

Gruyere: Delicious Cheese But Generic Term

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by Kaleb McNeely



When you hear the word “gruyere,” what comes to mind? A bucolic region in the mountains of Switzerland? Perhaps the Gruyère region of neighboring France? Or, more likely, you think of a type of cheese. Not just any old cheese though – according to the Oxford Companion to Cheese, gruyere cheese is “widely considered among the greatest of all cheeses.” In a delightfully cheese-pun stuffed decision, the Fourth Circuit Court of Appeals recently

held that U.S. cheese consumers primarily think of “gruyere” as a type of cheese, rather than a product specific to the Gruyère regions of Switzerland and France. As such, the Court found that the term “gruyere” was too generic to warrant a certification mark of

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geographic origin.

As the Fourth Circuit explained, gruyere cheese originated in the district of La Gruyère in the Canton of Fribourg, Switzerland, in 1115 AD. The original area of production expanded to include other areas of Switzerland and certain neighboring areas of France. According to sources the court quoted, Swiss and French gruyere “producers make cheese from the unpasteurized milk of cows that graze on alpine grasses.” As is common in Europe, Switzerland and France have approved “Gruyère” as a protected designation of origin and a protected geographical indication, respectively. Those designations set forth detailed requirements for the gruyere production process, including that the cheese only be produced in specified areas of Switzerland and France.

The U.S., however, does not extend similar protections to gruyere cheese. While the FDA has a general standard of identity of “Gruyere cheese,” that standard does *not* impose any geographic restrictions on where gruyere-labeled cheese can be produced. It’s no surprise that, as a result, cheese from all over the world – as well as from U.S. states such as Wisconsin and Idaho – has been labeled and sold as gruyere in the U.S. for decades. Of course, it’s also not a huge surprise that Swiss and French gruyere producers aren’t terribly keen on (maybe even cheesed off about) what the court termed “the indiscriminate labeling of cheese as gruyere in the United States.”

In 2015, a Swiss and a French gruyere consortium (appellants in the Fourth Circuit case) teamed up to file an application with the USPTO to register the word “GRUYERE” as a certification mark. The intended mark would certify that the cheese originates in the Gruyère region of Switzerland and France, and would preclude any cheese produced outside that region from using the “GRUYERE” label. However, a group of U.S. dairy producers/importers (appellees in the Fourth Circuit) opposed the certification mark, arguing that the term “gruyere” was generic as to cheese and therefore not eligible for the certification. The TTAB agreed with the Opposers that “GRUYERE” is generic and could not be registered as a certification mark. After the Consortiums challenged that decision in a Virginia district court, the district court reached a similar conclusion and granted summary judgment for Opposers. The Consortiums then appealed to the Fourth Circuit, which noted that “[l]ike a fine cheese, this case has matured and is ripe for our review.” (Given the number of cheese puns in the decision, one wonders if the judges and their clerks nibbled on some gruyere while drafting the opinion.)

The court began with a brief but helpful refresher course on certification marks, including indications of regional origin. The federal Lanham Act, 15 U.S.C. § 1127, defines a certification mark as “any word, name, symbol, or device, or any combination thereof” that is used “to certify regional or other origin, material, mode of manufacture, quality, accuracy, or other characteristics of such 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.” The court explained that, unlike a typical trademark, a “geographic certification mark is not used by the owner of the mark; rather, the owner of the certification mark controls how others use the mark.” Certification marks are, however, registrable “in the same manner and with the same effect as are trademarks.” 15 U.S.C.

§ 1054. Of course, this means that the same standards apply – including that a generic name (*i.e.*, the name of a class of products or services) is ineligible for registration as a certification mark. The Fourth Circuit noted that 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.” In this case, the issue was whether the cheese-consuming public primarily understand the term “GRUYERE” as referring to a type of cheese (*i.e.*, generic), rather than indicating that the cheese was produced in the Gruyère region of Switzerland and France (*i.e.*, non-generic).

The district court had granted summary judgment to Opposers on the basis of three categories of evidence. First, the FDA standard of identity for “Gruyere cheese” indicates the mark is generic. Second, the district court held that USDA import data (which showed the prevalence of imported gruyere from countries other than Switzerland and France), as well as evidence of domestically produced gruyere-labeled cheese, favors a finding of genericness. Third, the district court found that “common usage” of the term gruyere shows that it is generic.

On appeal, the Fourth Circuit agreed with the district court that the FDA standard of identity for “Gruyere cheese,” which does not contain any geographic restrictions on where the cheese can be produced, supports a finding that the term “GRUYERE” is generic. The court noted that, while the FDA standard of identity for “Gruyere cheese” does not *preclude* registration of the “GRUYERE” certification mark, that standard of identity “*presents strong evidence* that GRUYERE is a generic term.”

Moving on to the second category of evidence (non-Swiss/French imports and domestically produced gruyere), the Fourth Circuit agreed with the Consortiums that the district court made an improper inference from the USDA import data. Specifically, the district court erroneously concluded that that data showed that the majority of gruyere-labeled cheese imported into the U.S. was from countries other than Switzerland and France, when that was unclear at best. Unfortunately for the Consortiums, despite this improper inference, the Fourth Circuit nonetheless held that “a substantial quantity of cheese has been imported to the United States from countries other than Switzerland and France and sold to consumers as gruyere.” Similarly, while conceding that some of the Consortiums’ criticisms of the domestically-produced gruyere cheese evidence had merit, the appellate court still concluded from the evidence that millions of pounds of domestic-produced cheese are sold as gruyere in the U.S.

Next, the Fourth Circuit discussed the evidence of common usage of the term gruyere. Yet again, the court found that even though the district court had made mistakes, they didn’t impact the conclusion. The district court had first looked at various dictionary definitions of the term gruyere and concluded that most of those definitions did not limit the meaning of gruyere to cheese produced in Switzerland and France. But, as the Consortiums pointed out, some definitions do define “Gruyere cheese” as being produced or originating in Switzerland or France. Thus, the Fourth Circuit held that the district court erred in concluding from dictionary definitions of gruyere that the term was

generic. But the district court had also considered references to gruyere in the media, and the Fourth Circuit agreed that those references – many of which described gruyere as originating in places *other than* Switzerland and France – supports a finding of genericness.

Finally, the Fourth Circuit addressed the Consortiums' argument that summary judgment was improper because Opposers failed to provide consumer survey evidence. In the court's words, that "argument slices the cheese too thinly." While survey evidence is common in genericness cases, it is not mandatory and evidence of consumer understanding of a mark may be obtained from *any* competent source. In sum, the court held that because the evidence made clear that cheese consumers in the U.S. understand "GRUYERE" to refer to a type of cheese (and not cheese from a particular region), the term is generic and the district court properly granted summary judgment to Opposers.