

**THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB**

Mailed:  
August 21, 2013

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re Loops, LLC

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Serial No. 85203745

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Timothy W. Fitzwilliam of Lewis Kohn & Fitzwilliam LLP for  
Loops, LLC.

Lief Martin, Trademark Examining Attorney, Law Office 112  
(Angela Bishop Wilson, Managing Attorney).

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Before Seeherman, Zervas and Kuczma, Administrative  
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Loops, LLC has appealed from the final refusal of the  
trademark examining attorney to register FLOSS LOOPS, in  
standard characters, for dental floss.<sup>1</sup> As part of its  
initial application papers, applicant claimed acquired  
distinctiveness pursuant to Section 2(f), asserting that  
"the mark has become distinctive of the goods/services

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<sup>1</sup> Application Serial No. 85203745, filed December 22, 2010, and  
claiming first use and first use in commerce as early as July 1,  
1996.

through the applicant's substantially exclusive and continuous use in commerce for at least the five years immediately before the date of this statement."

Subsequently applicant amended its Section 2(f) claim, to assert acquired distinctiveness for the word LOOPS in its mark. This triggered a requirement that applicant submit a disclaimer of exclusive rights to the word FLOSS, which applicant provided.

Registration has been refused pursuant to Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that applicant's mark is merely descriptive of its identified goods, and that applicant's evidence is insufficient to show that its mark has acquired distinctiveness and is therefore registrable pursuant to the provisions of Section 2(f).

The appeal has been fully briefed.<sup>2</sup>

Because applicant seeks registration pursuant to Section 2(f), we must treat the mark as not being inherently distinctive, i.e., without proof of acquired distinctiveness, it is merely descriptive. See *Yamaha*

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<sup>2</sup> At the end of its reply brief applicant states that its mark is entitled to registration on the Supplemental Register. Applicant did not amend its application to the Supplemental Register, or seek registration on that register in the alternative. Therefore, the question of whether or not applicant's mark is registrable on the Supplemental Register is not before us.

Int'l Corp. v. Hoshino Gakki Co., Ltd., 840 F.2d 1572, 6 USPQ2d 1001, 1005 (Fed. Cir. 1988) ("Where, as here, an applicant seeks a registration based on acquired distinctiveness under Section 2(f), the statute accepts a lack of inherent distinctiveness as an established fact.") The burden is on applicant to show that its applied-for mark has acquired distinctiveness as an indicator of source.<sup>3</sup> The question for us to determine, then, is whether applicant has demonstrated that its mark, and specifically the term LOOPS as used in its mark, has acquired distinctiveness for its goods. To determine this, we must first consider the degree of descriptiveness of FLOSS LOOPS, since the greater the degree of descriptiveness the term has, the heavier the burden to prove it has attained secondary meaning. *Id.*, 6 USPQ2d at 1008.

The examining attorney has submitted as evidence of descriptiveness various dictionary definitions of "loop" and "floss," including definitions from the Encarta World

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<sup>3</sup> In its main brief, and again in its reply brief, applicant has made some comments that its mark is inherently distinctive, and takes issue with the examining attorney's position and evidence that it is merely descriptive. We reiterate that it is not the examining attorney's burden to show the descriptiveness of applicant's mark since applicant has admitted such descriptiveness by seeking registration pursuant to Section 2(f); therefore, applicant's statements that the mark "may reasonably be deemed merely suggestive and not merely descriptive," reply brief, p. 8, have been given no consideration.

Dictionary © 2009 of "loop" as "circle or oval: a circular or oval shape formed by a line or something such as a piece of string" and "floss" that states it is "same as dental floss"; a copy of applicant's registration for FLOSS LOOPS



in stylized form, , in which applicant disclaimed the words FLOSS LOOPS;<sup>4</sup> and internet evidence, including the following:

Webpage from SWS Detention, using a heading identifying goods as "Dental Floss-Floss Loops" [www.swsdetention.com](http://www.swsdetention.com)<sup>5</sup>

Webpage from Patentstorm, headed "Dental floss loop devices, and methods of manufacture and packaging same," which describes, in the Abstract, "Dental floss loop devices are formed by a pair of parallel floss strands extending between and having their ends secured to a pair of spaced apart gripping elements." [www.patentstorm.us](http://www.patentstorm.us)

Yahoo! Answers, in which a person asks about what retainer to choose, stating "I'm tired of using the floss loops to get around my braces."

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<sup>4</sup> Registration No. 2439791. This registration was cancelled on November 4, 2011 (after the examining attorney pointed out applicant's disclaimer), because of applicant's failure to file a Section 8 affidavit. Although this registration is now dead, and therefore does not have the probative value of an active registration, we can take note of the fact that applicant disclaimed the words FLOSS LOOPS.

<sup>5</sup> Applicant has pointed out that SWS Detention is an authorized third-party dealer, and "all trademark usage therein [the website] has been authorized" by applicant. This does not affect the fact that the website uses the term "floss loops" in what viewers would be perceived as the name of the goods, i.e., as a category of "dental floss," rather than as a trademark.

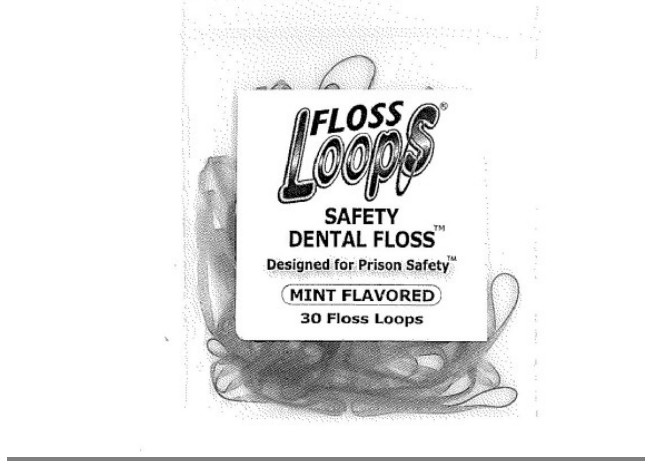
"You have to use the floss loops, you have to brush behind your teeth really good..."  
<http://answers.yahoo.com>

Webpage from Iowa Department for the Blind, regarding Threading a Needle  
You can purchase self-threading needles... You can also use dental floss loops, which are available at a drug store.  
[www.blind.state.ia.us](http://www.blind.state.ia.us)

A directive from the Minnesota Department of Corrections which lists items that indigent offenders may receive free of charge, and includes as personal care items "toothbrush, toothpaste, razor, comb, deodorant, soap, shampoo, dental floss loops..."  
[www.doc.state.mn.us](http://www.doc.state.mn.us)

In addition, the examining attorney has submitted copies of patents which describe dental floss loops in connection with flossing teeth. See, for example, Patent No. 5,086,792, entitled "Dental floss loop devices, and methods of manufacture and packaging same."

The examining attorney also made of record a webpage in which "floss loops" is used as a generic descriptor of applicant's own goods; the American Institutional Supply webpage features applicant's dental floss and describes it as "Floss Loops 30 dental floss loops Sold by the Package."  
[www.amerisup.com](http://www.amerisup.com). Further, we note that applicant's specimen uses "floss loops" as the name of the product, identifying the contents of the package as "30 Floss Loops":



The foregoing evidence shows that "floss loops" is at the very least a highly descriptive term for dental floss.<sup>6</sup> Therefore, applicant has a heavy burden to demonstrate that the mark, and more particularly the LOOPS portion of the mark, has acquired distinctiveness, such that the mark as a whole is registrable pursuant to Section 2(f).

In support of its claim that LOOPS has acquired distinctiveness, applicant relies on its own registrations that include the word LOOPS, use of "the LOOPS family of trademarks," its corporate existence under the name Loops LLC since 1996, letters to retailers, advertising brochures, trade show participation, sales, articles, Master Product Lists from the Florida Department of

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<sup>6</sup> Although the examining attorney stated in an Office action that he was not suggesting that applicant amend its application to the Supplemental Register because the mark "appears to be generic," Office action mailed August 31, 2011, the examining attorney did not actually refuse registration on this ground, and therefore we will treat the term as highly descriptive but not generic.

Corrections, and definitions of "floss" taken from a slang dictionary. We will examine each piece of evidence in turn.

First, we give no probative value to the slang definitions of "floss." Applicant's goods are identified as "dental floss." When FLOSS LOOPS is used in connection with dental floss, consumers will understand the word FLOSS to mean dental floss. Applicant has in effect acknowledged this both by its initial claim that FLOSS LOOPS has acquired distinctiveness, and therefore that "floss loops" is descriptive for dental floss, and because, after it amended its claim of acquired distinctiveness to LOOPS, it agreed to disclaim exclusive rights to FLOSS.

As for the Florida Department of Corrections product lists, these are approved canteen lists from 2001 and 2003. The 2001 lists include "FLOSS LOOPS 30ct" in the same group of "sundry items" in which, inter alia, "HAIR BRUSH, NO HANDLE," "COMB, POCKET," "TOOTHBRUSH, SOFT, 6/12" and "TOOTHBRUSH HOLDER, TWO PIECE" are listed. Given that all of these terms are the generic names for the foregoing sundry items, the inclusion of "FLOSS LOOPS 30ct" in this list gives the impression that FLOSS LOOPS is, or is regarded as, a generic term as well. As for the 2003 canteen product lists, it is not clear how the listings

would be perceived. On the MALES CANTEEN PRODUCT LIST it is shown as "FLOSS LOOPS 30 CT LLP," so the inclusion of "LLP" may indicate that that this is meant to refer to a particular company (although applicant's name is "Loops, LLC"). The other items on the list seem to be a combination of generic terms, trademarks, and company names, e.g., "TOOTHBRUSH, SOFT, COLGATE 6/12"; "TOOTHBRUSH HOLDER, TWO PIECE, CLEAR, PRO; EMERY BOARDS, CARDED, TRIM 10 CT"; SHOWER SLIDES, V-STRAP, MEDIUM, IMPORT"; "SNICKERS 2.7 OZ" and "CHIPS, PLAIN 1 OZ." On the FEMALE CANTEEN PRODUCT LIST the product is listed as "FLOSS LOOPS, LLP 30 CT," and therefore "LOOPS, LLP" may have been listed as a company name. At most, we regard this evidence as equivocal, and we cannot conclude from the appearance of these terms on these lists that FLOSS LOOPS per se is perceived as a trademark for dental floss.

There are two newspaper articles from 2012<sup>7</sup> reporting a prisoners' lawsuit for the right to use dental floss. The "Hernando Today" article, published November 17, 2012,<sup>8</sup> has the following statement:

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<sup>7</sup> Applicant submitted three articles, but one is from the AP website and the second is a copy of it that was printed in "The Seattle Times." Whether we view these as two separate articles or one has no effect on our decision herein.

<sup>8</sup> The article states, after "Hernando Today," "An edition of THE TAMPA TRIBUNE and THE TAMPA TIMES."



However, Florida's state prison officials say that they have found a solution. At the state's prison canteens they sell to inmates "security oriented floss loops." A 30-loop bag costs \$2.26, said Ann V. Howard, communications director for the Florida Department of Corrections.

In contrast to traditional string and nylon floss, the "Floss Loops Safety Dental Floss" is designed to break easily, can't be made into a rope, can't be used to pick locks or handcuffs, and can't be used as a weapon or a saw, according to the manufacturer. Each safety loop consists of a pair of parallel rubbery floss strands extending between a pair of grips. The loops require using both the flosser's hands to hold the grips...

Prodded by the inmates' lawsuit, officials at the Westchester County Department of Correction have announced that inmate-safe floss loops will be sold at the jail commissary...

... it can hardly be a huge hardship for the Palm Beach County Jail to sell the safety floss loops to inmates...

We do not find this article to be persuasive that FLOSS LOOPS will be perceived as a trademark. Although there is a reference to "Floss Loops Safety Dental Floss" in the manner of a trademark, with quotation marks and initial capital letters, the rest of the article is replete with generic uses of "floss loops."

The second article, published in "The Seattle Times" on October 26, 2012, does show "Floss Loops" with proper trademark usage, although one of the mentions incorrectly uses the term "Floss Loop":

Deputy Commissioner Justin Pruyne said the jail is not required to supply floss to inmates and said floss posed security risks. But the jail has since brought in a supply of Kayser's<sup>9</sup> "Floss Loop," [sic] circles of rubbery floss with no hard plastic that are designed to break easily before they can be used as a weapon.

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In California, the state approves Floss Loops. Regular floss can be used as a garrote...

However, because the article is primarily concerned with problems with dental floss in jails (the article is entitled, "Prisoners sue to get dental floss, but jailers say it's a weapon"), and "Floss Loop" is not mentioned until the middle of the article, and "Floss Loops" is not mentioned again until six paragraphs later, it is not clear to what extent FLOSS LOOPS makes an impression as a trademark on the reader.

Applicant has stated, through its attorney, that between 1998 and 2007 it sent approximately 5,000 direct mailings to prison institutions and correctional facilities. The examples of these mailings submitted by applicant are generally letters, product specification sheets and order forms. The letters identify "Floss Loops<sup>®</sup> Dental Floss" in the "Re" and the same phrase appears

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<sup>9</sup> Steven Kayser is identified in many of applicant's submissions as its president, and was identified earlier in this article with the statement, "whose company sells a floss product advertised as prison-safe."

prominently in the product specification sheet and order form.

Applicant also submitted an "Invitation to Bid" from the Florida Department of Corrections, issued on March 19, 1998, for "Dental Floss Loops." Rather than supporting applicant's claim of acquired distinctiveness of LOOPS, this document shows generic usage of "dental floss loops" and "floss loops," e.g., the introduction section states that "it is estimated that the department will purchase approximately 30,000 packages containing thirty (30) floss loops per package." The contract that resulted from the invitation to bid states, in a "whereas" clause, that applicant "is a qualified and willing participant with the department to provide dental floss loops to various institutions throughout the state of Florida."

With respect to its promotional activities involving correctional institutions, applicant has exhibited in trade shows directed to Correctional Health Care in 2001 and 2002, as well as at the Las Vegas Merchandise Expo in 2002 in which it used a banner featuring its stylized FLOSS LOOPS mark (shown in its cancelled registration No. 4239791, discussed supra, in which FLOSS LOOPS has been disclaimed).

It also appears that, at least at one time, applicant targeted the general public as its customers: its 1998 packaging stated that it was "great for kids and adults"; in November 2002 it sent a letter to Vons stating that the product was currently sold in Sav-On Stores and offering to introduce the product to Vons, and enclosing packages in mint and cherry berry flavors; two typed pages listing the "benefits" of FLOSS LOOPS and product information bear handwritten notations that they were sent to Longs Drugs Stores on April 5, 2003; and an additional sheet listing benefits of the product for consumers and kids bears a handwritten notation of October 17, 2003--there is no further information as to whom this may have been distributed.

The sales information provided by applicant consists of applicant's sales receipts showing sales of 285 cases of its dental floss product, all to correctional institutions. Each case contains 144 packages, and each package contains 30 loops (a one-month supply). In 2002 the packages were priced at \$1.89, with a suggested retail price of \$2.99; the 2012 "Hernando Today" article reports that the price is \$2.26 (presumably this is the price that the institution would pay).

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Applicant has pointed to other registrations it owns for marks containing the term LOOPS, and claims ownership of a LOOPS family of marks, in order to show that LOOPS in the subject mark has acquired distinctiveness. The registrations are for the following marks:

LOOPS FLEXIBLE TOOTHBRUSH HOLDER, with FLEXIBLE TOOTHBRUSH HOLDER disclaimed, for toothbrush holders (Registration No. 3383396);

LOOPS for dental floss, toothbrush holders; toothbrushes, registered pursuant to Section 2(f) (Registration No. 3714032);

LOOPS MINI-FLEXBRUSH for toothbrushes (Reg. No. 3254567);

LOOPS FLEXBRUSH for toothbrushes (Reg. No. 3146009);

DENTALOOPS for dental floss (Reg. No. 2743767);

and

The logo features the word "Loops" in a stylized, bold, italicized font with a thick outline. To the right of "Loops" is the phrase "Safe and Secure" in a plain, sans-serif font.

for personal hygiene items, namely, toothbrushes, toothbrush holders, combs (Registration No. 3748113).

Applicant, through the response filed by its attorney, states that it has used its "LOOPS family of trademarks" since 1996, and has averaged sales of 400,000 units of product per year since 2000.

We are not persuaded by this evidence that LOOPS, as used in the mark FLOSS LOOPS, has acquired distinctiveness as a trademark for dental floss. First, many of applicant's registrations are for marks that use LOOPS as the first or only word of the trademark; these registrations convey a different commercial impression from FLOSS LOOPS, where LOOPS appears as the second word in the mark, and is used as a descriptive term for the shape of the dental floss. Because applicant uses FLOSS LOOPS in a different manner from its other LOOPS marks, such as LOOPS FLEXIBLE TOOTHBRUSH HOLDER, consumers would not be likely to view the usage of LOOPS in FLOSS LOOPS as being the same as the marks where LOOPS is the first term. Further, mere ownership of registrations does not establish that a party has a family of marks; there must not only be a showing of use of the marks, but of promotion of a family having the common "surname" element. See *J & J Snack Foods Corp. v. McDonald's Corp.*, 932 F.2d 1460, 18 USPQ2d 1889 (Fed. Cir. 1991). Applicant has not provided any evidence of such promotion that would establish a family based on LOOPS, let alone that FLOSS LOOPS would be perceived as part of such a family.

As for applicant's evidence of sales, the annual sales of 400,000 units appear to be for all of applicant's

products under all of its marks, not just for applicant's sales of dental floss under the mark FLOSS LOOPS. Sales of different goods under different marks are not probative evidence of acquired distinctiveness of LOOPS in the mark FLOSS LOOPS for dental floss. As noted, the only evidence of sales of floss under this mark are the 285 cases applicant referenced in its response to the February 29, 2012 Office action, and for which it has submitted invoices. Given the highly descriptive nature of FLOSS LOOPS for dental floss, these sales are simply not sufficient to meet applicant's burden to show that LOOPS, in the mark FLOSS LOOPS, has acquired distinctiveness.

After reviewing all of the evidence of record, we find that applicant has failed to show that LOOPS in the mark FLOSS LOOPS has acquired distinctiveness, such that the mark as a whole is a source-indicator. With respect to applicant's use of FLOSS LOOPS for dental floss sold to the general public, the evidence of such promotion is minimal, and there is no evidence of any sales (applicant's statement in its letter to Vons about the product being available in certain Sav-On stores is not evidence of sales). Because applicant's identification of goods is not restricted to any particular trade channel or group of consumers, and dental floss is a product that is purchased

by the general public, it is appropriate to consider whether the mark, or the word LOOPS as used in the mark, has acquired distinctiveness with respect to this group. Clearly it has not, and on this basis alone applicant has not met its burden.

Applicant does have another channel of trade, selling the dental floss to and in prisons, and it has provided evidence of its promotional efforts in this area, e.g., the letters it has written to buyers for prisons, and exhibiting at trade shows directed to such customers, as well as actual sales. The examining attorney has dismissed much of this evidence as not being directed to the ultimate purchasers, i.e., the inmates. Although the evidence regarding canteen lists indicates that dental floss may be purchased by prisoners, it is also possible that the correctional facilities themselves may purchase the goods for distribution, rather than sale, to prisoners, so we think it appropriate to consider the buyers for the institutions and/or the institutions that may purchase the goods as relevant purchasers. Even so, it is not clear that even among this portion of its consumer base that FLOSS LOOPS, or LOOPS within that mark, has acquired distinctiveness as a source-indicator: as previously noted, the 1998 Florida Department of Corrections request for bids



and the resulting contract uses "dental floss loops" in a generic manner; the canteen list on the 2001 Florida Department of Corrections canteen product list shows "FLOSS LOOPS 30ct" in the same manner as other generic terms, and the significance of the terms as used on the 2003 canteen lists is equivocal. There is a 2006 contract resulting from solicitations by the State of New Jersey, which was extended in 2007, in which goods provided by Keefe Supply Co. include "loops dental floss, breakable loops" which identify the brand as "FLOSS LOOPS." However, in 2009 a solicitation by the State of New Jersey Purchase Bureau lists the "brand" as "LOOPS LLC" for the item described as "loops dental floss, breakable loops..." Thus, this raises a question as to whether this agency recognizes LOOPS as used in FLOSS LOOPS, or FLOSS LOOPS per se, as a source-indicator for applicant's goods. The final piece of evidence regarding applicant's sales is a purchase order for the California State Prison at Corcoran in 2012, in which the item is identified as "Floss Loops, 144pk/cs," which we agree shows recognition of FLOSS LOOPS as a trademark. However, the limited evidence that is of record, including sales and promotion activities, is not sufficient for us to find acquired distinctiveness even in the correctional institution channel of trade.

In short, applicant's evidence of use and promotion of its mark is not sufficient to demonstrate that FLOSS LOOPS, or the word LOOPS as used in the mark, has acquired distinctiveness. Therefore, in view of the fact that applicant has failed to show that LOOPS in the mark FLOSS LOOPS has acquired distinctiveness as a mark for dental floss, we find that the applied-for mark is merely descriptive of applicant's goods.

Decision: The refusal of registration on the ground that the mark is merely descriptive, and that LOOPS in the mark FLOSS LOOPS has not acquired distinctiveness, is affirmed.