owned by the winery, or controlled by the winery.

[19] Office Action, October 20, 2014, TSDR 107.

- The vineyards must be in a viticultural area.
- The winery and the vineyard must be in the same viticultural area.
- The winery must crush and ferment the grapes, and then finish, bottle and age the wine on their own premises, and in a continuous process. The wine may not leave the premises at any time during its production.

http://www.napavintnets.com/wines/how to read a wine label.asp[20]

How to Read a Wine Label

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Estate Bottled

Optional. This term certifies legally that the winery grew 100% of the grapes on land it owns or controls and that the winery crushed, fermented, aged, and bottled the wine in a continuous process on the same property. Both the vineyard and winery must be located in the viticultural area that is stated on the label.

*http://www.thewinecellarinsider.com/wine-*wineeducationalquestions/*abc-of-wine-glossary-of-wine-terms/*[21]

Wine Glossary of Terms, Wine Dictionary, Wine Definitions, Wine Words

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Estate Bottled: Term mostly used for American wineries. Estate bottled wines are required to use 100% of the grapes from the vineyards controlled or owned by the winery and must come from the same AVA, American Viticultural Area where the winery is located. Bottling must take place at the winery.

[20] Office Action, December 15, 2014, TSDR 27-28.

[21] *Id*. at 35.

http://www.buchmanlaw.com/events.php?action=page&id=48[22]

CURRENT NEWS

Notice of Proposed Rulemaking re: Winemaking Terms (12/03/2010)

"Estate Grown"
For twenty years, although not codified, TTB has allowed the term Estate Grown to be used as a synonym for Estate Bottled. Recently industry members sought to use the term on wines that do not meet the "Estate Bottled" standards contending that Estate Grown does not convey information about bottling and should therefore not need to satisfy the same requirements. TTB is considering amending the wine labeling regulations to include definitions for "Estate", "Estates", and "Estate Grown" and to set forth its position on use of these terms.

TTB is seeking comments specifically (1) whether the use if the term "estate" or "estates" conveys specific information about a wine and what information it conveys? (2) Whether TTB should propose to define the term "Estate" used separately from the expression "Estate Bottled"? (3) Whether the appearance of the terms "Estate" or "Estates" on a wine label lead consumers to believe the product is "Estate Bottled"? (4) Whether use of the terms "Estate" or "Estates" on the wine label lead consumers to believe the product was produced primarily from ingredients grown on the named estate even when not indicated as "Estate Bottled"? (5) Whether TTB should propose a new standard for use of the term "estate" or "estates" and if so what should it be? (6) Whether TTB should amend the regulations to reflect its current policy that the terms "Estate Grown" may only be used on wines meeting the "Estate Bottled" standards? (7) Whether TTB should create a different standard for use of the term "Estate Grown" and what it should be? (8) Whether TTB should continue to permit the use of the terms "Estate(s) Vineyards", "Vineyard Estate(s)", or other similar terms when not preceded by the name of the winery when the wine does not meet the "Estate Bottled" requirements? Why or why not? (9) Would the use of the terms in number 8 above lead consumers to believe the wine is "Estate Bottled"? Should TTB establish different standards for use of these terms?

http://www.wine-pages.com.resources/20-wine-questions-answers.shtm[23]

20 common wine questions (by Tom Cannavan and Jonathan Hesford, 2013)

***

11. How do you know a wine is "Estate Produced"?

That information is usually featured on the label, though sometime it needs a bit of de-coding! In classic French regions words like "Mis en Boutelle en Château" or "au

[22] *Id.* at 19.

[23] *Id.* at 23.

> Domaine" literally say the wine is 'estate bottled', whilst in Germany the word 'Erzeugerabfüllung' means much the same. In English-speaking nations the term "Estate wine" or, specifically, something like "Estate Chardonnay," is sometimes used. Champagne is a special case, where the code letters RM indicate the wine was made by a 'récolant-manipulant', someone who grew the grapes and made the wine.

The Examining Attorney also points to Internet evidence attached to the January 19, 2016 Office Action and the specimen of record (shown below) and notes that the evidence "identifies the "FINCA" as the vineyard where the wine emanates, namely, Finca La Celia":[24]

Applicant's Specimen

[24] 13 TTABVUE 8.

http://thefermentedfruit.com/la-finca-malbec-review-trader-joes/[25]

> The La Finca Malbec is produced from the vineyards of Finca La Cecilia which lie in the foothills of the Argentine Andes. While the increasingly popular Malbec varietal might trace it's roots to the Cahors region of Southern France, it is **Argentina that has succeeded in resurrecting Malbec**.

In traversing the genericness refusal, Applicant not only questions the probative value of the Examining Attorney's evidence, but argues that "consumers encounter Applicant's LA FINCA mark in the marketplace in a manner where the mark LA FINCA clearly and effectively is used as a mark." To support its position, Applicant has introduced the following:

1. Unsolicited Reviews of its LA FINCA wines, a sampling shown below:[26]

The Fermented Fruit

La Finca Malbec Review | Trader Joe's

5 Replies

La Finca Malbec | Trader Joe's Wine

If you recall from my recent review of the Grifone Primitivo I am on the hunt for the best wine values in the Trader Joe's Wine Section. According to their **in-store wine specialist** the Grifone Primitivo topped the list and the **second best value available** is today's feature: the La Finca Malbec from Mendoza, Argentina.

The La Finca Malbec is produced from the vineyards of Finca La Cecilia which lie in the foothills of the Argentine Andes. While the increasingly popular Malbec varietal might trace it's roots to the Cahors region of Southern France, it is **Argentina that has succeeded in resurrecting Malbec**.

[25] Office Action, January 19, 2016, TSDR 5.

[26] The evidence from vspt.wine.group is printed in Spanish and Applicant did not provide a translation. Accordingly, it has no probative value. *Hard Rock Cafe Licensing Corp. v. Elsea*, 48 USPQ2d 1400, 1405 (TTAB 1998) (objections sustained as to documents not in English).

***

The bottom line is that the La Finca Malbec is **yet another good value** wine in the Trader Joe's Wine Section and for just the price of a Latte one that I would enjoy again with food in the future. And while your Latte is probably grossly overpriced, you can rest assured you're not overpaying for the La Finca Malbec. [27]

http://thefermentedfruit.com/la-finca-malbec-review-trader-joes/[12/14/2015 2:12:19 PM]

50 States of Wine – A Food, Wine, craft Beer, and Travel Blog

2011 La Finca Tempranillo

For Tempranillo Day, our second wine was the La Finca 2011. Definitely more fruit forward: blueberry and cherry on the nose, adding cocoa on the palate, smooth finish - nice wine for the price! ($3.99 at our Trader Joe's) [28]

http://www.50statesofwine.com/2012/11/2011-la-finca-tempranillo.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed:+50StatesOfWine+(50+STATES+OF+WINE)[12/14/2015 2:17:08 PM]

[27] Request for reconsideration, December 15, 2016, TSDR 159-160.

[28] *Id.* at 239.

Sweet Success – Trader Joe's Haul's – March 2014

29

lot gone off the shelves, so I'm taking that to mean they are good (or just super cheap).

Both trips were successful and I've already been enjoying some of my purchases!

What are your fave things to buy at Trader Joe's?

http://sweet-success.tumblr.com/post/80775343627/trader-joes-hauls-march-2014[12/14/2015 2:30:53 PM]

2013 La Finca Tempranillo, Mendoza, Argentina

BY ROY KELLEY
Education & Training with Realty Group Referrals 16766
December 07, 2014 03:00 PM Share: EMAIL SHORT URL

2013 La Finca Tempranillo, Mendoza, Argentina, Mendoza, Argentina

The **2013 La Finca Oak Aged Tempranillo** from Mendoza, Argentina is a very inexpensive red wine that you will find at Trader Joe's stores that sell wine. Click on the link to read a raving review.

This wine will be easy to pair with the pizza you are ordering for dinner. Put it in the refrigerator for 15 minutes before you serve it.

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http://activerain.com/blogsview/4543331/2013-la-finca-tempranillo-mendoza-argentina[12/14/2015 2:24:09 PM]

29 Id. at 186.

30 *Id*. at 235.

2. Photographs showing Applicant's wine displayed in the market place:[31]

[31] Response to Office Action, May 18, 2015, TSDR 16-19.

3. Third-party registrations for marks that include ESTATE and similar terms which were filed for alcohol (including wines), and where ESTATE or the similar term was not disclaimed.[32]

4. Third-party registrations that do not require a disclaimer of "estate(s)" or "finca":

Registration No.	Mark	Goods	Register	Translation
3589381	JAFFE ESTATE	wine	Supplemental	N/A
3687807	SONOMA ESTATE VINTERS	wine	Supplemental	N/A
3924363	FAMILY OWNED, ESTATE GROWN,	wine	Supplemental	N/A

[32] Id. at 44-138. Applicant also made of record printouts for Registrations Nos. 3315751 (HERDADE DOS GROUS); 3591939 (MAS CAVALLS); 3740741 (FATTORIA DI TRAVALDA); 3729704 (LA FERME DE SUZON); 3642816 (ALTAS QUINTAS); 4797383 (CASCINA DELLE ROSE); 4622923 (ANTICA CASCINA); 4000668 (MAS MACIA); AND 3223390 (COTO DE HAYAS). Because these registration include neither the words ESTATE or FINCA in the marks nor do any words in the marks translate to ESTATE, they have limited probative value in our genericness determination. We also find Registration Nos. 4414137 (LA FINQUITA); 4586957 (FINCA MONTE AZUL); 4830205 (HACIENDA RIO NEGRO) and 2697012 (HACIENDA DE BRACAMONTE) unpersuasive because they cover goods other than wine or alcoholic beverages. Last, pending application Serial No. 85809592 reflects nothing more than that it was filed with the USPTO, *In re Binion*, 93 USPQ2d 1531, 1535 fn.3 (TTAB 2009), and there is no indication that it ever matured into registration.

	SUSTAINABLY FARMED.			
4315112	BAITING HOLLOW FARM VINEYARD	wine	Supplemental	N/A
4366235	KAIKOURA ESTATES	wines	Supplemental	N/A
4729419	LA FINCA MIAMA	beer	Supplemental	The English translation of "La Finca" is "THE FARM"
4320059	FINCA DEL CASTILLO	wine	Principal	The English translation of "FINCA DEL CASTILLO is "castle farm" or "castle estate"
3658741	FINCA ALTORFER	wines	Principal	The English translation of "FINCA" is "farm"
4729420	LA FINCA FLORIDA	Beer	Supplemental	The English translation of "LA FINCA" is "THE FARM"
4731649	ESTATE Claim of acquired distinctiveness in whole	beer	Principal	
4656441	THE FARM	wines	Principal	N/A
4012027	FINCA LOS PRIMOS	wine	Principal	The English translation of "FINCA LOS PRIMOS" is "The Cousins Farm"
4126419	SOLAR DE URBEZO	wines	Principal	The English translation of "SOLAR DE URBEZO" is "URBEZO ESTATE"
4492146	DUCHATEAU	Wines	Principal	The English translation of "DUCHATEAU" is "of the estate" or "of the castle"
3632408	VILLA D'AQUINO	Wine and liquor	Principal	The English translation of "VILLA" is "house or estate"

As stated, the Office bears the burden of proof and genericness must be shown by clear evidence. Furthermore, any doubts must be resolved in favor of the applicant. *In re DNI Holdings Ltd.*, 77 USPQ2d 1435, 1437 (TTAB 2005).

Genericness is a fact-intensive determination and our conclusion must be governed by the record before us. After carefully reviewing the record, we find that the Office has not met its difficult burden of establishing by clear evidence that the designation LA FINCA is generic of "estate wines."

There is no question that the word "estate" and, by extension, its Spanish equivalent "finca" is merely descriptive of a characteristic of Applicant's wine, namely that the wine is produced on a farm or an estate.[33] This is shown through dictionary definitions of "estate" and "finca," Office practice requiring a disclaimer of those terms when they appear in marks for use on or in connection with wines,[34] as well as use of the word "estate" in the wine industry – by both tradesmen and wine aficionados – to describe certain origin aspects of wine, i.e., that the wine is made from grapes grown on an estate. In fact, Applicant responded to the Examining Attorney's requests for further information as follows:

- Whether the applicant's wine is made from grapes grown on a farm or estate -

[33] As noted, Applicant effectively admitted that "LA FINCA" is descriptive of wines by its claim of acquired distinctiveness pursuant to Section 2(f) of the Trademark Act. Because Applicant did not seek such registration in the alternative, it cannot now assert that its mark is not descriptive.

[34] The record also reflects Office practice of requiring a showing of acquired distinctiveness or Supplemental Register registration of such terms. We add, however, that a disclaimer is not an admission that a term is generic. *See In re Allegiance Staffing*, 115 USPQ2d 1325 (TTAB 2015).

Applicant[sic] wine is made from grapes grown on a farm.

- Whether the applicant's wine is manufactured or produced on a far or an estate –
Applicant's wine is produced at an estate winery.

The presence of the Spanish article "LA," which translates to "the," does not obviate this finding. *See e.g., In re The Place Inc.*, 76 USPQ2d 1467, 1468 (TTAB 2005) (definite article THE is a non-distinctive term that adds no source-indicating significance to the mark as a whole). *But see In re Johanna Farms Inc.*, 8 USPQ2d 1408 (TTAB 1988) (the French article "La" combined with the English generic term "Yogurt" was found to change the commercial impression).

However, we cannot conclude on the evidence before us that either the designation "the estate," or its Spanish translation "la finca," is the apt descriptive name for wines. While some of the blog posts and articles use the nomenclature "estate" or "estate wine" to refer to a wine that meets certain grape growing and processing requirements, the record clearly shows that only the term "Estate bottled" is defined in current TTB regulations,[35] and is the only term that is presently recognized in the regulations as indicating single vineyard, single control from grape to finished wine status, (although the current TTB regulations are under a notice of rulemaking to possibly address the terms "estate" and "estate grown" in relation to wine labeling). Moreover, given that blogs reflect the opinions of their authors, and for the most part those opinions belong to individuals, it is not surprising that the record includes posts

[35] Response to Office Action, December 15, 2014, TSDR 12.

that ascribe no meaning to the designation "estate," when used in connection with wine. An article titled "Know your wine words: the state of estate and more" - written by Paul Gregutt, wine columnist in a Special to the *Seattle Times*, addresses the TTB's announcement to hold hearings to improve, or to impose, legal definitions of terms used on a wine label and asks:

> [W]hat exactly is an estate? The TTB notes that "the regulations do not address or define the word 'estate' or 'estates' when used alone or with additional words other than 'estate bottled.'" So from a legal standpoint, "estate grown" is essentially meaningless.
>
> Even so, it can be a useful quality indicator when the winery is a small, family-owned enterprise.[36]

In another blog excerpt of record, titled "TTB: time to clear up vague, misleading label terms," posted on January 18, 2011, *in Appellations, Marketing, News, Wine Industry,* Steve Heimoff, opines in apparent response to the proposed TTB rulemaking that: "The problem, in TTB's words, is that 'the regulations do not address or define the word "'Estate"' or "'Estates"'…"'. In other words, the word 'Estate/s' means nothing … nada…zilch… and never has. …Therefore, if 'estate/s' is meaningless, and 'estate grown' is divorced from its connection to 'estate bottled.' Then 'estate grown' is meaningless. And down the slippery slope we go."[37]

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[36] http://www.seattletimes.nwsource.com/html/wineadviser/2016348589pacificpadvisor09.html. Office Action, October 20, 2014, TSDR 137.

[37] http://www.steveheimoff.com/indes.php/2011/01/18/ttb-time-to-clear-up-some-of-these-vague-misleading-label-terms/. Office Action, October 20, 2014, TSDR 123.

Because of these conflicting consumer perceptions of the designation "estate" in connection with wine, we find that "LA FINCA," the Spanish translation of "the estate" is not perceived by the relevant public as a generic name for a type of wine.[38]

While we agree with the Examining Attorney that a term that identifies the provider of a product or service may be generic of that product or service,[39] the record does not demonstrate that Applicant's wine is produced and bottled by "La Finca." Instead, the specimen of record clearly shows that Applicant's wine is produced "in the vineyards of Finca La Celia, S.A."

We also are unpersuaded by the Examining Attorney's argument that Applicant often refers to and markets its wine as "estate bottled." Not only does LA FINCA translate to "the estate" and not "estate-bottled," the evidence from Applicant's website purportedly evidencing this claim refers to Applicant's 2010 La Ceila Malbec Eagle's Rock Estate Bottled and 2010 Finca La Celia Torrontes Estate Bottled Piedra del Aguilia and not its LA FINCA branded wines.[40]

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[38] We also point out that similar to wine labeling regulations in the United States, certain Spanish countries use a regulated term to identify wine that originates from a single vineyard. We take judicial notice of the definition of "pago" found in the *Spanish A-Z Wine Dictionary*, where the term is defined as "single vineyard, Chateau style estate bottled wine." [http://www.cellartours.com/spain/wine-spirits/spanish-a-z-wine-dictionary-glossary.html].

[39] See In re William *See In re Wm. B. Coleman Co.*, 93 USPQ2d 2019, 2025 (TTAB 2010) (holding ELECTRIC CANDLE COMPANY generic for lighting fixtures); *In re The Paint Prods. Co.*, 8 USPQ2d 1863, 1865 (TTAB 1988) (holding PAINT PRODUCTS CO. generic for paint); *In re E. I. Kane, Inc.*, 221 USPQ 1203, 1205 (TTAB 1984) (holding OFFICE MOVERS, INC. generic for moving services); TRADEMARK MANUAL OF EXAMINING PROCEDURE ("TMEP") §1209.03(q) (Jan. 2017).

[40] Denial of Applicant's Request for Reconsideration, January 19, 2016; 5 TTAB 18, 6 TTABVUE 3.

In view of the forgoing, we find that the designation LA FINCA would not be perceived by the relevant public as generic for wines.

II. Acquired Distinctiveness

Having found the designation LA FINCA not to be generic, we address Applicant's alternative claim that the proposed mark has acquired distinctiveness. As previously noted, by applying for registration based on acquired distinctiveness under Section 2(f), Applicant has conceded that the proposed mark is merely descriptive,[41] and it is Applicant's burden to prove that LA FINCA has become distinctive. *Yamaha Int'l Corp. v. Hoshino Gakki Co. Ltd.*, 840 F.2d 1572, 6 USPQ2d 1001, 1005-1006 (Fed. Cir. 1988); *In re Hollywood Brands, Inc.*, 214 F.2d 139, 102 USPQ 294, 295 (CCPA 1954) ("[T]here is no doubt that Congress intended that the burden of proof [under Section 2(f)] should rest upon the applicant…."). The greater the degree of descriptiveness, the greater the evidentiary burden on the user to establish acquired distinctiveness. *See Yamaha Int'l Corp., supra.* Highly descriptive terms, for example, are less likely to be perceived as trademarks and more likely to be useful to competitors than are less descriptive terms. More substantial evidence of secondary meaning thus will ordinarily be required to establish their distinctiveness.

In determining whether secondary meaning has been acquired, the Board may examine, among other things, "copying, advertising expenditures, sales success,

[41] We reiterate that, in any event, the evidence of record convinces us that the designation LA FINCA would be understood by Spanish speaking consumers as "the estate," a term that would be readily perceived as merely descriptive of a feature of Applicant's wines, namely that they come from grapes that are either owned by the winery or under its direct viticultural control and are completely produced, aged, and bottled at the winery.

length and exclusivity of use, unsolicited media coverage, and consumer studies (linking the name to a source)." *Cicena Ltd. v. Columbia Telecomms Group*, 900 F.2d 1546, 14 USPQ2d 1401, 1406 (Fed. Cir. 1990). No single factor is determinative. *In re Tires, Tires, Tires Inc.,* 94 USPQ2d 1153, 1157 (TTAB 2009). *See also In re Cordua Rests. LP,* 110 USPQ2d 1227, 1233 (TTAB 2014) *aff'd on other grounds,* 118 USPQ2d 1632 (Fed. Cir. 2016). The amount and character of evidence required to establish acquired distinctiveness depends on the facts of each case, *Roux Labs., Inc. v. Clairol Inc.*, 427 F.2d 823, 166 USPQ 34 (CCPA 1970). The ultimate test in determining whether a designation has acquired distinctiveness is Applicant's success, rather than its efforts, in educating the public to associate the proposed mark with a single source. *In re Redken Labs., Inc.*, 170 USPQ 526, 529 (TTAB 1971) ("It is necessary to examine the advertising material to determine how the term is being used therein, what is the commercial impression created by such use, and what would it mean to purchasers.).

Applicant asserts acquired distinctiveness based on seven years of sales of LA FINCA wine in hundreds of Trader Joe's stores throughout the country, the prominent and catchy wine displays associated with its goods, and the active promotion of the LA FINCA wine by Trader Joe's in its "well-known" Fearless Flyer and TJ's Wine Insider. According to Applicant, the success of Trader Joe's marketing and the wide availability of LA FINCA wine has resulted in a number of unsolicited consumer reviews. Further, as of May 18, 2015, Applicant had sold over 5,000,000 bottles of wine in the United States, and there is no evidence of any use by a third

party of LA FINCA for wine. Applicant has supported its claim of acquired distinctiveness with the following:

1. A letter from Applicant's United States distributor, stating that the "[LA FINCA] brand has been distributed to Trader Joe's stores throughout several states around the country since [2009]."[42]

2. Third-party registrations without a disclaimer of "estate(s)" or "finca."[43]

Registration No.	Mark	Goods	Register	Translation
3589381	JAFFE ESTATE	wine	Supplemental	N/A
3687807	SONOMA ESTATE VINTERS	wine	Supplemental	N/A
3924363	FAMILY OWNED, ESTATE GROWN, SUSTAINABLY FARMED.	wine	Supplemental	N/A
4315112	BAITING HOLLOW FARM VINEYARD	wine	Supplemental	N/A
4366235	KAIKOURA ESTATES	wines	Supplemental	N/A
4729419	LA FINCA MIAMA	beer	Supplemental	The English translation of "La Finca" is "THE FARM"

[42] Request for Reconsideration, December 15, 2015, TSDR 366. Applicant categorized this letter as a declaration. However, it includes no averments under penalty of perjury that the statements made therein are true and correct. Nonetheless, the Examining Attorney proffered no objections and addressed Applicant's claims in its brief.

[43] Id. at. 44-138. Applicant also made of record printouts for Registrations Nos. 3315751 (HERDADE DOS GROUS); 3591939 (MAS CAVALLS); 3740741 (FATTORIA DI TRAVALDA); 3729704 (LA FERME DE SUZON); 3642816 (ALTAS QUINTAS); 4797383 (CASCINA DELLE ROSE); 4622923 (ANTICA CASCINA); 4000668 (MAS MACIA); AND 3223390 (COTO DE HAYAS). Because the marks in these registrations include neither the words ESTATE or FINCA, nor do any words in the marks translate to ESTATE, they have limited probative value in our genericness determination. We also find Registration Nos. 4414137 (LA FINQUITA); 4586957 (FINCA MONTE AZUL); 4830205 (HACIENDA RIO NEGRO) and 2697012 (HACIENDA DE BRACAMONTE) unpersuasive because they cover goods other than wine or alcoholic beverages. Lastly, pending application Serial No. 85809592 reflects nothing more than that it was filed with the USPTO, *In re Binion*, 93 USPQ2d 1531, 1535 fn.3 (TTAB 2009), and there is no indication that it ever matured into registration

4320059	FINCA DEL CASTILLO	wine	Principal	The English translation of "FINCA DEL CASTILLO is "castle farm" or "castle estate"
3658741	FINCA ALTORFER	wines	Principal	The English translation of "FINCA" is "farm"
4729420	LA FINCA FLORIDA	Beer	Supplemental	The English translation of "LA FINCA" is "THE FARM"
4731649	ESTATE Claim of acquired distinctiveness in whole	beer	Principal	N/A
4656441	THE FARM	wines	Principal	N/A
4012027	FINCA LOS PRIMOS	wine	Principal	The English translation of "FINCA LOS PRIMOS" is "The Cousins Farm"
4126419	SOLAR DE URBEZO	wines	Principal	The English translation of "SOLAR DE URBEZO" is "URBEZO ESTATE"
4492146	DUCHATEAU	Wines	Principal	The English translation of "DUCHATEAU" is "of the estate" or "of the castle"
3632408	VILLA D'AQUINO	Wine and liquor	Principal	The English translation of "VILLA" is "house or estate"

3. Internet printouts showing unsolicited media attention. A representative sampling from Applicant's reply brief follows:[44]

[44] The evidence from vspt.wine.group is printed in Spanish and Applicant did not provide a translation. Accordingly, it has no probative value. *Hard Rock Cafe Licensing Corp. v. Elsea*, 48 USPQ2d 1400, 1405 (TTAB 1998) (objections sustained as to documents not in English).

- 2010 La Finca Cabernet, Argentina. $3.99. This was great with burgers, both veggie and beef, at a Democratic Party barbeque.[45]

- La Finca Malbec Review - ***Should you buy***? Although priced like a Venti Latte, the La Finca Malbec is actually pretty decent for the money.[46]

- La Finca Wines from Trader Joe's - GrapeSmart.net - I found the La Finca 2009 Malbec to be very drinkable, very characteristic of Malbec from this region, and of pretty solid structure for a very young wine.[47]

- Sweet Success - Trader Joe's Hauls - March 2014 - My last impulse purchase as two bottles of wine. I bought the TJ's brand La Finca malbec and tempranillo, both Argentinian wines, which are my fave. There were a lot gone off the shelves, so I'm taking that to mean that they are good (or just super cheap).[48]

- Just Joep - La Finca Malbec, oak aged from Mendoza Argentina, is not a bad wine.[49]

- 2010 La Finca La Celia Malbec - I put off tasting this wine for quite a while … but I have to say, it surprised me a little.[50]

- 2010 La Finca La Celia Malbec - pinterest.com - "La Finca Malbec. This wine is 3.99 at Trader Joe's and

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[45] Request for Reconsideration, June 15, 2015, TSDR 157. *Wine, Physics, and Song*, posted September 27, 2011 – no comments.

[46] *Id*. at TSDR 161. *The Fermented Fruit*, 2 replies.

[47] *Id.* at TSDR 169. *Grape Smart*, posted January 12, 2010 – no comments.

[48] *Id*. at TSDR 186-187. *Sweet Success – Trader Joe's Haul's* – posted March 2014 - no comments.

[49] *Id*. at TSDR 218. *JUST JOEP*, posted June 25, 2013 – no comments.

[50] *Id*. at TSDR 224. *Reverse Wine Snob® THUMBING YOUR NOSE AT BOTTLES OVER $20*, posted April 12, 2011, no comments.

is very delish" "La Finca Malbec at Trader Joe's and is very good for the price!"[51]

- 2013 La Finca Tempranillo, Mendoza, Argentina - The 2013 La Finca Oak Aged Tempranillo from Mendoza, Argentina is a very inexpensive red wine that you will find at Trader Joe's stores that sell wine.[52]

- 50 States of Wine - For Tempranillo Day, our second wine was La Finca 2011. Definitely more fruit forward: blueberry and cherry on the nose, adding cocoa on the plate, smooth finish - nice wine for the price![53]

- Wine for $4? La Finca all the way! - I threw a small dinner party last Friday night for some friends from college … I recommend going to your nearest Trader Joe's and picking up a few bottles of La Finca.[54]

- Red Wine On A Sunday: 2012 La Finca Malbec - … I wasn't expecting much, but this one delivers….[55]

4. Results from Google searches for LA FINCA on the web and in images.[56]

5. Excerpts from Trader Joe's promotional materials, i.e., Fearless Flyer and TJ's Wine Insider.[57]

6. Articles touting Trader Joe's marketing.[58]

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[51] *Id*. at TSDR 232. Pinterest, posted April 2010 – no comments.

[52] *Id*. at TSDR 235. *Activerain,* posted December 7, 2014 – 3 comments.

[53] *Id*. at TSDR 240. *50 States of Wine – A Food, Wine, craft Beer, and Travel Blog: 2011 La Finca Tempranillo* – posted November 9, 2012 – no comments.

[54] Response to Office Action, May 18, 2015, TSDR 61. *PrettytastyThings*, posted April 4, 2012 – 5 comments.

[55] *Id*. at TSDR 69. *Red Wine On a Sunday*, posted February 24, 2013 – no comments.

[56] Request for Reconsideration, December 15, 2015, TSDR 37-41.

[57] Response to Office Action, May 18, 2015, TSDR 24-28; Request for Reconsideration, December 15, 2015, TSDR 174-175.

[58] Request for Reconsideration, December 15, 2015, TSDR 189-217.

7. Screen shots of two YouTube videos of reviews of LA FINCA wine, showing 956 and 2,628 view, respectively.[59]

Having carefully reviewed the totality of the evidence of record, we find that Applicant has failed to establish acquired distinctiveness of its proposed mark within the meaning of Section 2(f). While five years' use considered alone is sometimes sufficient to show acquired distinctiveness, *see* Trademark Act § 2(f), in this case, Applicant has sold its wines for more than seven years. However, the only "sales" figure provided by Applicant is that Applicant sold more than 5,000,000 bottles of wine in the United States between 2012 and 2014. While that figure appears impressive on its face, we are at a loss as to how it compares to the volume of sales by other producers of similarly-priced wine, inasmuch as Applicant provided no context. But even if the figure proves to be substantial, it is not in itself necessarily enough to prove secondary meaning. *In re Boston Beer Co. L.P.*, 198 F.3d 1370, 53 USPQ2d 1056 (Fed. Cir. 1999) (claim based on annual sales under the mark of approximately eighty-five million dollars, and annual advertising expenditures in excess of ten million dollars, not sufficient to establish acquired distinctiveness in view of highly descriptive nature of mark). Moreover, Applicant's sales are limited to Trader Joe's stores. Although Trader Joe's has more than 300 stores in the United States, there is no information regarding the market share occupied by Trader Joe's in the grocery store space.

[59] Response to Office Action, May 18, 2016, TSDR 76.

While there is unsolicited media attention, the record reveals that advertising is usually by way of Trader Joe's circulars. Applicant made of record an article titled "Why Trader Joe's Stands Out From All the Rest in the Grocery Business-Forbes," touting, among other things, the marketing prowess of Trader Joe's. The article states, in part: "[Trader Joe's] offers the most consumer-friendly monthly newsletter, titled The Fearless Flyer that shares recipes, product origin stories and other non-traditional insights that further promote the treasure-hunt experience. … Trader Joe's has leveraged the success of the Charles Shaw program (nearing 500 million bottles in sales since its launch) into expanded wine selections that many praise to be one of the best selections amongst food retailers."[60] Even if we take that statement at face value, we cannot ascertain the reach of Trade Joe's adverting. That is, while Trade Joe's may offer the Fearless Flyer, there are no particulars regarding its circulation, e.g., the geographic area of publication and the potential consumers to whom it is sent. We are also unconvinced that the store merchandising displays[61] create an association in the minds of the consuming public with LA FINCA and the source of Applicant's wines. We say so because pricing is also stressed in these displays. At $3.99 a bottle, Applicant's wine is subject to impulse purchasing, and it is not unreasonable for consumers to focus on the price in the display as opposed to the LA FINCA name as they place a bottle in their carts. Turning back to the unsolicited media reviews, while they demonstrate that Applicant's LA FINCA wine

[60] Request for Reconsideration, June 15, 2015, TSDR 191.

[61] Photographs of store displays are set forth, *supra*.

has garnered the attention of the reviewer, most are individual blog posts and, as such, have limited probative value in the absence of information regarding public exposure.

Similarly, results from the Google searches for "la finca wine" have limited utility to show acquired distinctiveness given the nature of the evidence and images which lack sufficient context. *Cf.*, *In re Thomas*, 79 USPQ2d 1021, 1026 (TTAB 2006) (Board rejected an applicant's attempt to show weakness of a term in a mark through citation to a large number of GOOGLE "hits" because the results lacked sufficient context). *See also, In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1833 (Fed. Cir. 2007) (Truncated results from search engines are entitled to little weight):

> Bayer asserts that the list of GOOGLE search result summaries is of lesser probative value than evidence that provides the context within which a term is used. We agree. Search engine results—which provide little context to discern how a term is actually used on the webpage that can be accessed through the search result link—may be insufficient to determine the nature of the use of a term or the relevance of the search results to registration considerations.

The screen shots of the apparent YouTube reviews of Applicant's LA FINCA wine also suffer from lack of context. Without more than the single views, we cannot begin to ascertain what kind of commercial impression the segments made.

As regards Applicant's claim that the Office has allowed numerous marks to register on the Principal Register without a disclaimer of the words "Finca" or "Estate," almost half are registered on the Supplemental Register. More importantly, we are not bound by the prior decisions of examining attorneys in allowing marks for registration. It has been noted many times that each case must be decided on its own

facts. *See In re Nett Designs Inc.,* 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) ("Even if some prior registrations had some characteristics similar to [applicant's] application, the PTO's allowance of such prior registrations does not bind the Board or this court."); *In re Merrill Lynch,* 4 USPQ2d at 1142**.**

Last, the absence of use by any third party of LA FINCA for wine does not persuade us that the designation has acquired distinctiveness. The record reflects that term FINCA is used, with other matter, in multiple marks covering wine.

For the reasons stated, Applicant has not shown that the designation LA FINCA will be perceived as identifying the source of Applicant's wines. Accordingly, we find that it has not acquired distinctiveness.

Decision: The refusal to register under Section 2(e)(1) of the Trademark Act on the ground that the mark is generic is reversed; and the refusal to register on the ground that the mark is merely descriptive and that the evidence is insufficient to show that the mark has acquired distinctiveness under Section 2(f) of the Act is affirmed.