

On My Mind Blog

“GRUYERE” Cheese Suffers a Meltdown

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If you happen to find yourself in Switzerland or France in search of gruyere cheese, you might be surprised to learn that it may taste a bit different from the gruyere you have come to know and enjoy in the US. You also might be surprised to learn that the term “gruyere” has different meanings in the EU and the US.

This is because the term “gruyere” is recognized under EU law as a **protected designation of origin** (PDO or AOP) and a **protected geographical indication** (PGI or IGP) since the alpine cow’s milk cheese product has been made according to a very specific aging and production process and has been produced in a specific location – the Gruyère regions of Switzerland and France - dating back to the early 12th century. Cheese that fails to meet these specifications is not allowed to be labeled as “gruyere.”

However, the same protections for gruyere cheese do not currently exist in the US. Since 1977, the Food and Drug Administration (FDA) has required that certain ingredient and production requirements be met for cheese to be labeled as “gruyere.” But, there is no restriction as to where in the US gruyere-labeled cheese can be produced. As a result, when European farmers migrated to the United States, they continued to produce the types of cheeses made in their homelands and continued to call the cheeses by the same names, including gruyere. Thus,

gruyere cheese has been produced domestically (and in locations that are not in France or Switzerland) and sold to US consumers under that name for decades.

US Certification Mark Application

Hoping to curb this broad labeling, Swiss and French Consortiums, (Interprofession du Gruyère and Syndicat Interprofessionnel du Gruyère) filed an application at the United States Patent and Trademark Office (USPTO) to register to the word “GRUYERE” as a certification mark in the US in 2015. A **certification mark**, like PDO and PGI in the EU, is used “to certify regional or other origin, material, mode of manufacture, quality, accuracy, or other characteristics of a person’s goods or services or that the work or labor on the goods or services was performed by members of a union or other organization.” 15 U.S.C. § 1127. Unlike a typical trademark, which is used by the mark owner, a certification mark is owned by the certifier and intended for use by others to indicate to consumers that the goods meet the standards set forth by the certifier. In filing the application, the Consortiums wanted to indicate to US consumers that any cheese bearing the mark GRUYERE was certifiably made only in Switzerland or France.

Opposition and Lower Tribunal Decisions

The US Dairy Export Council, Atlanta Corporation and Intercibus, Inc. each opposed the application, on the grounds that GRUYERE should not be registrable because the word “gruyere” had become generic in the US market. Indeed, a cornerstone of US trademark law is the rule that a term by which a product is commonly known (those that indicate a “type” or “genus” of a product rather than the “source” of a product) is generic and may not be issued a registration because it does not indicate a single source or specific geographic area.

The Opposers argued that US consumers considered “gruyere” to refer to a type of cheese, rather than as a sign to consumers that the cheese was made in the location, Gruyère. Ultimately, the Trademark Trial and Appeal Board (TTAB) and, subsequently, the US District Court for the Eastern District of Virginia, sided with the Opposers, finding the term generic. The Consortiums appealed again.

Fourth Circuit Decision on Appeal

The US Court of Appeals for the Fourth Circuit reviewed the case anew. It looked closely at the FDA standard of identity for Gruyere cheese, USPTO Guide on marks that include geographic wording, data speaking to the significant amounts of gruyere cheese imported from countries other than Switzerland and France (including the US), as well as looking at common usage of the word “gruyere” (i.e., use in media). [In *Interprofession du Gruyere v. U.S. Dairy Export Council*](#), No. 22-1041(4th Cir. Mar. 3, 2023), the Fourth Circuit affirmed the District Court and TTAB’s rulings, once again holding that “gruyere” was generic to US consumers and was therefore unregistrable as a certification mark.

Authors’ Note:

We have mostly followed the Fourth Circuit’s spelling convention as expressed in the Court’s first footnote: “For consistency, when discussing the cheese generally, we refer to it as ‘gruyere.’ However, we recognize that it is often spelled with a grave accent over the first ‘e,’ or

with a capitalized 'g.' When discussing the sought-after certification mark, we refer to it as 'GRUYERE.'”

Gruyere is not the only type of cheese that has faced the genericism issue. In fact, gruyere is just one cheese in a long line that are protected in the EU but are used generically in the US and elsewhere (other examples include feta, romano, asiago, parmesan, fontina, and gorgonzola). This case remains interesting, however, because it highlights how a variation in EU and US law can result in different treatment of the same mark in different countries, resulting in significant economic consequences for either side.

EU PDO and PDI laws were initially aimed at protecting and preserving the reputations and traditions of certain locally grown products. Many Europeans feel that the absence of legal protection in the US allows for exploitation of Europe’s cultural legacy and unfair competition against European cheese producers. At the same time, a U.S. federal court ruling to grant the certification mark in this case or to uphold the EU protections would require an extensive and expensive phasing out of US uses, to the detriment of US dairy sellers who have used the term for decades.

While there is no solution that will please both parties, the situation can serve as a useful reminder to trademark owners of the importance of enforcing one’s mark (whether it is a typical trademark, certification mark, PDO or PGI) both at home and abroad, and taking precautions to avoid permitting a mark to become generic in any market.

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