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Mailed:
April 15, 2011

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re eCopy, Inc.

Serial No. 76682275

Douglas R. Wolf of Wolf Greenfield & Sacks P.C., for eCopy, Inc.

Barney L. Charlon, Trademark Examining Attorney, Law Office 104 (Chris Doninger, Managing Attorney).

Before Quinn, Taylor, and Ritchie, Administrative Trademark Judges.

Opinion by Ritchie, Administrative Trademark Judge:

Applicant eCopy, Inc. seeks registration on the Principal Register of the mark "eCopy," in standard character format, for "software discs and associated apparatus for enabling the scanning and electronic distribution of documents over computer networks and touch screen control panels for interfacing with such software,"

in International Class 9.[1] The trademark examining attorney refused registration on the ground that applicant's mark is merely descriptive of the identified goods under Trademark Act Section 2(e)(1), 15 U.S.C. §1052(e)(1) and has not acquired distinctiveness under Section 2(f).[2] Applicant appealed the final refusal. Both applicant and the examining attorney filed briefs. After careful consideration of all of the arguments and evidence of record, we affirm the refusal to register.

By applying for a registration under the provision of Section 2(f), applicant admits that the term "eCopy" is descriptive of the goods for which it seeks registration.[3] *See The Cold War Museum, Inc. v. Cold War Air Museum, Inc.*, 586 F.3d 1352, 92 USPQ2d 1626, 1629 ("where an applicant seeks registration on the basis of Section 2(f), the mark's

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[1] Serial No. 76682275, filed on September 24, 2007, under Trademark Act Section 1(a), 15 U.S.C. §1051(a), and claiming acquired distinctiveness under Section 2(f).

[2] We agree with applicant that the wording used by the examining attorney could have been more artful. In particular, the examining attorney referred during prosecution to the needlessness of submitting evidence of acquired distinctiveness for a "generic term" although there was no genericness refusal.

[3] On brief, applicant argued that "[t]he record establishes that eCopy is not merely descriptive." (appl's brief at 2.) However, the brief also acknowledged that "[t]he original Application included the recitation that the Applicant's eCopy mark had become distinctive and has acquired secondary meaning as a result of more than five (5) years of continuous exclusive use throughout the United States." *Id.* Applicant did not argue its claim of Section 2(f) acquired distinctiveness in the alternative during prosecution of its application.

descriptiveness is a nonissue; an applicant's reliance on Section 2(f) during prosecution presumes that the mark is descriptive."). We focus our analysis, then, on the amount of evidence applicant would need to show that its use of the mark has acquired distinctiveness, and the sufficiency with which applicant has done so.

First, we must determine the degree of descriptiveness of the mark that applicant seeks to register in relation to its goods. In this regard, we note that a term is deemed to be merely descriptive of goods or services, within the meaning of Section 2(e)(1), if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services. *See, e.g., 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). Whether a term is merely descriptive is determined not in the abstract, but in relation to the goods or services for which registration is sought, the context in which it is being used on or in connection with those goods or services, and the possible significance that the term would have to the average purchaser of the goods or services because of the manner of its use. That a term may have other meanings in different contexts is not controlling. *In re Bright-Crest, Ltd*., 204

USPQ 591, 593 (TTAB 1979). Moreover, it is settled that "[t]he question is not whether someone presented with only the mark could guess what the goods or services are. Rather, the question is whether someone who knows what the goods or services are will understand the mark to convey information about them." *In re Tower Tech Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002).

The examining attorney submitted evidence of numerous Internet articles and advertisements showing that the term "ecopy" is used by multiple third parties as a shortened term for the words "electronic copy."[4] A sampling of this evidence includes the following web excerpts (with the term "eCopy" indicated in bold):

> Public Utility Commission: eDockets: Docket Summary: Second Amendment to Interconnection Agreement, Submitted for Commission Approval Pursuant to Section 252(e) of the Telecommunications Act of 1996. Filed by [-] for [—](cover letter dated 4/24/02); Electronic copy provided on disk (bad disk), replacement **ecopy** received on 4/26/02.
> *http://apps.puc.state.or.us/edockets*
>
> IRS: Information Technology: How to Request a Flexi Place Pager: The local ITS POC will resubmit approved requests via electronic copy

[4] As stated above, by asserting a claim of Section 2(f) acquired distinctiveness, applicant has admitted that the mark "eCopy" is merely descriptive of the goods for which it seeks registration. We are assessing this evidence, rather, to determine the degree of descriptiveness of the term with regard to those goods.

> (**e-copy**)[5] to the information Technology Service Voice Services support staff. *www.irs.gov*
>
> Get *Women Who Love Psychopaths, Just Like His Father,* and *The Child Well-Being Workbook,* (**ecopy**), for only $34.95. *www.justlikehisfather.com*
>
> The Write Way: finding the right words The Write Way Fees: Copy edit (**eCopy** only): $4.50/page. *www.thewriteway.us*
>
> XGS Products: While supplies last, we're including a FREE **eCopy** of "programming the SX Microcontroller – 1st Ed." and a FREE vintage Atari-compatible joystick with every XGS microEdition. *www.xgamestation.com*
>
> Method and system for creating a document having metadata" U.S. Patent No. 7397468; The invention claimed is: (4) The method of claim 1 further comprising storing an **e-copy** of the document strokes to the metadata storage device.
>
> U.S. and International Markets for Phytoremediation, 1999-2000" by David J. Glass, Ph.D. July 1999 *New Reduced Prices and Discounts for **eCopies**.* *www.dglassassociates.com*
>
> SciDAC: Conference Schedule: Abstracts of papers and **ecopies** of posters will be linked as they become available, slides will be linked AFTER they have been presented. *www.csm.oml.gov*

The overwhelming evidence of record convinces us that the term "eCopy" is, at the very least, highly descriptive of the goods for which applicant seeks registration, "software discs and associated apparatus for enabling the

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[5] Although some of the uses include hyphens or plurals, we find those differences to have no legal significance. *See Winn's Stores, Inc. v. Hi-Lo, Inc.,* 203 USPQ 140, 144 (TTAB 1979) (difference of apostrophe did not create significantly distinct commercial impression); *Goodyear Tire & Rubber Co. v. Dayco. Corp.,* 201 USPQ 485, 489 n.4 (TTAB 1978) (difference of hyphen was insignificant).

scanning and electronic distribution of documents over computer networks and touch screen control panels for interfacing with such software." This conclusion is consistent with Board precedent, in which we have recognized the prefix "e" as a shorthand for "electronic." *See In re International Business Machines Corp.*, 81 USPQ2d 1677, 1679 (TTAB 2006) (for proposed mark "eserver" Board took judicial notice that "e" stands for "electronic"); and *In re Styleclick,* 57 USPQ2d 1445, 1447-8 (TTAB 2000) (for proposed mark "E FASHION" Board accepted that "e" is recognized as denoting "electronic"). Accordingly, with a highly descriptive mark, applicant would need a commensurate high degree of evidence to show that its mark has acquired distinctiveness for its goods. *See Yamaha Int'l Corp. v. Hoshino Gakki Co., Ltd.,* 840 F.2d 1572, 6 USPQ2d 1001, 1008 (Fed. Cir. 1988) (quoting case law and treatise authorities "in general, the greater the degree of descriptiveness the term has, the heavier the burden to prove it has attained secondary meaning.")

The Section 2(f) evidence offered by applicant includes press and trade articles discussing eCopy and other products offered by applicant, promotional materials from applicant and its partners also discussing the applicant's various products, and a declaration from

applicant's president attesting to sales and revenue. We address the latter first.

In support of its claim of acquired distinctiveness, applicant submitted a declaration from its president, Eric Schmid. The declaration, dated June 16, 2008, attests to an "estimated" "more than 350 active dealer partners" who have advertised the "eCopy mark in the period 2001 to date." It further makes an "estimate" of "almost $10,000,000 in promotion/advertising of the eCopy mark since 2002." Finally, the declaration includes a "partial tabulation of sales" over a five and a half year period "which shows almost $300,000,000 worth of sales just of these eCopy products alone." However, it appears from the attached summary that it refers to a "Consolidated Statement of Operations: Summary View" of all products sold by eCopy the applicant, not just products sold under eCopy the mark. In other words, it is difficult for us to know how much of that amount can be attributed to the actual eCopy mark and the specific goods listed in the present application. Furthermore, even if we were to attribute the full amount to the eCopy mark, there is no context at all given for the industry. Therefore, we can only accord this

evidence limited probative value. It simply does not tell us very much.[6]

We turn then to an examination of the articles and press submitted by applicant in support of its claim of acquired distinctiveness. Applicant included a voluminous amount of evidence. Specifically, applicant submitted over two thousand pages in support of its claim. Of these, applicant highlighted about one hundred with its appeal brief. We note of course that it is specifically not the amount, but rather the sufficiency, of the evidence, that is at issue in our analysis. For example, a number of the press reports refer to an award granted to applicant. However, these refer to a product that is not sold under the eCopy mark (ScanStation OP) *see Buyer's Laboratory Inc.,* Press Release November 9, 2005, submitted by applicant ("Buyer's Laboratory Inc. (BLI) kicked off its Fall 2005 "Pick" awards with today's announcement citing eCopy's ScanStation OP as BLI's Inaugural choice for 'Outstanding Scan Routing Solution' in the company's new Solutions category." Accordingly, we do not find this or other articles on the subject to refer to any acquired

[6] The same is true for press reports regarding investments in the company. They simply do not give us context in the industry, nor tell us whether the particular mark as used on or in connection with the goods at issue in this application has acquired distictiveness.

distinctiveness of the "eCopy" mark vis-à-vis the goods for which applicant seeks registration.

Likewise, the press and "customer snapshots" submitted by applicant are largely repetitive. Although they do show use of the term "eCopy," they do not clearly use the term as a source-identifier. Indeed, applicant itself uses the term descriptively, including as a plural. Examples include the following:

> Making eCopies: Sending an eCopy instead of an unreadable fax or tardy overnight package helps accelerate business transactions by letting workgroups instantly share and view original-quality paperwork – while saving time and money and eliminating the frustration often associated with overnight and fax distribution. The eCopy product suite includes these components:
>
> - eCopier™[7] - a small formatted touchscreen-based control panel easily attached to a networked digital copier or MFP;
> - eCopy ShareScan™ - document Distribution software installed on a server connected to the digital copier;
> - eCopy Desktop™ - PC-based client software for document editing, annotation and management and,
> - eCopy Viewer™ – a free, small-footprint viewing and printing application easily downloadable from www.ecopy.com.
>
> (*Corporate Background: eCopy, Inc., submitted with response to office action and as Exhibit A to applicant's brief*)

> Making an eCopy is such an obvious thing to do, we want to obliterate the question, "Why aren't more people doing it?" . . . . We deliver an electronic copy, or 'eCopy.' (*News Release; ncolleti@eCopy.com dated June 20, 2000*).

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[7] We note that in this document, applicant used the designation "™" to refer to several of its products but not, however, to the eCopy apparatus. Rather, applicant uses the term descriptively including as a plural, "Making eCopies."

> Customer snapshot: Carolina Copy Services, Inc.: "eCopy's scanning capabilities did more than allow us to keep the business we had in litigation copying," said LaGrou. "They actually helped us expand the services we could offer into areas that were growing in demand, popularity, and value with all of our customers." Making eCopies at Carolina Copy Services is as easy as running the photocopier.
>
> The leader in creating electronic copies (eCopies) of important paper business. . . Sending an eCopy is as simple as making a paper copy. *Localbusiness.com March 20, 2001*

From this representative sampling of the evidence submitted by applicant, we simply cannot conclude that applicant's mark "eCopy" has acquired distinctiveness for the goods for which it seeks registration, "software discs and associated apparatus for enabling the scanning and electronic distribution of documents over computer networks and touch screen control panels for interfacing with such software." Rather, we find that applicant as well as others use the term "eCopy" (as well as "ecopies") in a non-source-identifying manner. Applicant has not shown substantial and exclusive use. Accordingly, with this highly descriptive mark, applicant has not met its burden of showing acquired distinctiveness. *See Yamaha Int'l Corp. v. Hoshino Gakki Co., Ltd., supra,* 6 USPQ2d at 1008.

Decision: The refusal to register under Trademark Act Section 2(e)(1) without acquired distinctiveness under Section 2(f) is affirmed.