

Blog Post

# No Twist on Pretzel Crisps on Remand

September 18, 2017

In a 54 page decision issued on September 6, 2017, the Trademark Trial and Appeal Board (the “Board”) ended (again) a long-standing dispute between snack food makers Frito-Lay, Inc. (“Frito”) and Princeton Vanguard, LLC (“Princeton Vanguard”) over the registrability of Princeton Vanguard’s PRETZEL CRISPS trademark. Frito claimed that “Pretzel Crisps” was a generic term that all parties are entitled to use to describe pretzel-style chips.

Princeton Vanguard launched its PRETZEL CRISPS brand in 2004. After receiving patent protection for its flattened pretzels, Princeton Vanguard registered the PRETZEL CRISPS brand, first on the Supplemental Register at the launch and then applying to register the mark on the Principal Register in 2009.

Frito challenged both marks at the Board, arguing that the name was either generic or, at the very least, a highly-descriptive and unprotectable name for the cracker-like products Princeton Vanguard was selling. The Board agreed with Frito. In holding the term “Pretzel Crisps” to be a generic term for flattened, crispy, pretzel-shaped snacks, the Board cited dictionary definitions, evidence of use by the public, references in the media, third-party food industry terminology, and some evidence of use by the defendant itself.

Although Princeton Vanguard noted during the proceedings that no other company used the

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combined term before the launch of PRETZEL CRISPS in 2004, being the originator of a term had little weight in considering whether the term was generic. In making its determination, the Board reasoned that “Pretzel Crisps” should be treated as merely a compound word of standard terms, rather than a more complex “phrase.” Under Board precedent, phrases need to be considered holistically, but compound words are simply analyzed by the common meaning of their constituent words. *Frito-Lay N. Am., Inc. v. Princeton Vanguard, LLC*, 109 USPQ2d 1949 (TTAB 2014).

Princeton Vanguard appealed to the Federal Circuit.

## Appeal

In a decision issued on May 15, 2015, the Federal Circuit vacated and remanded the Board’s decision for further proceedings, finding the Board applied the wrong legal standard for genericness. *Princeton Vanguard, LLC v. Frito-Lay N. Am., Inc.*, 786 F.3d 960 (Fed. Cir. 2015).

The Board’s analysis rested on a distinction between two lines of cases. According to the Board, if a mark is compound, then *In re Gould Paper Corp.*, 834 F.2d 1017 (Fed. Cir. 1987) applied, allowing it to analyze the terms individually. If on the other hand, the mark is a phrase, then *In re American Fertility*, 188 F.3d 1341 (Fed. Cir. 1999) applied, requiring the Board to consider the mark in its entirety.

The Federal Circuit clarified that there was only one legal standard for genericness: the two-part test set forth in *H. Marvin Ginn Corp. v. International Association of Fire Chiefs, Inc.*, 782 F.2d 987 (Fed. Cir. 1986). Under this test, to determine whether a mark is generic, the Board must identify the genus of goods at issue and then assess whether the public understands the mark, as a whole, to refer to that genus. The test is the same regardless of whether the mark is a compound term or a phrase. The case was therefore remanded for further consideration of the

possible genericness of “Pretzel Crisps” under the proper test.

## Remand

On remand, the Board quickly answered the first question of the *Marvin Ginn* test: the genus of the goods was described in Princeton Vanguard’s identification of goods in the application and registration, namely “pretzel crackers.” The Board then turned to the second question of the *Marvin Ginn* test, namely, whether the relevant public understands “Pretzel Crisps” to refer to pretzel crackers. As the Federal Circuit instructed, the Board was required to determine the public perception of “PRETZEL CRISPS” as a whole.

However, even reviewing the mark as a whole, the Board stated that it was appropriate as a first step to analyze the constituent terms in the mark. In analyzing the constituent terms “pretzel” and “crisps,” the Board considered evidence such as dictionary definitions and third party references such as product reviews and advertisements. The record contained a wealth of evidence that the term “pretzel crisps,” taken as a whole, is understood to be a generic term for a pretzel-shaped cracker. There was also evidence that Princeton Vanguard’s own use of the term “Pretzel Crisp” was sometimes generic and only sometimes brand-identifying.

Princeton Vanguard’s distributors’ declarations were found by the Board to be underwhelming. As the Board viewed it, while the declarations informed of the personal knowledge and opinions of the four declarants, they represented a very small subsection of snack food distributors. Together, they accounted for only about 6 to 10 percent of the distributorship of Princeton Vanguard’s product. More importantly, distributors were not end consumers of the product, whose understanding controls in genericness cases such as these. To the extent the distributors’ declarations purported to convey the views and

comments of end consumers, it was speculation and inadmissible hearsay.

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Overall, and taking into account the number of media articles, their sources, and what the contexts show about the authors' recognition of brand names, we find that the media references, product reviews, and the consumer feedback support a conclusion that the term "PRETZEL CRISPS" is more likely to be perceived by the relevant public as a name for a type of snack product that may derive from multiple sources, rather than as a brand that emanates from a single source.

*Slip Op. at 22.*

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### **Expert Surveys**

Each party proffered the results from a "Teflon" survey conducted to test how consumers perceive the term "Pretzel Crisps." Teflon surveys are the most common surveys used in "genericide" cases – whether a once original and protected trademark has over time become generic (e.g., "Aspirin," "Escalator"). The first step of a Teflon survey is to provide definitions and examples – explaining to respondents what is meant by the terms "common or generic name" and "brand name." The second step is to conduct a mini-test, for instance asking the respondents whether BAKED TOSTITOS is a brand or common name, and whether TORTILLA CHIPS is a brand or common name. The third step is to survey the name at issue by displaying the name and asking the respondents to classify it as either a common or generic name, or as a brand name.

Unsurprisingly, each party's expert reached different conclusions and each one attacked the others' methodology. However, the Board found that Teflon

surveys were inappropriate in cases like these that seek to prove alleged consumer recognition of an otherwise not inherently distinctive mark.

The Board reiterated the black-letter law: A generic term “is the common descriptive name of a class of goods or services.” To be the first user of a particular name for a product is not sufficient to take it out of the realm of genericness. As far as the utility of consumer surveys in informing the Board of the possible distinctiveness of a brand name, the Board noted that several Circuit Courts have found Teflon surveys to be unpersuasive when used outside the specific context of genericide. Specifically, where, as here, one party claimed to have exclusive rights in a term that was never before used as a trademark, courts have found that Teflon surveys were ineffective at determining the true weight of public perception.

The Board acknowledged that Princeton Vanguard’s registration for PRETZEL CRISPS was on the Supplemental Register and its new application was filed with a Section 2(f) claim of acquired distinctiveness. These facts were seen as constituting admissions that the term “PRETZEL CRISPS” is not inherently distinctive of “pretzel crackers.”

In sum, the Board found that the record demonstrates that the primary consumer perception of the term “PRETZEL CRISPS,” as a whole, is likely to be that of a common name for the identified goods, “pretzel crackers.”

### **Acquired Distinctiveness**

Finally, the Board considered the question of acquired distinctiveness – assuming solely for the sake of argument that the term “Pretzel Crisps” was descriptive rather than generic.

In proceedings before the Board, it is the plaintiff’s burden to make a *prima facie* showing that the

defendant's mark has not acquired distinctiveness. The Board found that Frito had met that burden. Princeton Vanguard's contrary evidence was considered to be insufficient and unpersuasive.

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No doubt, Princeton Vanguard will again appeal. It should be noted that Eastern District of Virginia recently found persuasive a Teflon-type survey in ruling that BOOKING.COM is not generic for travel agency and hotel reservations services. *Booking.com B.V. v. Matal*, Civil Action No. 1:16-cv-425-LMB-IDD (August 6, 2017). The acceptability of Teflon surveys in cases such as PRETZEL CRISPS will be a central issue on appeal.

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