

This Opinion is not a
Precedent of the TTAB

Mailed: August 7, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

—
Trademark Trial and Appeal Board
—

In re Big Apple Performing Arts, Inc.
—

Serial Nos. 85781180
and 85781188
—

Phillip A. Rosenberg and Jason M. Vogel of Kilpatrick Townsend & Stockton LLP
for Big Apple Performing Arts, Inc.

Odessa Bibbins, Trademark Examining Attorney, Law Office 118,
Thomas G. Howell, Managing Attorney.

—
Before Seeherman, Lykos and Goodman,
Administrative Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

On November 16, 2012, Big Apple Performing Arts, Inc. (“Applicant”) filed two applications to register YOUTH PRIDE CHORUS, one in standard characters¹ and one in the stylized form shown below:²

¹ Serial No. 85781180 asserting first use and first use in commerce as early as April 30, 2003.

² Serial No. 85781188 asserting first use and first use in commerce as early as September 30, 2008.

The logo consists of the word "youth" in a lowercase, sans-serif font. Below it, the word "PRIDE" is written in a larger, bold, uppercase, sans-serif font. Below "PRIDE", the word "chorus" is written in a lowercase, sans-serif font. The words are stacked vertically and centered.

The stylized mark is described as follows:

The mark consists of the wording "YOUTH PRIDE CHORUS" with the term "YOUTH" in lower case letters, depicted above the term "PRIDE" with the letters "PRIDE" in all caps and the letter "T" in lower case, all above the word "CHORUS" which is depicted all in lower case letters.

Color is not claimed as a feature of the mark.

Both applications contain a disclaimer of CHORUS, and both have the following identification of services:

Entertainment services, namely, provision of live music concerts in the nature of chorus singing, production of shows, namely, choral performances; educational services, namely, providing educational speakers and live programs in the field of issues affecting gay, lesbian, bi sexual and transgendered communities; teacher training in the field of performing arts programs; consulting in the field of performing arts program design and development. (Class 41).

The Examining Attorney refused registration of both marks pursuant to Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that both of Applicant's marks are merely descriptive of its services. The Examining Attorney also refused to accept Applicant's alternative claim that the marks have acquired distinctiveness, and are therefore registrable under Section 2(f) of the Act, stating that the marks are so highly descriptive that Applicant did not meet its burden of showing acquired distinctiveness.

I. Preliminary Matters

A. After Applicant filed its appeal briefs, it filed a motion to consolidate the two appeals. Because the appeals involve nearly identical marks and identical services, as well as the same issues and evidence, the Board granted the motion. *See* TMBP § 1214 and cases cited therein at Note 1. Accordingly, we decide both appeals in this decision. References to page numbers of Office actions and responses are to the filings in Serial No. 85781180 unless otherwise specified.

B. We note that Applicant has submitted over 350 pages of attachments to each of its appeal briefs. Based on statements made by Applicant in its briefs, it appears that these are exhibits that it previously made of record during prosecution of the applications. However, we will not examine the attachments to determine whether or not they are properly of record. If they are of record, we have reviewed the material as part of the application files; if they are not properly of record, we give them no consideration. *See* Trademark Rule 2.142(d). *See also, In re Thor Tech Inc.*, 85 USPQ2d 1474, 1475 n.3 (TTAB 2007) (attaching evidence from record to briefs is duplicative and is unnecessary).

C. In its consolidated reply brief Applicant takes issue with the Examining Attorney's reliance on an entry from Wikipedia, citing *In re Carrier Consulting Grp.*, 84 USPQ2d 1028 (TTAB 2007), for the proposition that any information obtained from Wikipedia should be treated as having limited probative value. Applicant also points to a statement in the Trademark Manual of Examining Procedure ("TMEP") to essentially assert that any evidence from Wikipedia must be

corroborated.³ Applicant's contentions overstate the problem with evidence from Wikipedia. "The Board gives consideration to evidence taken from Wikipedia, bearing in mind the limitations inherent in this reference work, so long as the non-offering party has an opportunity to rebut the evidence by submitting other evidence that may call its accuracy into question." *In re Swatch Grp. Mgmt. Servs. AG*, 110 USPQ2d 1751, 1754, n.2 (TTAB 2014). As was the case in *Swatch*, here the Examining Attorney submitted the Wikipedia article with the first Office action, (March 13, 2013, p. 4), so if Applicant believed it was inaccurate it had multiple opportunities to rebut it (response filed September 13, 2013; response filed April 7, 2014; request for reconsideration filed November 7, 2014). Applicant did not do so. In fact, ironically, Applicant has relied on Wikipedia entries on other topics. We further note that the Wikipedia article submitted by the Examining Attorney lists quite a number of sources in support of the statements made in the article, including the statements relevant to the issue involved in this appeal. Because Applicant has not shown that the Wikipedia article is inaccurate, we have accorded it the appropriate probative value.

D. During prosecution, Applicant stated that its claim of acquired distinctiveness was made in the alternative, that is, it was seeking registration under Section 2(f)

³ "If the examining attorney relies upon Wikipedia evidence and makes it of record, then additional supportive and corroborative evidence from other sources should also be made of record, especially when issuing final actions." TMEP § 710.01(b) (July 2015). We do not regard this directive to examining attorneys in connection with the examination of applications as preventing the Board from considering Wikipedia evidence even if the examining attorney has not submitted corroborative evidence from other sources. We also point out that in the present case the Examining Attorney has, as detailed *infra*, submitted corroborating and supporting evidence.

only if the Examining Attorney and ultimately the Board did not agree with its position that its marks are inherently distinctive. However, in its briefs and consolidated reply brief Applicant presented no arguments against the mere descriptiveness refusal. Therefore, we consider Applicant to have waived its claim for registration under Section 2(f) as being in the alternative, and view Applicant as now seeking registration only pursuant to Section 2(f). Accordingly, the question of whether the marks are inherently distinctive is no longer before us, and the only issue currently on appeal is whether or not Applicant has shown that its marks have acquired distinctiveness. However, in determining whether the marks have acquired distinctiveness, we must still consider the evidence on the issue of mere descriptiveness, since the degree of descriptiveness has an impact on a showing of acquired distinctiveness.

II. Statutory Refusal

A term is merely descriptive if it immediately conveys knowledge of a significant quality, characteristic, function, feature or purpose of the goods or services it identifies. *See, e.g., In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012); *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987). If the mark is descriptive of any of the goods or services for which registration is sought, it is proper to refuse registration as to the entire class. *In re Analog Devices Inc.*, 6 USPQ2d 1808 (TTAB 1988), *aff'd* without pub. op., 871 F.2d 1097, 10 USPQ2d 1879 (Fed. Cir. 1989). Although Section 2(e)(1) prohibits the registration of a merely descriptive mark, an applicant may overcome such a bar if

the applicant can show that the mark has become distinctive of the applicant's goods or services.⁴ The Director may accept as *prima facie* evidence that the mark has become distinctive proof of substantially exclusive and continuous use of the term as a mark by the applicant in commerce for the five years before the date on which the claim of distinctiveness is made. Section 2(f), 15 U.S.C. § 1052(f). However, it depends on the degree of descriptiveness of the mark whether an affidavit or declaration of five years use will be acceptable to show acquired distinctiveness. The greater the degree of descriptiveness the term has, the heavier the burden to prove it has acquired distinctiveness. *Yamaha Int'l Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 6 USPQ2d 1001 (Fed. Cir. 1988).

The Examining Attorney asserts that YOUTH PRIDE CHORUS is merely descriptive of Applicant's services. Specifically, she contends that "youth pride" is an extension of the gay pride and LGBT⁵ movement, and "chorus" is a body of singers who perform choral compositions, and that when these words are combined in the mark YOUTH PRIDE CHORUS, the mark as a whole describes the identified services, which is directed to the LGBT community and features chorus singing. In support of her position, the Examining Attorney made of record a number of articles and entries referencing "youth pride," including the following:

⁴ Section 3 of the Trademark Act makes the provisions of Section 2 applicable to service marks.

⁵ LGBT stands for "lesbian, gay, bisexual and transgender." Some mentions add I, Q and A to this initialism; I stands for "intersexual," Q stands for "queer" or "questioning" and A stands for "allies." For ease of reference, we will use LGBT in this opinion to refer to the entire community, which includes "allies," i.e., those who support the people and aims of the community.

An entry for “LGBT culture” in Wikipedia,⁶ with the section title “Youth culture,” three paragraphs of which are shown below:

Youth Pride, an extension of the gay pride and LGBT social movements, promotes equality amongst young members (usually above the age of consent) of the lesbian, gay, bisexual, transgender, intersex and questioning (LGBTIQ) community. The movement exists in many countries and focuses on festivals and parades, enabling many LGBTIQ youth to network, communicate, and celebrate their gender and sexual identities. Youth Pride organizers also point to the value in building community and supporting young people....

...prompted the Massachusetts Governor’s Commission on Gay and Lesbian Youth to begin an annual Gay-Straight Youth Pride observance in 1995. In 1997 the nonprofit Youth Pride Alliance, a coalition of 25 youth-support and advocacy groups, was founded to hold an annual youth-pride event in Washington, D.C. ...In 1999, the first annual Vermont Youth Pride Day was held. As of 2009 it is the largest queer and allied-youth event in Vermont....

In 2004 the San Diego chapter of Gay, Lesbian and Straight Education Network (GLSEN) worked with San Diego Youth Pride coordinators to organize a Day of Silence throughout the county. In 2005, Decatur (Georgia) Youth Pride participated in a counter-demonstrationIn 2008 Chicago’s Youth Pride Center, primarily serving “LGBT youth of color”.... In 2009, the Utah Pride Center held an event to coincide with Youth Pride Walk 2009, a “cross-country walk ... to draw attention to the problems faced by homeless LGBT youth.” In August 2010 the first Hollywood Youth Pride was held, focusing on the “large number of homeless LGBT youth....”

NoVa Youth Pride exists to provide resources and support to Lesbian, Gay, Bisexual, Transgender, Queer, and Questioning students from the Northern Virginia area.
<http://hovayouthpride.tumblr.com>⁷

D.C.’s Youth Pride marks a second year back in Dupont Circle
(subtitle)

⁶ March 13, 2013 Office action, p. 4.

⁷ March 13, 2013 Office action, p. 5.

D.C. 16th annual Youth Pride celebration went ahead as planned Saturday, April 28, with periods of cloudiness and sunshine....

The Dupont Circle event, which featured booths from various LGBT and ally organizations ... was organized by Youth Pride Alliance, a nonprofit organization for “Lesbian, Gay, Bisexual, Transgender, Queer, Questioning, and Ally youth empowerment.”
Metro Weekly, published May 3, 2012⁸

Massachusetts Youth Pride is a one-day annual festival dedicated to celebrating LGBTQ youth in the Commonwealth of Massachusetts.
www.bostonpride.org⁹

GLSEN hosts annual Youth Pride Dance for LGBTQ teens (title)
Seattle Parks and Recreation and the Gay, Lesbian, and Straight Education Network (GLSEN) of Washington State will hold a Youth Pride Dance at Yesler Community Center from 8-11 p.m. on Friday, June 22.... The Youth Pride Dance honors the theme by allowing youth a space to celebrate
Seattle.gov¹⁰

Applicant’s Youth Pride Chorus “harnesses the power of the performing arts to galvanize lesbian, gay, bisexual, transgender and straight young people ages 13-22 as agents of change.” Declaration of Peter Criswell, dated September 12, 2013 (hereafter Criswell dec. I), ¶ 2.¹¹ One purpose of the Youth Pride Chorus is to fight homophobia. *Id.* Further, Applicant’s educational services are in the field of issues affecting gay, lesbian, bisexual and transgendered communities. Thus, it is accurate to say that Applicant serves the interests of those in the LGBT community.

⁸ March 13, 2013 Office action, p. 6.

⁹ March 13, 2013 Office action, p. 8.

¹⁰ March 13, 2013 Office action, p. 9.

¹¹ September 13, 2013 response, p. 123.

Applicant has acknowledged that many LGBT organizations “have adopted the expression ‘Youth Pride’ as a mode of empowerment.” Response filed November 7, 2014, p. 5. In fact, Applicant has submitted, as Exhibit 6 to its September 13, 2013 response, pp. 45-122, evidence of a large number of third parties that have adopted marks or names with include the term “Youth Pride.” *See*, for example, Youth Pride, an organization which “protects, unites, and dignifies the lives of gay, lesbian, bisexual, transgender, queer and questioning youth and young adults,” pp. 60-63; YouthPride Alliance, which serves LGBT youth and hosts programs like Youth Pride Day, pp. 65-68; Youth Pride Coalition, which strives “to increase awareness toward LGBTQ youth issues.” pp. 70-73; and Youth Pride Center, “an organization geared towards helping LGBTIQ Black youth.” We realize that the services provided by these third parties are not technically the same as those Applicant has identified in its applications. However, this evidence is relevant to show that the term “youth pride” has a recognized meaning in the LGBT community.

As for the word “Chorus,” the Examining Attorney required a disclaimer of this term because it is generic for Applicant’s identified services. Applicant acknowledged this by submitting the required disclaimer.¹² Applicant has also asserted that “youth chorus” is the generic term for a choral group that provides the type of entertainment services rendered by Applicant, and has submitted evidence

¹² The Examining Attorney also made of record a dictionary definition of “chorus”: “A body of singers who perform choral compositions, usually having more than one singer for each part.” Houghton Mifflin, in Yahoo! Education, submitted with March 13, 2013 Office action, p. 10.

to this effect; clearly “chorus” would be the generic term for any choral performances, whether the group is composed of “youth” or people of any age.

In view of the foregoing evidence, we find that the term YOUTH PRIDE CHORUS is highly descriptive of Applicant’s identified services. The term YOUTH PRIDE is a recognized term for the consumers of the services, that is, to the members of the LGBT community, and CHORUS is a generic term for concerts in the nature of chorus singing, and choral performances. Together, YOUTH PRIDE CHORUS would be understood by the LGBT community as a chorus that exemplifies or fosters youth pride, and that this is a major characteristic and purpose of Applicant’s services. We understand Applicant’s point that “youth pride chorus” is not found as a dictionary term. However, the Examining Attorney has not asserted that Applicant’s mark in its entirety, YOUTH PRIDE CHORUS, is generic, and therefore the fact that it is not found in the dictionary does not alter our conclusion that YOUTH PRIDE CHORUS, whether in standard characters or in the stylized form for which Applicant also seeks registration in Application Serial No. 85781188, is highly descriptive.

This case presents a somewhat unusual situation, because although the mark is highly descriptive, it would be highly descriptive only to those who are connected with the LGBT community. Based on the evidence of record, it is those consumers who would understand the specific meaning of “youth pride.” Therefore, although Applicant, in order to demonstrate that its marks are registrable under Section 2(f),

has a heavy burden to prove that its marks have acquired distinctiveness, it must do so with respect to the LGBT community, the consumers of the services.

Applicant has submitted two declarations of Peter Criswell, its executive director (Criswell I and II) and declarations by Robin Godfrey, Executive Director for the Gay and Lesbian Association of Choruses (GALA); Elven Hickmon, General Manager for PerformOUTKC, and Christopher Verdugo, Executive Director for the Gay Men's Chorus of Los Angeles.

Mr. Criswell averred in his first declaration¹³ that Youth Pride Chorus was founded in 2003, and is a program of The New York City Gay Men's Chorus and the Lesbian, Gay, Bisexual & Transgender Community Center. ¶ 2. Among the more significant evidence submitted by Applicant is the following:

Its chorus members have performed under the YOUTH PRIDE CHORUS mark at nationally attended events, including the GLAAD Media Awards, GLSEN's Respect Awards, Broadway Backwards at Lincoln Center, and with Cyndi Lauper on her True Colors Tour and her Home for the Holidays concert benefitting homeless LGBT youth, ¶ 3.

Its initial YOUTH PRIDE CHORUS concert at Carnegie Hall sold approximately 2,000 tickets, ¶ 4.

It has performed two YOUTH PRIDE CHORUS concerts per year for the last 10 years, with 5000 palm cards distributed for each, and each concert selling 300 tickets, *id.*; in addition, it has performed at various other venues, including Carnegie Hall in 2006¹⁴ and 2008.¹⁵

¹³ Filed September 13, 2013, pp. 123-129, with exhibits A through D, from p. 130 through p. 320.

¹⁴ "New York Times," December 8, 2006, submitted as an exhibit to Criswell I dec., Response filed September 13, 2013, p. 152.

¹⁵ "Home News Tribune," May 23, 2008, Response filed September 13, 2013, p. 156.

It has performed YOUTH PRIDE CHORUS concerts at the Gay and Lesbian Association of Choruses (GALA) quadrennial Festival in 2008 and 2012, reaching 4000 consumers from different cities across the United States. Criswell dec. I, ¶ 4. GALA leads the North American LGBT choral movement, and the Festival is GALA's signature event which brings together over 130 ensembles and 6000 singers for the world's largest LGBT performing arts event. Dec. of Robin Godfrey, ¶ 3.¹⁶

There is a Youtube YOUTH PRIDE CHORUS Channel which received over 126,000 views between 2009-2013. Criswell dec. I, ¶ 5.

"Out" magazine, December 2003 feature article about the formation of the Youth Pride Chorus, their appearance at the New York City Gay Men's Chorus annual pride concert at Carnegie Hall in 2003, and future performance plans.¹⁷

"The Villager," July 19-25, 2006 article about the Young Pride Chorus.¹⁸

"Now Chelsea," self-described as "The Weekly Newspaper of Chelsea," December 1-7, 2006, article entitled "Pride Chorus ready to rock too," and is about the Youth Pride Chorus and a rock 'n roll program to usher in the holidays.¹⁹

CBS News, October 20, 2010 posting on website www.cbsnews.com, with article about "It Gets Better" project regarding gay teens; article reports on video in which members of Youth Pride Chorus both talk about being bullied and then sing "Ooh Child."²⁰

"Next Magazine," February 29, 2012 article entitled "Youth Pride Chorus Brings Audience To Tears at New York Gay Men's Chorus' Annual Benefit, Harmony," about a benefit concert at which the Youth Pride Chorus entertained. Article reported in some detail on the chorus's performance, and included a photo of the Youth Pride Chorus.²¹

¹⁶ Response filed November 7, 2014, p. 8.

¹⁷ Exhibit C to Criswell dec. I, Response filed September 13, 2013, p. 201-02.

¹⁸ Response filed September 13, 2013, p. 231-34.

¹⁹ Response filed September 13, 2013, p. 235-36.

²⁰ Response filed September 13, 2013, p. 258-264.

²¹ Response filed September 13, 2013, p. 282-83.

We must emphasize that the kind and amount of evidence necessary to establish that a mark has acquired distinctiveness in relation to goods or services depends on the nature of the mark and the circumstances surrounding the use of the mark. *Yamaha Int'l Corp. v. Hoshino Gakki Co.*, 6 USPQ2d at 1008; *Roux Labs., Inc. v. Clairol Inc.*, 427 F.2d 823, 829, 166 USPQ 34, 39 (CCPA 1970); *In re Hehr Mfg. Co.*, 279 F.2d 526, 126 USPQ 381, 383 (CCPA 1960). In this case, the Youth Pride Chorus is not a normal commercial entity, but a program of the New York City Gay Men's Chorus and the Lesbian, Gay, Bisexual & Transgender Community Center. Its purpose is to help fight homophobia and bullying, and to help teens through the avenue of entertainment and education services. As a result, many of the normal indicia of acquired distinctiveness that we consider for consumer products, such as sales and advertising expenditures, do not apply to this situation.

Further, as we have said, Applicant must show that its marks have acquired distinctiveness for the members of the LGBT community, since it is only to that community that the marks would be understood as descriptive of Applicant's services. We find that the evidence submitted by Applicant is sufficient to show that the marks have acquired distinctiveness for these consumers. For more than ten years the members of the chorus have given numerous performances under the mark YOUTH PRIDE CHORUS at events, including major national events, that are of interest to members of the LGBT community. The community would be aware of the performances by being in the audience for such performances, or by word-of-mouth from those in attendance, or by watching or reading about the events and the

performances. We acknowledge that most of the evidence relates to the phrase YOUTH PRIDE CHORUS, rather than to the mark in stylized form. However, because it is the words that are highly descriptive, the evidence showing that the words have acquired distinctiveness is sufficient for us to find that the stylized version of the mark has also acquired distinctiveness.

We reiterate that we find the evidence sufficient to show acquired distinctiveness in the special circumstances of this case, and that such evidence would not necessarily be persuasive if the consumers of the goods or services were the public as a whole.

Decision: We find that Applicant's marks YOUTH PRIDE CHORUS in standard characters and in stylized form are registrable pursuant to Section 2(f) of the Trademark Act, and therefore the refusals to register these marks as merely descriptive is reversed.