

Journal of the American

# **Herbalists Guild**

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Volume 16 | Number 1 | Spring 2018

## **Autoimmunity and Inflammation**

**Autoimmunity Case Studies**

**Lymph Physiology and Herbs**

**Anti-Inflammatory Tree Medicine:  
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**Trademarks for Herbalists  
and Fire Cider Update**

**In Memoriam: Dr. James Duke**



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Journal of the American

# Herbalists Guild

Volume 16 | Number 1 | Spring 2018

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# Bioregional Herbalism and Responsibility

Bevin Clare, President, American Herbalists Guild

**T**he theme for AHG's 2018 Symposium is "Bioregional Herbalism," where we will celebrate the sense of place many of us experience as herbalists. Our connection to the land we live on is central to our choices in plants, techniques, and a contextual understanding of what herbal medicine means within our communities. This bioregionalism also brings up numerous critical questions about land ownership, cultural appropriation, colonialism, and how these concepts relate to our practice of herbalism wherever we are.

Nearly all of our practices of herbalism in the United States are some sort of hybrid or conglomeration. We blend a global materia medica with that of our native or locally common flora, we learn about traditions where we live while applying the work of those in other countries and continents, and we combine the shared wisdom of others with our own discoveries. Combine these personally blended practices with the unique and varied flora of our incredibly diverse continent, and we have a system of herbal medicine which is less a cohesive national system and more of a bioregional phenomenon.

It is possible to practice herbalism today straight from the books and store shelves, along with a bit of help from package delivery services. We can practice from the comfort of our homes or offices while using products in fancy labeled bottles with plenty of "substantiated evidence." Yet many herbalists thankfully

pursue and retain a connection to the cultural traditions and plants that surround us, and take time to better understand them as cohabitating members and qualities of our communities.

Bioregional herbalism is the coming together of the plants, the people, and the traditions of the area where an herbalist lives. It's the understanding each herbalist has of our local flora and how it blends into our practices and provides a picture and sense of place. It's a respect for the people and practices of our region and an honoring of the traditions present in our communities. It's also a responsibility to look deeply at our appropriate roles in interface with indigenous peoples and their knowledge and practices.

Bioregional herbalism brings serious questions we must ask ourselves: If we are not indigenous people to the land that we live on (occupy), what rights and roles do we have with the plants that grow there? What are our responsibilities to protect the rights and voices of people who came before us in our community? How can we responsibly learn about systems of herbal medicine of indigenous peoples? How can we rightly give credit for indigenous herbal knowledge? How can we be a positive contributor to our communities and all people living within them?

We hope to explore these questions as we more deeply dive into a sense of place at the AHG Symposium on October 25-29, 2018 in Georgia. We intend to continue these conversations in the time beyond, since an herbalism with a sense of place is an herbalism of heart, of roots, and of connection. ■



**Bevin Clare MS RH CNS LDN is a clinical herbalist and nutritionist and an Associate Professor at the Maryland University of Integrative Health. Bevin has studied herbal medicine around the world and blends her knowledge of traditional uses of plants with modern science and contemporary healthcare strategies to bring the art, science, and tradition of herbalism into greater visibility. She holds a Master's of Science degree in Infectious Disease from the London School of Hygiene and Tropical Medicine and is an Adjunct Associate Professor at the New York Chiropractic College and the Massachusetts College of Pharmacy. She is a board member of the United Plant Savers, a conservation group dedicated to medicinal plants, as well as being the mother of budding herbalists Alexander and Cassia.**



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# Trademark Law 101 for Herbalists: Fired Up Over Fire Cider

Henry M. Abromson, Esq.



Henry "Hank" Abromson, founder of Henry Martin Law, a Frederick, Maryland law firm, is a business and intellectual property attorney. Hank helps his clients with respect to corporate formation and maintenance, contracts and employment issues, and trademark, copyright, and trade secret protection. Hank's clients consist mostly of small and emerging businesses in the craft brew and technology industries. [www.henrymartinlaw.com](http://www.henrymartinlaw.com)

**T**he term "fire cider" is well known to herbalists as a term for a spicy, hot, deliciously sweet vinegar tonic, which is thought to have first been concocted in the kitchens of the California School of Herbal Studies in the early 1980s. It comes from a recipe which was created to be a dietary supplement drink with medicinal benefits.

It is estimated that since its inception, hundreds, if not thousands, of individuals have created and enjoyed their own fire cider recipes. Many have even sold versions of the elixir at stores and farmers markets across the country. The recipe, which often includes a mixture of garlic, onions, horseradish root, ginger root, hot peppers, and *Echinacea* spp. root, lies at the core of an herbal revolution that has quickly gained popularity in the US. As a result, the term "fire cider" has become commonplace as part of the herbal community's vernacular, due to its overwhelming popularity.

## The Fire Cider Case

When the United States Patent and Trademark Office (USPTO) granted registration of the trademark "Fire Cider" to Shire City Herbals, Inc. (Shire) in December 2012, many in the herbal community were not only confused, but also predictably outraged. Shire registered

"Fire Cider" in connection with the sale of a "dietary supplement drink," which many members of the herbal community saw as an attempt to monopolize a well-known name generically used in connection with the sale of a product which had been produced and/or sold under that name by others many years and decades prior. Given the circumstances, many in the herbal community collectively wondered if the trademark registration was correctly granted by the USPTO and some took action. Shire, a young business, found itself having to defend its use of the mark.

The "Fire Cider" mark is currently the subject of a cancellation proceeding before the Trademark Trial and Appeal Board (TTAB). Interestingly, the cancellation proceeding has been temporarily suspended pending the outcome of a civil action regarding the registrability of "Fire Cider" in the United States District Court of Massachusetts (a formal determination regarding this issue will likely be issued soon). It will be interesting to review how the courts decide this matter and whether they find the mark to be protectable.

This article will provide an overview and analysis of relevant trademark law in an attempt to determine how the trademark registration granted by the USPTO might fare in the current Shire case.

**Fire Cider Timeline**

This timeline is adapted from Free Fire Cider in order to give a clear summary of the Fire Cider trademark case. “Shire” refers to Shire City Herbals, the company that makes and has trademarked the term “Fire Cider.” Many herbalists see the application and execution of trademarking the traditional herbal term Fire Cider as a legal action against all herbalists who sell fire cider.

**Trademark Law 101**

A trademark is a word, design, sound, smell, color, or a combination thereof, which serves to identify the origin of a product or a service. One acquires trademark rights in a “mark” when that mark is used in connection with the sale of a good or service in the marketplace. Generally, the first party to acquire and use a mark is said to have priority to the rights in and to such mark, even if another party has already registered the mark. That is because the trademark system in the United States is a “first to use” system rather than a “first to register” system, as some other countries employ.

Not only does the user of a mark have to be the first to use the mark in commerce, generally speaking, but the mark also has to be eligible for protection under the law. To be eligible for protection, the mark must be sufficiently distinctive. It cannot be a term that is generically used for the product or service being sold under the mark. For example, the mark “Exxon” used in connection with the sale of fuel for motor vehicles is very strong because it is very

unique. It is a word that does not otherwise exist in the English language. On the other hand, the term “escalator” used in connection with the sale of people moving equipment is now generic, because that term is widely used for the actual product. Marks like “Exxon” are considered stronger because, as the theory holds, the more distinctive the mark, the less opportunity there will be for confusion to occur in the marketplace.

**Classification of Marks**

**Fanciful Marks**

The strongest marks, like “Exxon,” are referred to as fanciful marks. These marks generally consist of words that are not already in the English language, created solely for the purpose of identifying and distinguishing the origin of a product or service. These marks are inherently distinctive.

The mark “Fire Cider” does not appear to be a fanciful mark. It consists of actual words commonly used in the English language. Further, the term fire cider is itself commonly used, especially in the herbalist community.

1980	2014	2014	2014	2014
FIRE CIDER TERM COINED	FIRE CIDER TRADEMARKED	HERBALISTS UNITE	SHIRE RESPONDS	PRODUCERS CONTACTED
Rosemary Gladstar coins the term Fire Cider. For the next 36 years, the term is widely used in classes, books, and herbal products. Rosemary included the term in her home study course in 1981 and in several copyrighted books.	The herbal community becomes aware that Shire has trademarked “Fire Cider” and there is an outcry on social media. Shire received the trademark after the standard 18-month appeals period – there were no complaints because no herbalists were aware of the trademark filing.	As herbalists came together to organize to fight the trademark, a boycott of Shire’s products developed. A Change.org petition was started. The “Tradition Not Trademark” Facebook page was started at <a href="https://www.facebook.com/Tradition-Not-Trade-mark-311341798991086/">https://www.facebook.com/Tradition-Not-Trade-mark-311341798991086/</a> . The Free Fire Cider website was founded at <a href="http://freefirecider.com/">http://freefirecider.com/</a> and @FreeFireCider on Twitter.	Thousands of phone calls and emails are sent to Shire. Shire responds in February on Facebook that they will not revoke the trademark or work with the herbal community to preserve the traditional term for common use. They state that the only way to revoke the trademark is to file a petition to cancel it. Shire starts contacting producers of Fire Cider products at Etsy with cease and desist letters.	More producers of Fire Cider products were contacted by Shire in the spring of 2014. The boycott of Shire continued. Thousands of calls were made to Shire and to retailers, asking them to stop carrying Shire’s products. A Fire Cider postcard contest yield beautiful and impassioned results.

### Arbitrary Marks

Arbitrary marks are the next strongest type of marks. These are marks that include real words used with an unrelated goods or services. For example, the mark “Apple,” used in connection with the sale of personal computers is an arbitrary mark.

“Fire Cider” does not appear to meet the criteria for an arbitrary mark either. This particular type of dietary supplement drink has been referred to by many people for many years as fire cider, so the tie between the mark and the product do not seem to be arbitrary.

### Suggestive Marks

Suggestive marks are protectable marks with some strength, but are not quite as strong as fanciful or arbitrary marks. Suggestive marks conjure in the consumers’ minds, feelings, ideas, or attributes that can be directly connected to the goods or services being sold in connection with the mark. For example, the mark “Champion” used in connection with the sale of sports apparel is a suggestive mark.

“Fire Cider” could be deemed to be a suggestive mark. Despite the fact that

A trademark is a word, design, sound, smell, color, or a combination thereof, which serves to identify the origin of a product or a service.

the apple-cider-vinegar-based product does not actually emit fire, smoke, or flames, the term likely conjures up in the minds of many consumers the idea that the dietary supplement drink is spicy.

### Descriptive Marks

The final two categories consist of marks that are very difficult or impossible to protect. The first of those groups includes merely descriptive marks. As the name suggests, these are marks that merely describe a product or a feature of the product or service, e.g., “Tubeless” for computer monitors or “Light” for portable computers. These marks are only registerable after a showing of “secondary meaning.” Secondary meaning denotes that, although the mark is objectively

## 2014

### PETITION TO CANCEL

Tradition Not Trademark files a petition on June 20 to cancel the Fire Cider trademark with the USPTO. Shire has one year to respond to the petition. Kathryn Langelier, one of the three herbalists involved in the case, changes the name of her product to Fire Tonic around this time, but she is still sued by Shire in April 2015.

## 2015

### EVIDENCE OF GENERICITY

Tradition Not Trademark makes a public call for evidence in March to prove that Fire Cider is a generic term. Hundreds of people send pages of notes, videos, photographs, and other proof of fire cider product sales as evidence. Meanwhile, Shire continues to use the term and their business continues to build and expand.

## 2015

### “FIRE CIDER 3” SUED

Three herbalists – Nicole Telkes, Mary Blue, and Kathryn Langelier – are personally sued on April 20 by Shire for \$100,000 in damages for the boycott and for trademark infringement. The filing of the lawsuit causes a suspension of the petition to USPTO to cancel the Fire Cider trademark and pushes the issue into federal court. This is an unusual approach for a small business to settle a trademark dispute – filing suit is more common for multi-million-dollar businesses.

## 2016

### SOME COUNTS DISMISSED

On March 20, a federal judge in Massachusetts dismisses the five counts of the lawsuit pertaining to damages from the boycott of Shire’s products. The five trademark infringement claims against the herbalists still stand.

## 2017

### HERBALISTS DEPOSED

Depositions were collected from the “Fire Cider 3” herbalists being sued in the case and have been submitted to the court by the October 2017 deadline. The herbalists were offered to settle out of court, but they refused. The trial costs to the herbalists are expected to exceed \$150,000, with additional expenses for court costs and travel.

descriptive of the goods or services, consumers recognize the mark as having a source-indicating function. One example of a merely descriptive mark that was shown to have had a secondary meaning in the marketplace is the mark “Digital” for computers.

In determining whether a mark is merely descriptive, the question is whether someone who knows what the goods and services are will understand the mark to convey descriptive information about those goods or services (*In re Tower Tech, Inc.*, 64 U.S.P.Q.2d 1314, 1316-1317 [TTAB 2002]). As stated by the U.S. Court of Appeals for the Federal Circuit in *Duopross Meditech Corp. v. Inviro Medical Devices*, “[o]ne articulation of the [merely descriptive] rule is that a mark is merely descriptive if it consists of the qualities, ingredients, or characteristics of the goods or services related to the mark” (*Duopross Meditech Corp. v. Inviro Medical Devices*, 695 F.3d 1247, 1251 [Fed. Cir. 2012]). It can be difficult to determine whether a

mark is suggestive or merely descriptive because a suggestive mark also typically employs terms that relate to the product’s characteristics or intended use. It has been determined, however, that a suggestive mark, unlike a merely descriptive mark, “requires the observer or listener to use imagination and perception to determine the nature of the goods” (*Leelanau Wine Cellars v. Black & Red*, 502 F.3d 504, 513, 502, n.3 [6th Cir. 2007]).

The mark “Fire Cider” may be viewed more as a suggestive mark than a descriptive mark, because the product does not actually emit fire, smoke, or flame, nor is it hot to the touch. Rather, the drink is spicy, which requires consumers to use their imagination and perception to tie the term “Fire Cider” to something that features a spicy taste.

#### Generic Marks

Generic marks are the final category of trademarks. These marks are incapable of

2017

STANDING STRONG

In a newsletter update, herbalist Rosemary Gladstar says, “Though going to trial is the last thing any of us wanted to do, we are willing to stand strong in our beliefs that traditional herbal remedies should be used and sold freely. We stand with thousands of people in demanding that Fire Cider should remain in public domain and should be free from trademarks.”

2018

FOUR YEARS GOING

February marked the four-year anniversary of the Free Fire Cider campaign. The group started a #trademarkfreefirecider video campaign, asking herbalists to post videos of their products to the Tradition Not Trademark Facebook page.

2018

MOTION STALLS CASE

A court date was set for March 2018 until Shire City filed another motion. The motion meant that the court case was stalled until late 2018. The “Fire Cider 3” herbalists are still waiting for the court date to be announced. After the case is settled, there will potentially be another year of appeals. If the herbalists win, they probably will not be able to recover their costs, but they will have the satisfaction of setting an important case law precedent for other instances where people try to trademark common terms.

2018

OVER 30 CONTACTED

To date, over 30 producers of Fire Cider products who have been contacted by Shire and ordered to stop producing and selling their products. Most were contacted by personal letter or through “cease and desist” letters from Shire’s attorneys, and some have had lawsuits launched against them. Free Fire Cider maintains a website record of the producers who have been contacted by Shire.

2018

BOYCOTT CONTINUES

The boycott of Shire continues. Thousands of calls have been made to Shire and to retailers, asking them to stop carrying Shire’s product. Over 13,000 signatures have been gathered on a Change.org petition, now closed. Donations are especially needed as the case drags on.

...the field of Trademark Law is full of nuance and subjectivity, which can make it difficult for many individuals and businesses to navigate their way...

functioning as a trademark because they lack inherent distinctiveness. A generic mark is simply the term which is or becomes the common name of the product being sold under the mark. For example, “Rollerblade” is now a generic mark, as the entire genus of in-line skates is now known as rollerblades. Another example of a generic mark is the mark “Lite Beer” for light beer. The genericide of a mark – the process by which a trademark owner loses rights because the trademark is so widely used to refer to a type of product or service – is frequently due to the mark owner’s own very effective marketing of a product. For this reason, mark owners must clearly distinguish the brand name from the product type in

their marketing to consumers. It is generally recommended, for example, that mark owners use their respective marks as an adjective (e.g., “we sell Kleenex brand facial tissues”) rather than a noun (e.g., “we sell Kleenex”). As the Third Circuit explained in *E.T. Browne Drug Co. v. Cococare Prods.*:

*The jurisprudence of genericness revolves around the “primary significance test,” which inquires whether the primary significance of a term in the minds of the consuming public is the product or the producer. We ask whether consumers think the term represents the generic name of the product or service or a mark indicating merely one source of that product or service. If the term refers to the product (i.e., the genus), the term is generic. If, on the other hand, it refers to one source or producer of that product, the term is not generic (i.e., it is descriptive, suggestive, arbitrary, or fanciful) (E.T. Browne Drug Co. v. Cococare Prods, 538 F.3d at 192 [3d Cir. 2009]).*

2018

ROSEMARY  
GLADSTARNICOLE TELKES,  
RH (AHG)

MARY BLUE

KATHERYN  
LANGELIER

## THE FUTURE

The “Fire Cider 3” herbalists hope to establish an open, searchable online dictionary of traditional and common terminology of herbalists so that people new to the field can search to avoid trademarking terms that are in common use by herbalists around the country and world. This website might also include information such as a checklist for how to establish an ethical herbal business.

As a leader, teacher, and author in the field of modern herbalism for over 40 years and as someone who published Fire Cider recipes in the early 1980s, Rosemary Gladstar has been a champion of the Free Fire Cider campaign and points out how you can help right now:

- Donate to the trial costs at <http://freefirecider.com/donate/> or <https://www.indiegogo.com/projects/support-fire-cider-3#/>
- Make your own trademark-free Fire Cider
- Teach a trademark-free Fire Cider class
- Ask your local stores not to carry trademarked Fire Cider

After a decade of botanical studies and community organizing, Nicole founded The Wildflower School of Botanical Medicine in Austin, TX. The school provides on-site learning on bioregionalism, community herbalism, and in-depth holistic herbal training, serving over 300 students a year. The school is a United Plant Savers Botanical Sanctuary, participating in permaculture and sustainable herb projects. Nicole has been a Practicing Herbalist for 17 years. Nicole is a founding member of Traditions not Trademarks. <https://wildflowerherbschool.com/>

Mary founded Farmacy Herbs of Providence, RI, in 2006. She has been a practicing herbalist and farmer for 15 years. She was awarded The Northeast Herbal Association Community Herbalist Award in 2008 for her dedication to the herbal community. She offers free herbal, nutritional, and hospice support and classes for cancer patients, the homeless, and the recovery community. She is a founding member of Herbal Aide, The Northeast Community Herbalist Convergence, Providence Recycle-a-Bike, and Tradition Not Trademark. <http://www.farmacyherbs.com/>

Katheryn founded Herbal Revolution Farm and Apothecary in Union, ME, in 2009. Her commercial products include a variety of award-winning herbal tonics, elixirs, and tea blends. Her gardens and fields are where she organically grows and gathers medicinal plants. Katheryn has been practicing plant medicine for more than 20 years, gaining much of her early knowledge from farm apprenticeships. She has worked with kids and adults, sharing knowledge about wild edibles, medicinal plants, and sustainable gardening. <https://www.herbalrev.com/>

Here, the mark “Fire Cider” could also be determined to be within the class of generic marks. “Fire Cider” is being used as a mark to sell a good which is referred to, and has been known by many for a very long period of time, as fire cider. In applying the “primary significance test,” it seems clear that consumers of the product, which most likely are largely in the herbal community, would find that the mark refers to the generic name for the product rather than the source of the product, which is Shire.

### **Creating a Unique and Defensible Trademark**

For herbalists who wish to protect a mark or commonly used term like “Fire Cider,” it is recommended that such businesses and individuals carefully monitor and police use of similar marks by regularly surveying the Internet, regularly reviewing the USPTO Trademark Official Gazette that features newly published marks, and perhaps even hiring a third party trademark monitoring service which will review numerous publications and databases for potentially conflicting marks on their clients’ respective behalves. Although protecting one’s mark through constant surveillance can be beneficial, doing so can often be expensive and burdensome.

As this article makes clear, the field of Trademark Law is full of nuance and subjectivity, which can make it difficult for many individuals and businesses to navigate their way through the processes of trademark registration, trademark protection, and enforcement of trademark rights. The best practice for prospective herbal trademark owners is to create a unique mark, and then perform thorough trademark clearance searches prior to mark usage and registration with the help of a knowledgeable professional. This process will reduce the risk of an infringement claim or an opposition to registration of their mark by the USPTO and/or a potential competitor. ■

## **AHG Statement on Trademark of Traditional Herbal Preparations**

**April 2016**

The American Herbalists Guild (AHG) is a non-profit, educational, member-based association of herbal practitioners founded to represent the goals and voices of herbalists specializing in the medicinal use of plants. The AHG’s primary goal is to promote a high level of professionalism and education in the study and practice of therapeutic herbalism, whether based on modern biomedical, traditional, or other approaches.

The AHG opposes the granting of a trademark to a traditional herbal preparation predating any single company’s product. We believe the U.S. Patent and Trademark Office should respect the traditional use of herbs as a common good predating the modern use of trademarks. We urge the Office to review all applications with regards to traditional use and no longer grant trademarks if the product concerned has a generally accepted and historically known use.

The AHG stands firmly with the herbal community in believing that traditional herbal preparations, names, recipes, formulations, etc. should be available freely to all. We believe that no trademark or other exclusive right, commercial or otherwise, including other intellectual property rights such as copyright, patent, etc. should be granted to any company or individual for a traditional or historically generic term or preparation.