

geographically ...

inherently distinctive	fanciful arbitrary suggestive		misdescriptive		inherently distinctive product packaging
can acquire distinctiveness	merely descriptive	primarily geographically descriptive	deceptively misdescriptive	non-inherently distinctive product packaging product design color	primarily a surname
unprotectable	generic	primarily geographically deceptively misdescriptive	deceptive	functional	names/likenesses of living people without consent gov't symbols

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**Primarily Geographically Descriptive vs.
Primarily Geographically Deceptively Misdescriptive**

**Here's my boiling down of what the
casebook says . . .**

**Primarily Geographically Descriptive vs.
Primarily Geographically Deceptively Misdescriptive**

Primarily Geographically Descriptive:

A mark is primarily geographically descriptive if:

- (1) the primary significance of the mark is a generally known geographic location;
- (2) the goods or services originate in the place identified in the mark; and
- (3) purchasers would be likely to believe that the goods or services originate in the geographic place identified in the mark

In which case, it is registrable/protectable only with secondary meaning.

Primarily Geographically Deceptively Misdescriptive:

A mark is primarily geographically deceptively misdescriptive if:

- (1) and (3), above, are true, and
- (2) the goods or services do not originate from the place identified, and
- (4) the geographical representation would materially affect a potential purchaser's decision to buy

In which case it is not registrable/protectable at all.

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In which case, it is **registrable/protectable only with secondary meaning.**

Primarily Geographically Deceptively Misdescriptive:

A mark is primarily geographically deceptively misdescriptive if:

- (1) and (3), above, are true, and
- (2) the goods or services do not originate from the place identified, and
- (4) the geographical representation would materially affect a significant portion of potential purchasers' decision to buy

In which case it is **not registrable/protectable at all.**

**Primarily Geographically Descriptive
vs. Primarily Geographically Deceptively Misdescriptive**

Here's a more compact representation of the doctrine, if you prefer (which I based on the TMEP) ...

(Use which ever one you prefer! They are analytically and substantively equivalent.)

**Primarily Geographically Descriptive
vs. Primarily Geographically Deceptively Misdescriptive**

Primarily geographically descriptive:

- The primary significance of the mark is a geographic location, consumers are likely to believe the goods/services originate from that place, and they actually do.
- Registrable/protectable only with secondary meaning.

Primarily geographically deceptively misdescriptive:

- The primary significance of the mark is a geographic location, consumers are likely to believe the goods/services originate from that place, and they actually don't, and the false impression is material to the purchasing decision of a significant portion of relevant consumers.
- Not registrable/protectable at all.

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vs. Primarily Geographically Deceptively Misdescriptive**

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- Not registrable/protectable at all.



Primarily geographically descriptive?

(Company is in California and provides janitorial services there.)



Primarily geographically descriptive?

Yes

(Company is in California and provides janitorial services there.)

The TTAB said it was. That means registration will require a showing of secondary meaning.



Primarily
geographically
descriptive?

Registration DENIED by TTAB:
“[W]e find that the primary significance of CALIFORNIA GREEN CLEAN, in its entirety, is geographic. The addition of a descriptive term ('Green Clean') to a geographical term does not overcome the primary geographic significance of the mark as a whole.~ The term 'Green Clean' is merely descriptive for janitorial and maid services and the combination of that term with 'California' does nothing to alter the geographic significance of 'California' alone. Accordingly, we find that the primary significance of applicant's mark CALIFORNIA GREEN CLEAN is that applicant's janitorial and maid services originate from a California-based company.”

ANTARCTIC

for retail sales of snow cones
from a food truck in Texas

Primarily
geographically
deceptively
misdescriptive?

ANTARCTIC

for retail sales of snow cones
from a food truck in Texas

Primarily
geographically
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misdescriptive?

(This is a hypothetical, FYI.)

This would not be primarily
geographically deceptively
misdescriptive, because
consumers would not think
that the snow cones
originated from Antarctica.

ANTARCTIC

for retail sales of snow cones
from a food truck in Texas

Primarily
geographically
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(This is a hypothetical, FYI.)

This would not be primarily
geographically deceptively
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No

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Primarily geographically deceptively misdescriptive?

(Battery company is in New Jersey)



Primarily
geographically
deceptively
misdescriptive?

(Battery company is in
New Jersey)




Registration denied for
“SWISSCELL” batteries for lighting
by examiner because mark is
primarily geographically
deceptively misdescriptive
because Switzerland is a place
where batteries are manufactured,
consumers would likely believe the
batteries were from Switzerland,
and this could influence the
consumer’s purchasing decision
based on reputation for high
quality.



Registration denied for "SWISSCELL" batteries for lighting by examiner because mark is geographically descriptive.

OVERRULED by TTAB
 Mark held not primarily geographically deceptively misdescriptive, because of a lack of evidence. PTO had only "tenuous evidence" consumers would expect the batteries to come from Switzerland and because the evidence for materiality of misrepresentation fell short of showing "that Switzerland is noted for batteries for lighting."



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That means this mark is registrable if it otherwise counts as distinctive.

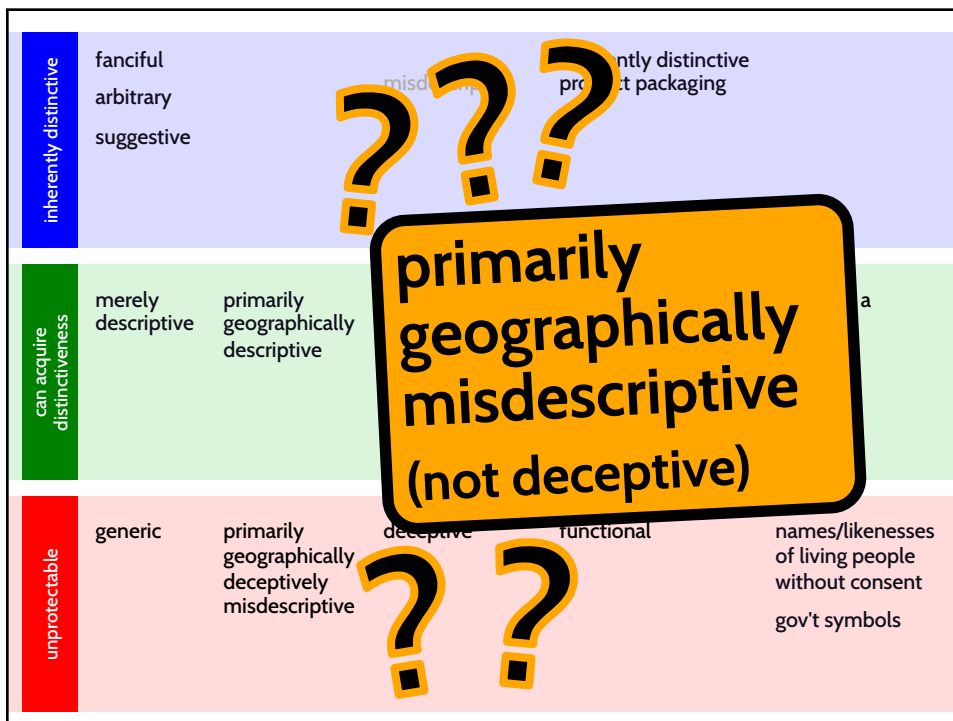
Primarily Geographically Descriptive vs. Primarily Geographically Deceptively Misdescriptive

Primarily geographically descriptive:

- The primary significance of the mark is a geographic location, consumers are likely to be influenced by the mark in their purchasing decision of a significant portion of relevant consumers.

What about something that's primarily geographically misdescriptive but not *deceptive!*?!?

- Not registrable/protectable at all.



What about something that's primarily geographically misdescriptive but not deceptive!?!

Primarily
Geographically
Misdescriptive

“Marks that are primarily geographically misdescriptive but not deceptive have been treated as arbitrary or fanciful, making them inherently distinctive and registrable on the principal register.”

Marketa Trimble, U.S. Law of Geographical Trademarks, "Google Effects," Historical Developments, and U.S. International Obligations: Proposal for Changes to the Lanham Act, 112 Trademark Rep. 706, 716 (2022)

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Primarily Geographically Misdescriptive

“When Congress amended section 2 of the Lanham Act as part of the implementation of the NAFTA agreement, it seems highly improbable that Congress's response to NAFTA's mandate to prevent the use of misleading geographic indicators would be to make it easier to register a misdescriptive geographic mark. ... [N]o such indications of intent exist [in the legislative history]. It therefore appears that the Federal Circuit has misconstrued the intent behind the NAFTA amendments, and that its ... interpretation of these provisions frustrates the intent of Congress.”

Mary LaFrance, Innovations Palpitations: The Confusing Status of Geographically Misdescriptive Trademarks, 12 J. Intell. Prop. L. 125, 144 (2004)

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