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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Ultra Violet Devices, Inc.

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Serial No. 78589646

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Daniel M. Cislo, Esq. of Cislo & Thomas LLP for Ultra  
Violet Devices, Inc.

Ronald McMorrow, Trademark Examining Attorney, Law Office  
105 (Thomas G. Howell, Managing Attorney).

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Before Seeherman, Walsh and Taylor, Administrative  
Trademark Judges.

Opinion by Walsh, Administrative Trademark Judge:

Ultra Violet Devices, Inc. (applicant) applied to  
register the mark **Ultra Violet Devices** in standard  
characters on the Principal Register for goods now  
identified as "air and water purification units utilizing  
ultraviolet technology" in International Class 11.<sup>1</sup>  
Applicant claims first use of the mark anywhere and first  
use of the mark in commerce on May 12, 1992.

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<sup>1</sup> Application Serial No. 78589646, filed March 17, 2005.

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The Examining Attorney has finally refused registration on the Principal Register under Trademark Act Section 2(e)(1), 15 U.S.C. § 1052(e)(1), on the grounds that the mark is not only merely descriptive but generic. The Examining Attorney also rejected applicant's evidence of acquired distinctiveness as insufficient under Trademark Act Section 2(f), 15 U.S.C. § 1052(f). Furthermore, in the alternative, applicant sought registration on the Supplemental Register, and the Examining Attorney has also refused registration on the Supplemental Register under Trademark Act Section 23, 15 U.S.C. § 1091.

Applicant appealed. Applicant and the Examining Attorney have filed briefs. We affirm all refusals.

We must address two distinct issues. First, we must determine whether the Examining Attorney has established that **Ultra Violet Devices** is generic for "air and water purification units utilizing ultraviolet technology." If the Examining Attorney has done so, we must affirm the refusals to register **Ultra Violet Devices** on both the Principal and the Supplemental Registers. If the Examining Attorney has not established that **Ultra Violet Devices** is generic, then we must determine whether applicant has established that **Ultra Violet Devices** has acquired distinctiveness and, therefore, is registrable on the

Principal Register under Trademark Act Section 2(f). For the sake of completeness, we will address the adequacy of the evidence of acquired distinctiveness, even though we have concluded that **Ultra Violet Devices** is generic. *In re The Paint Products Co.*, 8 USPQ2d 1863 (TTAB 1988) (PAINT PRODUCTS CO. held generic for interior and exterior paints and coatings, namely, alkyd, oil, latex, urethane and epoxy based paints and coatings, and in the alternative, evidence of acquired distinctiveness also held insufficient).

I. The Genericness Issue

A term is generic if it identifies the class, genus or category of the goods at issue. See *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 57 USPQ2d 1807 (Fed. Cir. 2001), citing *H. Marvin Ginn Corp. v. International Association of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528 (Fed. Cir. 1986).

The Court of Appeals for the Federal Circuit provided a framework for the consideration of whether or not a term is generic in the *Fire Chief* case. Specifically, the Court dictated a two-step inquiry: "First what is the genus of goods or services at issue? Second, is the term sought to be registered or retained on the register understood by the relevant public primarily to refer to that genus of goods

or services." *H. Marvin Ginn Corp. v. International Assn. of Fire Chiefs, Inc.*, 228 USPQ at 530.

Thus, the ultimate test for determining whether a term is generic is its primary significance to the relevant public. See Section 14(3) of the Act. See also *In re American Fertility Society*, 188 F.3d 1341, 51 USPQ2d 1832 (Fed. Cir. 1999) and *Magic Wand Inc. v. RDB Inc.*, 940 F.2d 638, 19 USPQ2d 1551 (Fed. Cir. 1991). The Examining Attorney has the burden of establishing by clear evidence that the term is generic. See *In re Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 828 F.2d 1567, 4 USPQ2d 1141 (Fed. Cir. 1987). Evidence of the relevant public's understanding of a term may come from any competent source, including direct testimony of consumers, consumer surveys, newspapers, magazines, dictionaries, trade journals, catalogs, and other publications. See *In re Northland Aluminum Prods., Inc.*, 777 F.2d 1556, 227 USPQ 961 (Fed. Cir. 1985).

As to the first question *Fire Chief* poses, the genus question, applicant and the Examining Attorney have taken different positions. Applicant asserts that the relevant genus is "air and water purifiers." Applicant's brief at 2. The Examining Attorney asserts that the relevant genus is "air and water purification units utilizing ultraviolet

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technology." Examining Attorney's Brief at 3. In the end, the distinction between the two proposals is a distinction without a difference. We would find **Ultra Violet Devices** generic in either case.

The Examining Attorney proposes that we refer to the identification of goods to determine the genus, as the Court did in *Fire Chief. H. Marvin Ginn Corp. v. International Assn. of Fire Chiefs, Inc.*, 228 USPQ at 532. Applicant suggests a broader genus. Consistent with *Fire Chief*, and the evidence in this case, we conclude that "air and water purification units utilizing ultraviolet technology" is the appropriate genus.

In *Fire Chief*, because the evidence showed that there were other "magazine[s] directed to the field of fire fighting," use of that identification in the registration as the proper genus was warranted. Here the evidence also shows that there are other "air and water purification units utilizing ultraviolet technology." However, unlike the *Fire Chief* case where the Court found that the FIRE CHIEF mark did not identify a genus or class of publications directed to that field, here the evidence does establish that the **Ultra Violet Devices** mark identifies a class of goods. *H. Marvin Ginn Corp. v. International Assn. of Fire Chiefs, Inc.*, 228 USPQ at 530 ("A generic

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term is the common descriptive name of a class of goods or services...").

Even if we concluded that "air and water purifiers" is the genus, we would still conclude that **Ultra Violet Devices** identified a genus or class of goods. The fact that the genus is conceptually broader than the identification of goods does not inexorably lead to the conclusion that **Ultra Violet Devices** is not generic. *Micro Motion Inc. v. Danfoss A/S*, 49 USPQ2d 1628 (TTAB 1998) (MASSFLO held generic for flowmeters for the measurement of flow of mass of fluids); *In re Central Sprinkler Co.*, 49 USPQ2d 1194 (TTAB 1998) (ATTIC held generic for automatic sprinklers for fire protection); *Stromgren Supports Inc. v. Bike Athletic Co.*, 43 USPQ2d 1100 (TTAB 1997) (COMPRESSION held generic for hosiery); *In re Reckitt & Colman, North America Inc.*, 18 USPQ2d 1389 (TTAB 1991) (PERMA PRESS held generic for soil and stain removers for permanent press fabrics); *In re Analog Devices Inc.*, 6 USPQ2d 1808 (TTAB 1988), *aff'd*, 10 USPQ2d 1879 (Fed. Cir. 1989) (ANALOG DEVICES held generic for a wide range of electronic products in International Class 9<sup>2</sup>).

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<sup>2</sup> The goods include: "operational amplifiers, power supplies, active filters, converters including analog-to-digital and digital-to-analog converters, instrumentation and isolation amplifiers, analog computational circuits, voltage references, transducers, sample track-hold amplifiers, data-acquisition

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We now turn to the second question *Fire Chief* poses - Is the term sought to be registered understood by the relevant public primarily to refer to that genus of goods or services?

The Examining Attorney argues that the evidence that **Ultra Violet Devices** is generic is "overwhelming." Examining Attorney's Brief at 3. Applicant argues that the record is "mixed" and that it does not show clear generic use of **Ultra Violet Devices**. Applicant's Brief at 2. Applicant argues further that "Devices" is "... a broad term and does not refer to (sic) primarily to any genus of goods..." Applicant's Brief at 6. Applicant also argues that much of the evidence shows uses of terms other than **Ultra Violet Devices** or uses in fields other than air and water purification.

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modules, switches, multiplexers, monolithic chips, linear IC testers, analog multiplier/dividers, log-analog amplifiers, signal conditioners, digital panel meters, microcomputer I/O subsystems comprising input/output boards, measurement and control systems comprising signal conditioners, signal isolators and converters, computer programs for electronic data processors for computer based measurement of signals, computer programs for electronic data processors for computer based measurement and display of input signals and computer programs for electronic data processors for computer based measurement of input signals and generation of output signals in response to measured input signals for control thereof; computer programs for visual inspection of assembly and production lines, quality control for production and assembly lines, robot guidance of assembly operations, inventory control; digital thermometers; computer interface products, namely, realtime interfaces and data exchangers, serial transmittal card/modules, serial receiver card/modules and serial multiplier card/modules."

The evidence includes pages from excelwater.com, a site connected with Excel Water Technologies Inc. The excerpt includes the heading "Ultraviolet Disinfection Systems." The excerpt also includes the following explanation regarding ultraviolet purification:

Disinfecting your drinking water with ultraviolet light (UV) makes good sense. It's environmentally safe, it's well proven, and it's the way of the future for water disinfection requirements around the globe.

...

Ultraviolet (UV) disinfection is a UV light source, which is enclosed in a transparent protective sleeve. It is mounted so that the water can pass through a flow chamber, and UV rays are admitted and absorbed into the stream. When ultraviolet energy is absorbed by the reproductive mechanisms of the bacteria and viruses, the genetic material (DNA/RNA) is rearranged and they can no longer reproduce.

Attachment to October 11, 2005 Office Action.

Excerpts from thstore.com, a site connected with "the health store," includes the following explanation regarding the use of ultraviolet technology in air purification:

Nature purifies air by generating ultraviolet (UV) light rays from oxidizing ions and ozone from the sun and lightening.

Ultraviolet triggers the formation of peptide bonds between certain amino acids in the pathogens' DNA molecules, which robs them of the ability to reproduce and renders them harmless. As a result, UV is known to be an effective

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disinfectant due to its strong germicidal ability...

UV air purifiers utilize high intensity germicidal UV bulbs with reflective chambers to further increase the UV intensity.

*Id.* The excerpt also discusses the use of ultraviolet technology in water treatment.

Web pages from [alerg.com](http://alerg.com), a site connected with ALERG, discusses the operation of certain air purification equipment the company offers, as follows:

Air filters can remove particles from the air, but most can't kill airborne microorganisms. The UV Sterilizer will. Using clean ultraviolet light, the UV Sterilizer can help kill and reduce mold, bacteria, viruses and fungi. One unit is all you need for your entire home.

...

The UV Sterilizer is installed in the main supply or return duct of any heating or air-conditioning system. It emits powerful ultraviolet (UV) light which sterilizes and reduces airborne microorganisms as they pass through the system.

*Id.*

Excerpts from [watertiger.net](http://watertiger.net), a site connected with Tiger Purification Systems, discuss various water treatment equipment and refers to "Hallett™ Ultraviolet Water Purification..." and includes the following statement: "Crossfire Technology™ provides the most effective ultraviolet treatment." *Id.*

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Evidence from aqua-sun-intl.com, a site connected with Aqua Sun International, includes the heading "Ultraviolet (UV) Disinfection." The excerpt provides an explanation of the ultraviolet purification process similar to those quoted above. It also states, "Ultraviolet devices are most effective when the water has already been partially treated..." Attachment to May 16, 2006 Office Action (emphasis added).

Web pages from greatachievements.com include a discussion of how a scientist at the Lawrence Berkeley National Laboratory in California pioneered the development of ultraviolet purification technology in response to the need for a less expensive way to purify drinking water in response to a cholera epidemic in India and neighboring countries in 1992 and 1993. The excerpt states, "Their device was simplicity itself, a compact box containing an ultraviolet light suspended above a pan of water. ...the device kills all microorganisms in the water. Whatever their scale from aqueducts and dams to desalination plants and portable ultraviolet devices, the notable successes in water management achieved in the 20<sup>th</sup> century..." *Id.* (emphasis added).

An excerpt from des.state.nh.us, a site connected with the New Hampshire State Government, includes the heading

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"Ultraviolet Drinking Water Disinfection." The excerpt also states, "Ultraviolet disinfection, often abbreviated UV, provides rapid disinfection of water with no chemical addition and no residual taste or odor." It continues, "UV disinfection devices expose the water to light from a special light, which produces UV radiation... A typical UV device consists of a UV lamp... and plumbing connections to facilitate installation of the device to the water system." The excerpt includes other headings - "Features of a (sic) Ultraviolet Device," "Standards for UV Devices" and "Design of UV Devices." Finally the excerpt includes an illustration with the following heading, "A Commercial type Ultraviolet Disinfection Device." *Id.* (emphasis added).

Excerpts from rael.berkeley.edu, connected with the University of California at Berkeley Department of Environmental and Civil Engineering, include the title/heading "Ultraviolet Water Disinfection Device." *Id.* (emphasis added).

Evidence from lbl.gov, a site connected with the Lawrence Berkeley National Laboratory, consists of an article which describes the use of an ultraviolet water purification device "invented at a Berkeley lab" in the aftermath of a devastating hurricane in Central America. The article states, "In response, many of the disaster

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relief efforts are bringing in 'UV Waterworks' - a small, simple device that uses ultraviolet light to quickly, safely and cheaply disinfect water..." *Id.* (emphasis added).

Excerpts from ultraviolet.com, a retail site, includes the heading "Residential and Recreational Ultraviolet Water Purifiers" and displays of five units for sale, each identified as "ultraviolet water purifier(s)." Attachments to March 28, 2007 Office Action.

These examples are representative of the voluminous evidence the Examining Attorney made of record. We find the evidence more than sufficient to show that **Ultra Violet Devices** is generic for "air and water purification units utilizing ultraviolet technology." The evidence shows consistent use of "ultraviolet" to refer to a distinct class of air and water purification units. Also, we highlighted the instances in which "ultraviolet devices" appears. Beyond those examples, the evidence shows consistent use of "device," rather than "unit" or any other term, to refer to the equipment in question. The evidence thus establishes that in this context the addition of "device" to "ultraviolet" does nothing to change the generic character of "**Ultra Violet**," and results in the generic term "**Ultra Violet Devices**." *In re Analog Devices Inc.*, 6 USPQ2d 1809-10. Taken as a whole, the evidence of

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record shows beyond question that **Ultra Violet Devices** is generic for the identified goods.

Applicant questions certain evidence because it is from sources from outside the United States. We have not considered that evidence in reaching our conclusions here.

Applicant also questions certain evidence related to goods other than air and water purification units, for example, equipment used in tanning, counterfeit detection and dental sterilization. Applicant implies that, because "ultraviolet" is used in relation to these products, it cannot be generic for applicant's goods. We reject this argument. This evidence simply shows that ultraviolet technology has many applications. "Ultraviolet" may or may not be generic as applied to these other goods. That is not our concern here, and we have not considered the evidence related to other goods in reaching our conclusions. As we stated, the evidence which is relevant to applicant's goods is more than sufficient to show that **Ultra Violet Devices** is generic for those goods.

In addition, applicant appears to argue that there is insufficient evidence showing use of the entire term **Ultra Violet Devices** in the record. Among the examples we discussed, we highlighted examples where "ultraviolet

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devices" is used as a unitary term in relation to the identified goods.

Furthermore, we also find highly relevant the examples where "ultraviolet" is used to identify a category of air or water purification units, with or without the word "device" appearing in close proximity. This evidence also supports our conclusion that **Ultra Violet Devices** is generic. As we explained above, we reject applicant's arguments that "devices" is a broad term which somehow negates the generic character of **Ultra Violet Devices**. See *In re Analog Devices Inc.*, 6 USPQ2d at 1810.

We also reject applicant's argument that "device," as used in applicant's mark, is like the term "technology" in the HUTCHINSON TECHNOLOGY mark. See *In re Hutchinson Technology Inc.*, 852 F.2d 552, 7 USPQ2d 1490 (Fed. Cir. 1988). In this case, "device" identifies what the goods are in a tangible way, not something intangible which the goods incorporate. The term "device" is used throughout the evidence, as we have highlighted, to identify the type of goods identified in the application. We reject any argument that there is any meaningful distinction between "unit" as used in the identification of goods and "device" as used in the mark. More broadly, we reject any argument that the addition of the word "device" in this case serves

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to transform an otherwise generic term into a term which is not generic. See *In re Analog Devices Inc.*, 6 USPQ2d at 1810.

Also, we reject applicant's reliance on the Board's decision in *In re The Rank Organisation Ltd.*, 222 USPQ 324 (TTAB 1984) (LASER held not merely descriptive for high fidelity loudspeakers which do not incorporate laser technology). There is no legitimate analogy between the use of "laser" in that case and "ultraviolet" here. "Laser" merely identified the technology used to test the goods in the cited case, in this case "ultraviolet" identifies the technology which defines the class of goods to which the identified goods belong.

Finally, we reject any argument that the space between "Ultra" and "Violet" or any other aspect of the display of the mark is significant here. In fact, applicant's mark is displayed as "UltraViolet," without a space, in the specimen which was ultimately accepted in this case. Furthermore, applicant seeks registration of its mark in standard characters here, signifying that it is not limiting the application to the display of the mark in any particular form. Trademark Rule 2.52(a), 37 C.F.R. § 2.52(a).

Accordingly, we conclude that the Examining Attorney's evidence establishes that **Ultra Violet Devices** is generic for "air and water purification units utilizing ultraviolet technology."

II. Acquired Distinctiveness

In view of our finding that the Examining Attorney has established that **Ultra Violet Devices** is generic we need not consider whether applicant has established that **Ultra Violet Devices** has acquired distinctiveness under Trademark Act Section 2(f). Nonetheless, we will do so in order to render a decision on all the issues in this appeal. For purposes of this analysis and in view of the evidence of record, we will proceed on the basis that **Ultra Violet Devices** is highly descriptive. *In re The Paint Products Co.*, 8 USPQ2d at 1867.

Section 2(f) contemplates that, in the case of a mark found to be merely descriptive under Section 2(e)(1), but not generic, an applicant may nonetheless establish that the mark is entitled to registration on the Principal Register by showing that the mark has acquired distinctiveness. The applicant bears the burden of establishing acquired distinctiveness. *Yamaha Intl. Corp. v. Hoshino Gakki Co. Ltd.*, 840 F.2d 1572, 6 USPQ2d 1001, 1004-1008 (Fed. Cir. 1988).

In support of its claim of acquired distinctiveness, applicant has submitted the verified statement of its president, Dan Goetz, alleging "substantially exclusive and continuous use" of **Ultra Violet Devices** for fourteen years prior to the statement. In its brief, applicant also refers to evidence that its products have been promoted under the mark in trade journals and that over one million of its systems and components have been installed around the world. Applicant provided what appear to be five examples of its advertisements in journals. Attachments to Applicant's April 10, 2006 Response. The only mention of applicant's installations appears in one of applicant's advertisements which states that over a million of its systems and components are installed around the globe.

Due to the highly descriptive nature of the mark, the evidence of fourteen-years use is not sufficient to show acquired distinctiveness.

The information regarding applicant's advertisements is of limited probative value because we have no information about the frequency of the advertisements or the names of the publications, and no information as to whether those advertisements would reach substantial numbers of potential purchasers of the identified goods.

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With regard to the installation information, the reference to the installations of the products appears in an advertisement. We have no confirmation, in an affidavit or otherwise, that those sales and installations took place and whether those sales were in the United States. Without that confirmation the information is of limited value. Also, for our purposes, only U.S. sales would be relevant. However, even if all of these sales were confirmed and within the United States, we would still conclude that the evidence is insufficient.

Conspicuous by its absence is any evidence showing the recognition of **Ultra Violet Devices** as a mark by relevant consumers. Considering how highly descriptive applicant's mark is, direct evidence that the use and promotion of the mark has had an impact resulting in consumer recognition of the mark would have been far more probative than a mere declaration of 14 years of use and copies of some advertisements which merely report sales/installations.

In sum, we find applicant's evidence falls far short of what would be required to show acquired distinctiveness in this case. Accordingly, even if we had not found **Ultra Violet Devices** generic, we would conclude that the totality of the evidence in this case is insufficient to establish

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acquired distinctiveness. See *In re Lens.com Inc.*, 83 USPQ2d 1444, 1448 (TTAB 2007) and cases cited therein.

**Decision:** We affirm the refusals to register the mark on both the Principal and the Supplemental Register on the grounds that the mark is generic. Furthermore, even if the mark were not generic, we affirm the refusal to register the mark on the Principal Register under Section 2(e)(1) because the evidence is not sufficient to show that the mark has acquired distinctiveness under Section 2(f).