

This Opinion is Not a  
Precedent of the TTAB

Mailed: December 10, 2014

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Distribusun LLC*  
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Serial No. 85912404  
Serial No. 85912421<sup>1</sup>  
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Michael D. Hobbs, Jr. and Austin Padgett of Troutman Sanders LLP,  
for Distribusun LLC.

Michael A. Wiener, Trademark Examining Attorney, Law Office 108,  
Andrew Lawrence, Managing Attorney.

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Before Zervas, Wolfson and Gorowitz,  
Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

Distribusun, LLC (“Applicant”) seeks registration on the Principal Register of  
the following marks:

RADIANT POWER (Application Serial No. 84912404) for “Retail  
electricity provider services that allow customers to purchase electricity”  
in International Class 35; and

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<sup>1</sup> Because the marks in the applications are similar, the applications have the same International Class 35 services, and the records are essentially identical, we consolidate the appeals. References to the record are to application Serial No. 85912404 unless otherwise indicated.

RADIANT (Application Serial No. 85912421) for (i) “Retail electricity provider services that allow customers to purchase electricity” in International Class 35, and (ii) “Generation of electricity from solar energy” in International Class 40.

Both marks are in standard character form, and both applications were filed on April 23, 2013 based upon Applicant’s allegations of a *bona fide* intention to use the marks in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

The Examining Attorney has refused registration of Applicant’s marks under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that, when used in connection with Applicant’s services, the marks would be merely descriptive of such services. When the refusals were made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the requests for reconsideration, the appeals were resumed. We affirm the refusals to register.

A term is deemed to be merely descriptive of goods or services, within the meaning of Section 2(e)(1), if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services. *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987); and *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215 (CCPA 1978). A term need not immediately convey an idea of each and every specific feature of the applicant’s goods or services in order to be considered merely descriptive; it is enough that the term describes one significant attribute, function or property of the goods or services. *In re H.U.D.D.L.E.*, 216 USPQ 358 (TTAB 1982); and *In re MBAssociates*, 180 USPQ 338 (TTAB 1973). It is well-established that the determination of mere

descriptiveness must be made not in the abstract, but in relation to the goods or services for which registration is sought. *In re Abcor Development Corp.*, 200 USPQ 215; *In re Vehicle Identification Network, Inc.*, 32 USPQ2d 1542 (TTAB 1994) (descriptiveness of mark in an intent-to-use application determined by services identified in application).

We first consider the RADIANT POWER mark and then consider the RADIANT mark.

***RADIANT POWER***

The Examining Attorney maintains that “[t]he mark in this application merely describes one attribute, feature, quality, characteristic, source or purpose of applicant’s services that the retail electricity provider services are for the generation of electricity from solar power” and that there is an “immediate and direct connection to solar power.” Brief at unnumbered p. 4-6.

Applicant describes its involvement with solar power in its webpages, which Applicant placed into the record with its response to the first Office action. Applicant is described as “[d]edicated to transforming the way solar is provided in this country, DistribuSun is a solar utility that designs, builds and operates the solar facility on your roof and sells you the power it produces.” Response to first Office Action, p. 10. Specifically, Applicant submitted promotional material which demonstrates that its services involve the generation of electricity through solar power. Thus, Applicant’s “electrical provider services” in its identification of services include the provision of electricity generated through solar power.

Applicant also introduced an article from the U.S. Department of Energy website, which discusses the operation of solar electric systems, stating in relevant part:

Solar cells – the basic building blocks of a PV [photovoltaic] system – consist of semiconductor materials. When sunlight is absorbed by these materials, the solar energy knocks electrons loose from their atoms. This phenomenon is called the “photoelectric effect.” These free electrons then travel into a circuit built into the solar cell to form electrical current. ... Only sunlight of certain wavelengths will work efficiently to create electricity. PV systems can still produce electricity on cloudy days, but not as much as on a sunny day.<sup>2</sup>

As this passage confirms, electricity is generated through photovoltaic cells through the light of the sun.

The Examining Attorney introduced, *inter alia*, the following evidence to support the refusal to register the proposed mark:

### ***Definitions***

- “**Radiant Power**” defined in the online version of *OED, Oxford English Dictionary*, (Oxford University Press 2013), as “the ability to radiate heat, or light; (Physics) the power of radiated energy; *spec. = radiant flux n.*”<sup>3</sup>

- “**Radiant**” defined as an adjective, accessed on credoreference.com, taken from *Collins English Dictionary* (HarperCollins Publishers 2000), providing in relevant part:

1. sending out rays of light: bright: shining.
3. emitted or propagated by or as radiation: radiated: *radiant heat*.

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<sup>2</sup> <http://energy.gov/energysaver/articles/small-solar-electric-systems>.

<sup>3</sup> <http://www.oed.com/viewdictionaryentry/Entry/157232>.

- “**Power**” defined in the online version of *Merriam-Webster Dictionary*

providing, in relevant part:

6 a : a source or means of supplying energy; *especially* : ELECTRICITY

*Uses of “Radiant Power”*

From the final Office action:

- A webpage stating “Solar energy is the **radiant power** produced by the Sun.”<sup>4</sup>
- A chapter of a textbook “The physical basis of climate” stating, “The total **radiant power** output of the sun is about  $3.88 \times 10^{26}$  watts which is equivalent to the thermal emission from a black body the size of the solar photosphere at a temperature of 5,790 K.”<sup>5</sup>
- A book on renewable resources for academics and researchers in environmental or electrical power engineering stating, “At the beginning of this chapter it is noted that the solar constant is a measure of the **radiant power** from the sun that is intercepted by the Earth’s disc.”<sup>6</sup>
- A webpage stating, “The total **radiant power** from the sun falling on one square meter of a surface area can be as high a 1000W/m<sup>2</sup> on a clear summer[] day ...”<sup>7</sup>

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<sup>4</sup> This article, “Pros and Cons of Solar Energy,” By: Jose Juan Gutierrez, was originally published on January 19, 2012, in [www.worldissues360.com/index.php/pros-and-cons-of-solar-energy-4383/](http://www.worldissues360.com/index.php/pros-and-cons-of-solar-energy-4383/). It was then reprinted in <http://www.helium.com/items/2282955-pros-and-cons-of-solar-energy>, as accessed by the Examining Attorney on October 11, 2013.

<sup>5</sup> Taken from a university level textbook “Climatic Change and Variability: A Southern Perspective,” edited by A. B. Pittock, L. A. Frakes, D. Jenssen, J. A. Peterson, J. W. Zillman, Ch. 2, at 9 (Cambridge University Press 2011). An excerpt available to the Examining Attorney was located online on October 11, 2013.

<sup>6</sup> Taken from a book, “Energy for a Warming World: A Plan to Hasten the Demise of Fossil Fuels,” written by Alan John Sangster, Ch. 3.6, at 65 (Springer Science+Business Media 2010). An excerpt available to the Examining Attorney was located online on October 11, 2013.

<sup>7</sup> This article, “Generating Electricity from the Sun,” by Tankut Yalcinozwas, originally published in Issue 20 of “The Fountain Magazine on Life, Knowledge, and Belief” (Oct. – Dec. 1997), drawn from <http://www.fountainmagazine.com/Issue/detail/Generating-Electricity-from-the-Sun>, by the Examining Attorney on October 11, 2013.

- An introduction to an article from “Popular Science” titled “American Power” and stating, “The sun’s **radiant power** is strongest in the desert Southwest, where the greatest energy demand – hot afternoon air conditioning – coincides with peak power supply.”<sup>8</sup>
- An article entitled “Electric Rates Too High? Can a Home Solar Power System Help?” stating, “The sun shines down on us providing free energy for the taking. Changing this **radiant power** to usable electric power is what a solar power system does.”<sup>9</sup>

From the denial of the request for reconsideration:

- An article from Sunday News (Lancaster, Pennsylvania) stating, “so Jay built the first solar-powered station in the country’s Radio Lumiere network. The station operated on 50 watts of **radiant power** and served four major towns ... .”
- US Patent Application No. 12/616683 for “Techniques for analyzing performance of solar panels and solar cells using infrared diagnostics” stating, “The operating solar panel or cell is cooler by several degrees relative to a non-working cell which must dissipate all if [sic] its absorbed **radiant power** as heat.”<sup>10</sup>
- US Patent Application No. 07/234708 for “Composite coverglass for solar cell,” from the “Background of the Invention,” stating, “Various semiconductor materials having differing bandgap energies may be employed to attain power conversion, from **radiant power** to electric power, over a band of the solar spectrum; the band may be increased by use of more of the materials.”<sup>11</sup>
- Webpages from the research and development corporation MTPV Corporation stating, “Thermophotovoltaic devices were conceived in

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<sup>8</sup> Drawn from the caption of a changing infographic produced by XPLANE, a business design consultancy, appearing with an article by Michael Moyer and Amanda Schupak published on October 31, 2008, in *Popular Science*, accessed at <http://www.popsci.com/environment/article/2008-10/american-power-0> by the Examining Attorney on October 11, 2013.

<sup>9</sup> This article, “Electric Rates Too High? Can a Home Solar Power System Help?” by Opher Ganel was originally published on February 6, 2008, in [http://www.associatedcontent.com/article/576489/electric\\_rates\\_too\\_high\\_can\\_a\\_home.html?cat=3](http://www.associatedcontent.com/article/576489/electric_rates_too_high_can_a_home.html?cat=3). It was reprinted in <http://voices.yahoo.com/electric-rates-too-high-home-solar-power-system-865153.html>, as accessed by the Examining Attorney on October 11, 2013.

<sup>10</sup> Issued as U.S. Patent No. 8,373,758 on February 12, 2013.

<sup>11</sup> Issued as U.S. Patent No. 4,909,856 on March 20, 1990.

the early 1960's and consist of a heated black-body which radiates electromagnetic energy across a gap onto a photovoltaic device which converts the **radiant power** into electrical power.”<sup>12</sup>

Applicant maintains that thought, imagination or perception is required to arrive at the meaning of the mark determined by the Examining Attorney. Specifically, Applicant cites to the Examining Attorney's evidence regarding the technical process of converting “radiant power” from the sun into electrical power, which is what Applicant supplies. Applicant concludes:

Because this process requires multiple steps and technologies, there is no instantaneous connection between the applied-for services provided to consumers and, at best, the distantly suggestive phrase “Radiant Power.” ... That is, a consumer purchasing the Applicant's “retail electricity provider services” for everyday use in their homes will not have an immediate connection to any type of energy emitted by the sun—energy that could not be used by consumers like the electricity consumers are purchasing to power their refrigerators, televisions, and other products.

Brief at 10.

We are not persuaded by Applicant's argument. Consumers of Applicant's services, who include members of the general public, would not likely go through the technical analysis proffered by Applicant, especially because “radiant power” is a defined and used term. The evidence reflects that “radiant power” connotes in relevant part “the power of radiated energy,” which informs consumers that an aspect of Applicant's services is that the electricity it provides is derived from radiant power, that is, power from rays of light coming from the sun. Uses of “radiant power” in the evidence of record, e.g., the webpage containing the article

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<sup>12</sup> <http://www.mtpv.com/technology.php?tab=2> as accessed by the Examining Attorney on May 5, 2014.

“Pros and Cons of Solar Energy” (*supra* at n4) stating “Solar energy is the radiant power produced by the Sun,” are consistent with this meaning and immediately associate Applicant’s proposed mark with a feature of the services.

As a second argument, Applicant offers that the proposed mark has a double entendre. According to Applicant, the word “radiant” has a number of meanings including “having or showing an attractive quality of happiness, love, health, etc.” With its request for reconsideration, Applicant introduced the following definition of “radiant” from *Webster’s Online Dictionary*, in support of the connotation it proposes:

- 1 a : radiating rays or reflecting beams of light
- b. : vividly bright and shining : GLOWING
- 2 : marked by or expressive of love, confidence, or happiness, a radiant smile.
- 3 a : emitted or transmitted by radiation
- b : emitting or relating to radiant heat

In addition, Applicant introduced a passage from the children’s book *Charlotte’s Web* with its request for reconsideration, and states, “the spider Charlotte used the word ‘Radiant’ in describing the positive attributes of her friend Wilber the pig.” (See excerpt from *Charlotte’s Web*, stating, “And when his audience grew bored, he would spring into the air and do a back flip with a half twist. At this the crowd would yell and cheer. ‘How’s that for a pig?’ Mr. Zuckerman would ask, well pleased with himself. ‘That pig is radiant.’”). Applicant argues:

With regard to electrical power, the company supplying that electrical power can likewise strive for its services and products to be described as radiant. Consumers clearly have positive feelings about using solar energy instead of other types of energy. As stated in Applicant’s



Exhibit D, “[s]olar energy is one of the most popular and least controversial green technologies in the eyes of consumers.” Moreover, extensive consumer polling of over one thousand respondents shows [favorable view of solar energy] ... The word “radiant” in the Mark is a play on words that evokes ... general feelings and connotations of happiness and well-being.

Brief at 12 – 13.

While imaginative, we are not persuaded by Applicant’s argument as it applies to the proposed mark for the identified services. First, there is no evidence in the record that purchasers would recognize the meaning offered by Applicant, especially because the Examining Attorney’s evidence demonstrates that “radiant power” is a term used in the solar energy field, and radiant power results in the generation of electricity. Applicant’s argument is therefore based on conjecture. Second, the asserted double entendre is based on the term “radiant” and not on the proposed mark, RADIANT POWER. In its brief, Applicant states “As demonstrated in Applicant’s evidence, ‘Radiant’ is an adjective that describes the word ‘Power.’ That is, the energy being supplied under the applied-for services is ‘radiant’ in the sense that the power supplied is the type towards which consumers have positive sentiments—namely, solar energy.” Applicant’s brief, p. 13. This argument is not well-taken, especially when the Examining Attorney demonstrated that the proposed mark, RADIANT POWER, is a defined and used term, and “solar power” is defined as “power obtained by harnessing the energy of the sun’s rays.”<sup>13</sup>

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<sup>13</sup> Accessed at [http://www.oxforddictionaries.com/definition/american\\_english/solar-power](http://www.oxforddictionaries.com/definition/american_english/solar-power). The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ

Applicant also submitted three third-party registrations for marks including the term “radiant,” which do not contain a disclaimer of “radiant.” These registrations list goods or services which are considerably different from Applicant’s services and hence have limited probative value on the question of the asserted mere descriptiveness of Applicant’s proposed mark. To the extent that the registrations were offered to suggest a definition of the term “radiant,” they similarly have limited probative value because RADIANT appears to be arbitrary with respect to the goods identified in the registrations, and the definition of “radiant” Applicant relies on, *i.e.*, “marked by or expressive of love, confidence, or happiness, a radiant smile,” is not applicable to “radiant” in these marks. See, *e.g.*, Registration No. 4497210 for RADIANT RAW FOODS and Design for “Raw fruit-based snack food” (RAW FOODS disclaimed). Further, Applicant submitted only three registrations, which are too few to establish the point Applicant desires to make.

Finally, Applicant argues that any doubt as to the descriptiveness of the mark must be resolved in favor of Applicant, citing *In re Shutts*, 217 USPQ 363, 365 (TTAB 1983) (finding SNO-RAKE to be suggestive for “a snow removal hand tool). We have no doubts as to the descriptiveness of RADIANT POWER as used in connection with Applicant’s services.

In conclusion, the Examining Attorney’s evidence of record supports a determination that Applicant’s proposed mark, RADIANT POWER, when considered in relation to the aforementioned services, immediately informs

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505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

prospective purchasers as to a quality, feature or characteristic of Applicant's services, namely, that the electricity Applicant provides to its customers derives from the radiant power generated by the sun. Thus, the Office has met its burden of demonstrating that Applicant's proposed mark RADIANT POWER, when used in connection with the identified services, is merely descriptive.

***RADIANT***

In discussing the refusal, the Examining Attorney stated:

All of the dictionary definitions, articles, third-party company web site pages, news articles, and patents [in the record] demonstrate that the term "RADIANT" would draw an immediate and direct connection to solar power in the mind of a prospective consumer, [as] the source of the electricity applicant offers through its electricity retail and generation services.

Brief at unnumbered p. 6. The Examining Attorney clarifies his position at unnumbered p. 12 of his brief, stating, that "the term 'radiant' does refer to 'solar'" and that "the Applicant does supply radiant energy and radiant electrical power."


Applicant offers many of the same arguments made in the RADIANT POWER application, including its contention that RADIANT does not immediately call to mind a feature of Applicant's services, that there are other non-descriptive meanings for Applicant's mark as applied to the services, and that there is a double entendre with a non-descriptive meaning. As noted earlier in this decision in connection with Applicant's immediacy argument, Applicant's consumers would not likely go through the technical analysis proffered by Applicant when considering the nature of the services, especially since "radiant power" is a defined and used term. In addition, we are not persuaded by Applicant's double entendre argument as

applied to RADIANT alone because there is no persuasive evidence that Applicant's consumers would recognize the asserted double entendre, and "having or showing an attractive quality of happiness, love, health, etc." is not a definition that would likely be applied to electrical power or services relating thereto, even if its source is solar power. With regard to Applicant's argument in its reply brief at p. 8 that Applicant's mark is not merely descriptive because it has at least one non-descriptive meaning, Applicant has not persuaded us that there is a non-descriptive meaning that is relevant to the services at issue in this case. Further, as discussed, *supra*, the determination of descriptiveness must be determined in the context of the goods or services. "That a term may have other meanings in different contexts in not controlling." *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007).

We note too that "radiant" is an adjective which appears in the term "radiant power." Inasmuch as the Examining Attorney's evidence establishes that "radiant power" is merely descriptive of a feature of Applicant's International Class 35 services, "radiant," as an adjective describing a type of "power," is also merely descriptive of services that provide such power. The same holds true for Applicant's "generation of electricity from solar energy" services in International Class 40. See webpage from Tribal Energy and Environmental Information Clearinghouse ("Solar energy is the radiant (light and heat) energy produced by the sun.").<sup>14</sup> A mark that consists of a term that is descriptive for a product is considered merely descriptive

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<sup>14</sup> <http://teeic.indianaffairs.gov/er/solar/restech/uses/index.htm>, as accessed by the Examining Attorney on October 11, 2013.

of the services providing such product. *See In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 57 USPQ2d 1807 (Fed. Cir. 2001) (proposed mark “1-888-M-A-T-R-E-S-S” is merely descriptive of applicant’s telephone shop-at-home mattress retail services); *In re Pencils, Inc.*, 9 USPQ2d 1410 (TTAB 1988) (Term “pencils,” when applied to applicant’s retail stationery and office supply services, is merely descriptive and must be disclaimed apart from design mark  ). Because the term RADIANT describes the nature of the electricity that Applicant provides (that it is from the sun), the term is also merely descriptive of the services of generating such electricity.

In conclusion, the Examining Attorney’s evidence of record supports a determination that Applicant’s proposed mark, RADIANT, when considered in relation to the aforementioned International Class 35 and 40 services, immediately informs prospective purchasers as to a quality, feature or characteristic of Applicant’s services. Thus, the Office has met its burden of demonstrating that Applicant’s proposed mark RADIANT POWER, when used in connection with the identified services, is merely descriptive.

**Decision:** The descriptiveness refusals under Section 2(e)(1) of the Trademark Act to register (i) Applicant’s proposed RADIANT POWER mark (as to International Class 35), and (ii) Applicant’s proposed RADIANT POWER mark (as to International Classes 35 and 40), are affirmed.