

4/11/02

**THIS DISPOSITION
IS NOT CITABLE AS PRECEDENT
OF THE T.T.A.B.**

Paper No. 5
TEH/RC

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Ralph S. Gray

Serial No. 75/725,201

James C. Wray, P.A. for Ralph S. Gray.

Karanendra S. Chhina, Trademark Examining Attorney, Law Office
101 (Jerry Price, Managing Attorney).

Before Wendel, Holtzman and Drost, Administrative Trademark
Judges.

Opinion by Holtzman, Administrative Trademark Judge:

Ralph S. Gray (applicant) seeks to register HEMP BURGER
for goods which were amended to read "sandwiches," in
International Class 30.¹

Registration has been finally refused on the ground that
the mark HEMP BURGER is merely descriptive within the meaning
of Section 2(e)(1) of the Trademark Act, 15 U.S.C. Section
1052(e)(1). The word "burger" has been disclaimed.

¹ Application Serial No. 75/725,201, filed on July 2, 1999. The
application is based upon applicant's claim of a bona fide intention
to use the mark in commerce.

Applicant has appealed. Briefs have been filed, but an oral hearing was not requested.

The Examining Attorney maintains that the wording HEMP BURGER is merely descriptive of significant characteristics of applicant's sandwiches, namely, that the sandwiches are burgers containing hemp as the primary ingredient, and further, that the wording in the mark in fact describes a type of sandwich, i.e., a "hemp burger." In support of her position, the Examining Attorney has relied on a dictionary definition of "hemp" as "cannabis" and a definition of "burger" meaning "sandwich with a nonbeef filling. Often used in combination: a crab burger, a tofu burger."² The Examining Attorney has also submitted numerous excerpts of articles retrieved from the Nexis database referring to hemp as an ingredient in various food products and "hemp burger" as a type of sandwich. Representative examples of these articles are reproduced below (emphasis added):

Hemp seeds have also found their way into energy bars and peanut butter. Though not really enjoyable, we'd pick a spoonful of green-hued **hemp** butter over a **hemp burger** any day. *The San Francisco Chronicle*. (August 30, 2000).

Hemp is one of the most versatile products. ... Chippi says **hemp** is the most nutritionally complete plant food for

² *The American Heritage Dictionary of the English Language*, Third Edition (1992).

human consumption, which is the key reason companies use it in food products. *The Denver Post*. (October 20, 1999).

Since the sprouted chickpea falafel isn't fried, it's sort of mushy, but it tastes perfectly good on its bed of red cabbage and greens. Avoid the **hemp burger**, though. *Los Angeles Times*. (September 29, 1999).

She met Almquist at a music festival. She was vending **hemp** hot cakes and cookies; he was selling **hemp burgers**. *Denver Rocky Mountain News*. (May 2, 1999).

You can order totally legal carrot cake made with **hemp**, **hemp burgers**, and blueberry **hemp** smoothies. *The Daily News of Los Angeles*. (December 21, 1998).

The Examining Attorney has also made of record a number of excerpts of web sites from the Internet containing various references to hemp burger and food products containing hemp. Examples of these excerpts follow (emphasis added):

Products list HempWorld Hotel: **hemp** cheese, **hemp burgers**, **hemp** muesli, **hemp** bread... .. Recipe: Heat vegetable oil in a large saucepan until hot. Fry the onions until soft then pour **hemp burger** mix and stir. *Hempunion.karoo.net*.

Fancy a **hemp burger**? Be careful report warns. *Friendlystranger.com*.

Hempeh (sic) Veggie Burger. This is the original and still the best **hemp burger**. *Shop.store.yahoo.com*.

Hempnut: This is the original and still the best **hemp burger** available mix available! First introduced in 1994, its (sic) smoked for your dining pleasure. *Johnnymarijuany.com*

If they drug-test me, I won't show up positive, will I? One city firefighter inquired as he waited for his **hemp burger**. *Marijuananeews.com*

Applicant, on the other hand, argues that even if the individual components of its mark are descriptive, the mark as a whole is "ambiguous and unclear" and as such is suggestive of its goods. Relying on a dictionary definition of "hemp" submitted with its appeal brief applicant contends that the combination of HEMP and BURGER "is capable of different meanings" and that HEMP BURGER is therefore, quoting *In re Colonial Store Incorporated*, 394 F.2d 549, 157 USPQ 382 (CCPA 1982), "bizarre and incongruous" in relation to the identified goods. In particular, applicant claims that the word "hemp" has a number of different definitions (including a meaning of a "...tough...fiber that is used for making cloth, floor covering and cordage") none of which, according to applicant, suggest any type of food product.³ Further, according to applicant, nothing in the record suggests that others in the relevant field have used or need to use HEMP BURGER to describe their goods. In addition, applicant has questioned the persuasive value of the *Nexis* and Internet evidence based on its view that such evidence is hearsay.

³ The Board may take judicial notice of dictionary definitions. *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983). We note, however, that applicant did not submit the relevant pages from the dictionary and that the only definition provided is the one indicated above.

It is well settled that a term is considered to be merely descriptive within the meaning of Section 2(e)(1) of the Trademark Act, if it immediately conveys knowledge of the ingredients, qualities, or characteristics of the goods or services with which it is used, or is intended to be used. See *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987); and *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). Moreover, the question of whether a particular term is merely descriptive must be determined not in the abstract, but in relation to the goods or services for which registration is sought. See *In re Engineering Systems Corp.*, 2 USPQ2d 1075 (TTAB 1986).

The evidence in this case is strongly persuasive that the term HEMP BURGER when applied to applicant's goods, immediately and without conjecture, describes the primary ingredient of applicant's sandwiches as well as the type of sandwiches. It can be seen from the *Nexis* and Internet references made of record by the Examining Attorney that hemp is frequently used as an ingredient in a variety of food products including burgers, and that the word "hemp" is typically combined with the generic names of food products to identify the main ingredient of that product, as in, for

example "hemp cheese" or "hemp bread" or "hemp burger." We also note that applicant had originally identified its goods as "hemp burgers...that look like regular burgers, made from hemp seed flour." Moreover, the dictionary entry submitted by the Examining Attorney shows that the word "burger" is often used in combination with its primary ingredient, for example, tofu or crab, to identify the type of burger as a "tofu burger" or a "crab burger." The *Nexis* and Internet materials also make it clear that the term "hemp burger" refers to a particular type of burger and that, contrary to applicant's claim, competitors who are producing or selling burgers made from or with hemp will need to use that term to describe their own goods.

It is true that hemp has other dictionary meanings such as the definition supplied by applicant of a tough fiber used for making cordage. However, as indicated earlier in this decision, the question of descriptiveness must be determined, not in the abstract, but in relation to the identified goods. Notwithstanding the absence of a dictionary definition of "hemp" as an ingredient of food, the *Nexis* and Internet evidence of record clearly demonstrates that "hemp" is commonly used as a food product and more particularly as an

ingredient of other food products.⁴ Thus, the only plausible meaning of "hemp burger" in relation to applicant's burgers is a type of edible sandwich made with hemp, as opposed to a type of sandwich made out of cordage or fiber.

Unlike the mark SUGAR & SPICE in the case *In re Colonial Store Incorporated, supra*, on which applicant relies, it can be seen from the foregoing that the combination of the words "hemp" and "burger" does not create a new nondescriptive term which is "unique and catchy" or for which the meaning is unclear. Instead, purchasers of applicant's goods would, without any guesswork or the exercise of any imagination, immediately understand that applicant's product is a sandwich made of or containing hemp, or a type of sandwich known as a "hemp burger."

Decision: The refusal to register is affirmed.

⁴ Evidence of the public's understanding of the term may be obtained from any competent source, such as consumer surveys, dictionaries, newspapers and other publications. *In re Northland Aluminum Product, Inc.*, 221 USPQ 1110 (TTAB 1984), *aff'd*, 777 F.2d 1556, 227 USPQ 961 (Fed. Cir. 1985). Contrary to applicant's claim, the stories attached by the Examining Attorney are not presented for the truth of the matter asserted therein but rather to show the context of the use of the term. The use of a term in a descriptive or generic manner in a variety of general circulation newspapers is a strong indication that the general public views the term as a descriptive or generic term for the particular goods. *See, for example, In re Audio Book Club Inc.*, 52 USPQ2d 1042 (TTAB 1999).