

**THIS OPINION IS NOT A
PRECEDENT OF
THE T.T.A.B.**

Hearing: March 19, 2014

Mailed: April 22, 2014

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Somerset Soup Works, Inc.

Serial No. 85034559

Timothy D. Pecsénye, Matthew A. Homyk and Megan E. Spitz of Blank Rome LLP for Somerset Soup Works, Inc.

Kristina Morris, Trademark Examining Attorney, Law Office 116 (Michael W. Baird, Managing Attorney).

Before Cataldo, Wolfson and Gorowitz,
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Applicant, Somerset Soup Works, Inc., has applied to register in standard characters on the Principal Register the term SOUP SINGLES as a mark for “frozen soups” in International Class 29.¹ The trademark examining attorney refused registration under Section 2(e)(1) of the

¹ Application Serial No. 85034559 was filed on May 10, 2010 based upon applicant’s allegation of a bona fide intent to use the mark in commerce. On September 22, 2011, applicant filed an amendment to allege use, asserting July 2010 as a date of first use of the mark anywhere and in commerce in connection with the goods.

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Trademark Act on the ground that applicant's mark is merely descriptive of a feature or quality of applicant's goods. In addition, the examining attorney required applicant to disclaim SOUP apart from the mark as shown.

Applicant presented arguments in response to the examining attorney's refusal to register and, in the alternative, argued that the designation SOUP SINGLES has acquired distinctiveness as a mark under Section 2(f) of the Trademark Act. Applicant also presented arguments against a disclaimer of SOUP. The examining attorney subsequently issued a final Office action on the following issues:

- the proposed mark is merely descriptive under Section 2(e)(1);
- applicant's showing in the alternative under Section 2(f) is insufficient;
- applicant must disclaim SOUP apart from the mark as shown.²

Applicant filed an appeal on all three issues. Applicant and the examining attorney filed briefs and presented arguments on the issues under appeal in an oral hearing held before this panel on March 19, 2014.

Evidence of Record

In support of her position, the examining attorney made of record the following dictionary definitions:

“soup” – “a liquid food prepared from meat, fish, or vegetable stock combined with various other ingredients and often containing solid pieces;”³

² We note that the issue of the registrability of the applied-for mark on the Supplemental Register is not before us.

³ yahoo.com/reference/dictionary

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and “single” – “consisting of one part, aspect, or section: a single thickness, a single serving.”⁴

The examining attorney further made of record evidence from the internet website of applicant’s President, Benjamin I. Tabatchnick:

Tabatchnick

Soup singles: These soups come frozen, in a safe, BPA (bisphenol-A) free, single serving bowl that is both microwavable and ovenable to 350°. The contents can also be heated in a saucepan on the stovetop. They are convenient to take to the office for lunch, or for a healthy snack just about anytime!⁵

The examining attorney has also made of record webpages from the internet websites of various third parties, showing use of the term “single” or “singles” to identify various single serving food items, *e.g.*:

Maxwell House Coffee Singles, 19-Count Single Serve Bags
(Pack of 4)

Frequently Bought Together

This item

Maxwell House Decaffeinated Coffee Singles, 19-Count Single
Serve Coffee Bags (Pack of 4)

Folgers Classic Roast Coffee Singles, 19-Count Single Servings
(Pack of 4).⁶

SPAM Single Classic

Already cooked SPAM® Singles take convenience to a whole new level. For a quick snack, a single sandwich or add a small portion to a favorite recipe. Simply, a great option to have on hand.⁷

Kraft® Mac & Cheese Singles
#4608

⁴ *Id.*

⁵ tabatchnick.com/soup_singles

⁶ amazon.com

⁷ spam.com

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A Market Day exclusive from Kraft®. The cheesy favorite your kids love is now in frozen single serve portions that are perfect for today's busy families. It's exactly like the "blue box" only there is no pan, no boiling water, no measuring and no stirring needed. Just microwave from frozen in the plastic pouch and serve. Now a good source of calcium.⁸

Red Baron Deep Dish Singles – Microwave Pepperoni Pizza in Minutes!

Red Baron is a company that sells easy to prepare frozen pizzas, found in the freezer section of just about any grocery store around the country. ... That's where something like the Red Baron pizzas step in, but more specifically, their deep dish single-serving options.⁹

Reward Yourself with Edwards® Frozen Desserts Singles – You Deserve It!

Relax and unwind with the exceptional indulgence of Edwards® frozen dessert singles. Why fight the temptation? These single serve delights are convenient, easy to prepare, and loaded with premium high-quality ingredients.¹⁰

Applicant, for its part, introduced two declarations of Benjamin I.

Tabatchnick, its President, with attached exhibits. Mr. Tabatchnick declares that SOUP SINGLES has acquired distinctiveness as a result of the following:

use as a mark since July 2010;

\$315,000 in gross revenues from goods under the SOUP SINGLES designation from July to December 2011;

\$250,000 spent on advertising and promotion of goods under the SOUP SINGLES designation since its launch;

promotion via the internet at tabatchnick.com/soup_singles and

⁸ marketday.com

⁹ epinions.com

¹⁰ edwardsdesserts.com.

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applicant's Facebook pages for Tabatchnick Fine Foods and Soup Singles as well as trade shows, newspapers and magazines;¹¹

sales at numerous retailers, including Stop&Shop, Price Chopper, CVS and Tops, located in 15 states; and

third-party reviews, articles and customer testimonials.

Included as exhibits to Mr. Tabatchnick's declaration are several exhibits, including customer testimonials in the nature of internet blog postings to show that the designation SOUP SINGLES as applied to the goods identified in its involved application has acquired distinctiveness, and also that SOUP SINGLES suggests soup for singles, *i.e.*, single men and women. The following examples are illustrative [emphasis in original]:

[Sponsored Post] Soup for One [and why this couldn't come soon enough]

Tabatchnick has recently launched a new line of single serving soups (SOUP SINGLES) that are not only wholesome but nutritious as well. ...

It's nice to know that there are companies looking out for the single gals (and guys!) out there.

*This post was sponsored by Tabatchnick.*¹²

Comfort Food For Singles

Last week, I was asked if I'd be interested in doing a post for Tabatchnick soup singles. I've been looking for a soup to bring to work, so this was right up my alley. Tabatchnick's new line of Soup Singles each come in a single serving bowl that you can heat in the microwave or traditional oven. Soup Singles are also prepared with fresh ingredients that are lower in fat, sodium and fewer calories than other canned soups and frozen meats.¹³

¹¹ We observe that while applicant does not explain the exact relationship between itself and Tabatchnick Fine Foods, the evidence of record suggests that they are at least related companies engaged in common promotion of certain products.

¹² mypixieblog.com

¹³ thebiggirlblog.com

Sponsored Post: Comfort Food for Singles

Everyone knows that soup is good for the soul, but this company has made an effort to deliver wholesome goodness to singletons who only need one serving. Tabatchnick Fine Foods, a leading manufacturer of handcrafted quality soups and other products, just launched their Soup Singles line, great for when you're running late for another online date and don't know if you're having dinner or drinks.¹⁴

In addition, applicant and the examining attorney both made of record third-party registrations containing the terms SOUP or SINGLE(S) for a variety of goods. Some are registered on the Principal Register, with or without a claim of acquired distinctiveness; others are registered on the Supplemental Register. Some but not all of the third-party registrations contained the term SOUP include disclaimers thereof.¹⁵

Mere Descriptiveness

It is well settled that a term is considered to be merely descriptive of goods and/or services, within the meaning of Section 2(e)(1) of the Trademark Act, if it immediately describes an ingredient, quality, feature or characteristic thereof or if it directly conveys information regarding the nature, function, purpose or use of the goods and/or services. *See* Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052. The test for determining

¹⁴ cupidspulse.com (posted May 25, 2011)

¹⁵ Further, the expired registrations submitted by applicant are of no value. *See Action Temporary Services Inc. v. Labor Force Inc.*, 870 F.2d 1563, 10 USPQ2d 1307, 1309 (Fed. Cir. 1989) (“[A] cancelled registration does not provide constructive notice of anything”); and *Interpayment Services Ltd. v. Docters & Thiede*, 66 USPQ2d 1463 (TTAB 2003) (applications show only that they have been filed).

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whether a mark is merely descriptive is whether it immediately conveys information concerning a significant quality, characteristic, function, ingredient, attribute or feature of the product or service in connection with which it is used, or intended to be used. *See, e.g., In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (internal citations omitted). The determination of whether a mark is merely descriptive must be made in relation to the goods or services for which registration is sought. *Chamber of Commerce of the U.S.*, 102 USPQ2d at 1219. It is not necessary, in order to find a mark merely descriptive, that the mark describe each feature of the goods or services, only that it describe a single, significant ingredient, quality, characteristic, function, feature, purpose or use of the goods or services. *Chamber of Commerce of the U.S.*, 102 USPQ2d at 1219; *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987).

In the instant case, applicant's goods are "frozen soups." "Soup" is defined above as "a liquid food prepared from meat, fish, or vegetable stock combined with various other ingredients and often containing solid pieces." "Single" as discussed above, is defined as "consisting of one part, aspect, or section: a single thickness, a single serving." Based upon this evidence, one definition of SOUP SINGLES is a single serving of soup. It is settled that "evidence [that a term is merely descriptive] may be obtained from any competent source, such as dictionaries, newspapers, or surveys." *See*

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Chamber of Commerce of the U.S., 102 USPQ2d at 1219; *In re Stereotaxis, Inc.*, 429 F.3d 1039, 77 USPQ2d 1087 (Fed. Cir. 2005); and *In re Bed & Breakfast Registry*, 791 F.2d 157, 229 USPQ 818 (Fed. Cir. 1986). We are not concerned that SOUP SINGLES may have other, non-descriptive meanings when used in connection with other products or services. That a term may have other meanings in different contexts is not controlling. *See In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979).

The internet evidence made of record by the examining attorney further supports a finding that the term “singles” is used in connection with various food products to describe a food item packaged and sold in single serving size. The website of applicant’s president describes the goods under the SOUP SINGLES designation as frozen soup sold in a “single serving bowl.” It is settled that material obtained from the internet is acceptable in *ex parte* proceedings as evidence of potential public exposure to a term. *See In re Fitch IBCA, Inc.*, 64 USPQ2d 1058 (TTAB 2002).

As a result, we find that SOUP SINGLES, as applied to applicant’s “frozen soups,” would immediately describe, without conjecture or speculation, a significant characteristic or feature thereof, namely, that they are packaged in single serving size.

We note applicant’s argument that its mark is a “clever alliterative product name, which suggests the portion size, but also cleverly suggests the consumers who would find the product convenient – individuals living alone

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or perhaps seeking a one course meal.”¹⁶ However, the internet blog posts submitted by applicant (and reproduced above) in support of this point also tout the fact that applicant’s goods under the SOUP SINGLES mark are available in single servings. As a result, the blog postings do not convince us that consumers will perceive SOUP SINGLES as suggesting soup for single individuals. Rather, the evidence of record supports a finding that SOUP SINGLES merely describes soup available in single servings. We observe in addition 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). *See also, e.g., In re Patent & Trademark Services Inc.*, 49 USPQ2d 1537 (TTAB 1998). In this case, the evidence shows that individuals will readily perceive that SOUP SINGLES merely describes a feature or characteristic of applicant’s “frozen soups,” namely, that they are packaged in single servings.

We note in addition that even if applicant was the first and/or the only user of the term SOUP SINGLES in connection with its goods, it is well settled that such does not entitle applicant to the registration thereof where, as here, the term has been shown to immediately convey only a merely descriptive significance in the context of applicant’s goods. *See, e.g., In re*

¹⁶ Applicant’s brief, p. 17.

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National Shooting Sports Foundation, Inc., 219 USPQ 1018, 1020 (TTAB 1983); and *In re Mark A. Gould, M.D.*, 173 USPQ 243, 245 (TTAB 1972).

Finally, we have considered the third-party registration evidence submitted by applicant and the examining attorney. These registrations, containing the terms SOUP or SINGLE(S), with or without a disclaimer of SOUP, are not of assistance in determining whether the mark SOUP SINGLES is merely descriptive, particularly inasmuch as we do not know the reason for the treatment of the term “SOUP” or “SINGLE(S)” in each. *In re International Taste Inc.*, 53 USPQ2d 1604, 1606 (TTAB 2000) (“With respect to third-party registrations which include disclaimers...we do not have before us any information from the registration files as to why an Examining Attorney required and/or why the applicant/registrant offered such disclaimers.”). *See In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) (“Even if some prior registrations had some characteristics similar to [applicant’s] application, the PTO’s allowance of such prior registrations does not bind the board or this court.”); and *In re Scholastic Testing Service, Inc.*, 196 USPQ 517 (TTAB 1977). This is particularly the case where, as here, the third-party registrations made of record by applicant and the examining attorney are not uniform in their treatment of the terms comprising the designation at issue herein.

Accordingly, based upon the evidence of record, including any evidence not specifically discussed herein, we find that applicant’s mark is merely

descriptive as contemplated by Section 2(e)(1) of the Act.

Acquired Distinctiveness

A mark which is merely descriptive of the identified goods may nonetheless be registered if it has “acquired” distinctiveness. Trademark Act § 2(f). “To establish acquired distinctiveness, applicant must show that the primary significance of the [mark] in the minds of consumers is not the product but the producer.” *In re Ennco Display Sys. Inc.*, 56 USPQ2d 1279, 1284 (TTAB 2000). Applicant bears the burden of demonstrating that its mark has acquired distinctiveness. *In re Hollywood Brands, Inc.*, 214 F.2d 139, 102 USPQ 294, 295 (CCPA 1954) (“there is no doubt that Congress intended that the burden of proof [under Section 2(f)] should rest upon the applicant”).

Acquired distinctiveness may be shown by direct or circumstantial evidence. Direct evidence includes actual testimony, declarations or surveys of consumers as to their state of mind. Circumstantial evidence is evidence from which consumer association might be inferred, such as years of use, extensive amounts of sales and advertising, and any similar evidence showing wide exposure of the mark to relevant consumers. We determine whether a mark has acquired distinctiveness on the basis of all competent evidence, including “advertising expenditures, sales success, length and exclusivity of use, unsolicited media coverage, and consumer studies (linking the name to a source).” *In re Steelbuilding.com*, 415 F.3d 1293, 75 USPQ2d

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1420, 1424 (Fed. Cir. 2005).

There is no fixed rule for the amount of proof necessary to demonstrate acquired distinctiveness; the evidence required is in proportion to the degree of non-distinctiveness of the mark at issue. *Yamaha Int. Corp. v. Hoshino Gakki Co. Ltd.*, 840 F.2d 1572, 6 USPQ2d 1001, 1008 (Fed. Cir. 1988). “The greater the degree of descriptiveness the term has, the heavier the burden to prove it has attained secondary meaning.” *In re Bongrain Int’l Corp.*, 894 F.2d 1316, 13 USPQ2d 1727, 1728 n.4 (Fed. Cir. 1990) (citing *Yamaha Int’l Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 6 USPQ2d 1001, 1008 (Fed. Cir. 1988)). Thus, even long periods of substantially exclusive use may not be sufficient to demonstrate acquired distinctiveness when the term in question is highly descriptive. In this case and as discussed above, applicant’s mark is SOUP SINGLES for “frozen soups” that, as acknowledged by applicant’s president on his internet website, are packaged in single servings. Thus the relevant consumers — including those seeking single servings of frozen soup — would immediately understand SOUP SINGLES to describe “frozen soups” available in single servings. As to such goods, applicant’s mark is not distinctive, but is, if not highly descriptive, at best merely descriptive.

Applicant included in the September 22, 2011 and April 18, 2012 declarations of its president a statement that its mark has acquired distinctiveness as a result, *inter alia*, of use since July 2010. This is far short of the statutory suggestion of five years’ use under Section 2(f). Moreover,

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the statute does not say that a declaration of five or more years' use *must* be considered *prima facie* evidence of distinctiveness; the statute explicitly invests the USPTO with the discretion to accept or reject such a declaration as *prima facie* evidence of distinctiveness. And in practice, a mere claim of five years' use will often be insufficient proof that a descriptive mark has acquired distinctiveness. See TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1212.05 (April 2013) ("The USPTO may, at its option, require additional evidence of distinctiveness.").

Applicant also argues that its actual use of the mark — or such use in combination with its statutory claim of use since July 2010 — establish the acquired distinctiveness of SOUP SINGLES. Applicant's evidence of sales and marketing figures, examples of advertisements placed in magazines and newspapers, marketing at trade shows and the number of retail chains carrying applicant's goods under the SOUP SINGLES designation all point to applicant's efforts to market such goods. However, they do not serve to put these efforts into context, *i.e.*, to indicate applicant's market share or the proportion of relevant consumers exposed to applicant's mark, nor is there any indication of whether, for instance, applicant's sales figures from July to December 2011 represent anything more than some passing interest in applicant's goods, as opposed to wide recognition of the words SOUP SINGLES as an indication of source.

Similarly, applicant's evidence in the form of internet blog postings

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discussing the goods under the SOUP SINGLES designation is not persuasive inasmuch as the majority of the blog posts indicate that they are “sponsored” and in one case (mypixieblog.com) acknowledges “*This post was sponsored by Tabatchnick.*” A handful of blog postings that appear to have been solicited by applicant, its president, or an entity associated with both is hardly probative of whether the consuming public has come to recognize SOUP SINGLES as a source identifier for applicant’s goods.

Lastly, and as discussed above, the third-party registrations made of evidence by applicant do not compel a finding that the designation at issue herein has acquired distinctiveness. We are not privy to the evidence and argument adduced in these other registrations and although the USPTO strives for consistency, each application must be examined on its own. Neither the examining attorney nor the Board is bound to register applicant’s mark based on the registration of other marks for other goods or services, based upon another evidentiary record. *In re Boulevard Entm’t Inc.*, 334 F.3d 1336, 67 USPQ2d 1475, 1480 (Fed. Cir. 2003) (“the PTO must decide each application on its own merits, and decisions regarding other registrations do not bind either the agency or this court” (citing *In re Nett Designs*, 57 USPQ2d at 1566 (Fed. Cir. 2001))).

In light of the foregoing, we find that applicant’s evidence falls short of establishing that SOUP SINGLES has acquired distinctiveness as a mark used in connection with “frozen soups” under Section 2(f).

Disclaimer

In the interest of completeness and in the event applicant prevails in an appeal of our determination above that SOUP SINGLES merely describes “frozen soups” and has not acquired distinctiveness as a mark used in connection therewith, we address the examining attorney’s requirement for a disclaimer of “SOUP.”

The examining attorney may require applicant to disclaim an unregistrable component of a mark otherwise registrable. *See* Section 6 of the Trademark Act, 15 U.S.C. §1056. Merely descriptive terms are unregistrable under Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1), and therefore may be subject to disclaimer apart from a mark otherwise registrable. Failure to comply with a disclaimer requirement is grounds for refusal of registration. *See In re Omaha National Corp.*, 819 F.2d 1117, 2 USPQ2d 1859 (Fed. Cir. 1987); and *In re Box Solutions Corp.*, 79 USPQ2d 1953 (TTAB 2006).

As shown by the examining attorney’s evidence, the term SOUP as it appears in the designation SOUP SINGLES is generic as applied to applicant’s goods, namely, “frozen soups.” *See* 15 U.S.C. §1056(a); *In re Wella Corp.*, 565 F.2d 143, 196 USPQ 7 (C.C.P.A. 1977); and *In re Creative Goldsmiths of Wash., Inc.*, 229 USPQ 766 (TTAB 1986). We are not persuaded by applicant’s assertion that “the individual meanings of the terms ‘SOUP’ and ‘SINGLES’ are essentially melded, guiding the consumer’s focus

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instead on to the meaning of SOUP SINGLES and its unique commercial impression.”¹⁷ As noted by the examining attorney, a term or phrase is unitary if it consists of elements that create a single commercial impression or that have a distinct meaning independent of the constituent elements. TMEP §1213.05, 1213.05(g)(iv) (October 2013). However, if these elements can be regarded as separable elements, the matter is not unitary. *See, e.g., In re Ginc UK Ltd.*, 90 USPQ2d 1472 (TTAB 2007); *In re Brown-Forman Corp.*, 81 USPQ2d 1284 (TTAB 2006); and TMEP §1213.05, 1213.05(g)(i) (October 2013). In this case, applicant’s mere arguments do not convince us that SOUP SINGLES creates such a unitary impression that a disclaimer of SOUP is unnecessary. There is no evidence of record to support a finding that consumers view SOUP SINGLES as a unitary expression. *See* TMEP §1213.05(e) (October 2013).

Alliterative wording does not in itself make a mark unitary. *See, e.g., In re Lean Line, Inc.*, 229 USPQ 781, 782 (TTAB 1986) (“there is nothing in the record to suggest that the mere fact that both words which form the mark begin with the letter ‘L’ would cause purchasers to miss the merely descriptive significance of the term ‘LEAN’ or consider the entire mark to be a unitary expression.”); and *In re Ginc UK Ltd.*, 90 USPQ2d 1472, 1477 (TTAB 2007) (the rhyming quality of the words ZOGGS TOGGS “does not infuse TOGGS with any separate and distinct meaning apart from its generic

¹⁷ *Id.* at 14.

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meaning”). *Cf. See In re Kraft, Inc.*, 218 USPQ 571, 573 (TTAB 1983) (finding LIGHT N’ LIVELY to be a unitary term not subject to disclaimer, because the mark as a whole “has a suggestive significance which is distinctly different from the merely descriptive significance of the term ‘LIGHT’ per se” and that “the merely descriptive significance of the term ‘LIGHT’ is lost in the mark as a whole.”).

In this case, the mere fact that the term SOUP begins with the letter “S” and SINGLES both begins and ends with the letter “S” is sufficient to create an alliteration that would render SOUP SINGLES a unitary term in which the generic nature of SOUP would be lost. Nor is there evidence that the consuming public so construes applicant’s mark. In view thereof, we find that SOUP is generic in connection with applicant’s “frozen soups” and that the required disclaimer is appropriate.

Decision: The refusal to register under Trademark Act Section 2(e)(1) on the ground that the mark is merely descriptive of the goods and has not acquired distinctiveness is affirmed.

In the event applicant successfully appeals our decision under Section 2(e)(1), the refusal to register based on applicant’s failure to disclaim SOUP is affirmed. In such case, applicant would be allowed time in which to submit a disclaimer, this decision would be set aside as to the affirmance of the disclaimer requirement, the application would be amended to enter the

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disclaimer, and the application then would proceed to publication.¹⁸ *See* Trademark Rule 2.142(g), 37 C.F.R. § 2.142(g).

¹⁸ The standardized printing format for the required disclaimer text is as follows: “No exclusive right to use SOUP is claimed apart from the mark as shown.” *See* TMEP §1213.08(a) (October 2103).