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INTELLECTUAL PROPERTY LITIGATION
IP CASE OF THE WEEK

American Purchasers Poke Holes in Swiss Cheese Certification

***Interprofession du Gruyere v. US Dairy Exp. Council*, No. 22–1041 (Fourth Cir. Mar. 3, 2023)**

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Edited by: Jason Keener
March 13, 2023

This week, the Fourth Circuit affirmed the United States Trademark Trial and Appeal Board's ("TTAB") and subsequent Eastern District of Virginia's ("District Court") summary judgment finding that "GRUYERE" could not be registered as a certification mark because the term had become generic. Specifically, "GRUYERE" is generic because the "relevant consuming public" only viewed gruyere as a "firm, nutty flavored cheese that can be made anywhere."

Appellants were Swiss and French consortiums that sought a certification mark which would limit use of the term "gruyere" in the United States to a cheese that could only be produced in the Gruyère region of Switzerland and France. Appellants pointed to the fact that gruyere cheese originated from the Gruyère region in 1115 AD and enjoyed "protected designations of origins" and "protected geographical indications" in Switzerland and France. Appellants also argued that other cheeses, like "Roquefort" and "Reggiano," enjoy the benefits of a certification mark.

But the Fourth Circuit and previous courts disagreed, pointing to substantial evidence that "American purchasers" generally did not distinguish cheeses based on region, but based on the "type of cheese." Specifically, the Fourth Circuit cited the FDA's standard identity for "Gruyere cheese," which defines gruyere as a cheese that contains "small holes or eyes," "a mild flavor, due in part to the growth of the surface-curing agents," that is aged a minimum of ninety days, and has a "maximum milkfat content [of] 45 percent by weight of the solids and [a] maximum moisture [of] 39 percent by weight." The Fourth Circuit noted that the standard "does not contain any geographic restrictions on where the cheese can be produced." Accordingly, the FDA's standard identity was strong evidence that gruyere had become a generic term for the type of cheese. The Fourth Circuit also pointed to the "millions of pounds" of gruyere cheese produced in the midwestern United States and sold across nearly every retailer across the country. Although appellants wrote cease-and-desist letters to numerous retailers to try and stop those retailers from selling domestically produced gruyere cheese, most of those retailers declined to do so with no consequence. Accordingly, the Fourth Circuit reasoned that "the more members of the public see a term used by competitors in the field, the less likely they will be able to identify the term with one particular producer" or "geographic region." Finally, the Fourth Circuit did not find the "Roquefort" and "Reggiano" certification mark comparisons convincing because the FDA standard of identity prescribed alternative names for those cheese. For example, Roquefort could be referred to as "blue-mold cheese." Likewise, many domestic purchasers of "Reggiano" cheese likely refer to it as parmesan, a term originating from Parma, Italy that has undoubtedly become generic.

Like with trademarks, it is important for parties seeking a certification mark to begin education and enforcement on the applied-for marks early. The record in this case seems to indicate that the United States only started large scale production of domestic gruyere cheese in 1991. But appellants in this case applied for a certification mark in 2015. Appellants also sent cease-and-desist letters with little effect, demonstrating the importance of actually enforcing those cease-and-desist letters with known infringers. By 2015, American purchasers had already genericized gruyere as just another type of cheese.