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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Society of Cardiovascular Patient Care

Serial No. 86156209

Sherry Flax of Saul Ewing LLP,
for Society of Cardiovascular Patient Care.

Marynelle W. Wilson, Trademark Examining Attorney, Law Office 113¹
Odette Bonnet, Managing Attorney.

Before Ritchie, Kuczma, and Goodman, Administrative Trademark Judges.

Opinion by Ritchie, Administrative Trademark Judge:

The Society of Cardiovascular Patient Care (“Applicant”) filed an application to register on the Principal Register the mark EARLY HEART ATTACK CARE, in standard character format, for services identified as “promoting collaboration within the scientific, research and provider

¹ The case was reassigned to Trademark Examining Attorney Wilson after the appeal was filed and the case was ready for briefing.

communities to achieve advances in the field of recognition, evaluation, and treatment of early heart attack symptoms; promoting public awareness of recognition, evaluation, and treatment of early heart attack symptoms; promoting public interest and awareness of recognition, evaluation, and treatment of early heart attack symptoms,” in International Class 35.²

The Trademark Examining Attorney refused registration on ground that the applied-for mark is merely descriptive of the services pursuant to Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1). While disputing the refusal of mere descriptiveness, Applicant claims acquired distinctiveness in the alternative. The Examining Attorney has made final the Section 2(e)(1) refusal, and found that Applicant’s evidence is insufficient to establish acquired distinctiveness under Section 2(f), 15 U.S.C. § 1052(f). When the refusal was made final, Applicant filed this appeal, which is fully briefed.

Evidentiary Issues

The Examining Attorney objected to evidence submitted by Applicant for the first time with its appeal brief. Specifically, the Examining Attorney objects to Exhibit A, which is a cancelled registration owned by Applicant’s predecessor and on which Applicant relies for its assertion of acquired distinctiveness, and Exhibit D, which consists of copies of third-party registrations containing the term “CARE.”

² Serial No. 86156209, filed on January 2, 2014, under Trademark Act Section 1(a), 15 U.S.C. §1051(a), with dates of first use and first use in commerce on December 3, 1991.

The record in an application should be complete prior to the filing of an appeal. Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d). Accordingly, it was not appropriate for Applicant to submit new evidence for the first time with its appeal brief. Exhibit A was not, however, new evidence. The registration was submitted by the Examining Attorney as page two of the July 16, 2014 Office Action. Accordingly, we consider it in our analysis as discussed below. The third-party registrations, however, were not submitted during prosecution, and we do not consider them in our analysis.

Mere Descriptiveness

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. *See, In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012), *citing In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987); *see also In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). Whether a term is merely descriptive is determined not in the abstract, but in relation to the goods or services for which registration is sought, the context in which it is being used on or in connection with those goods or services, and the possible significance that the term would have to the average purchaser of the goods or services because of the manner of its use. That a term may have other meanings in different contexts is not controlling. *In re Bright-Crest, Ltd.*, 204

USPQ 591, 593 (TTAB 1979). Moreover, it is settled 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 In re Patent & Trademark Services Inc.*, 49 USPQ2d 1537 (TTAB 1998); *In re Home Builders Association of Greenville*, 18 USPQ2d 1313 (TTAB 1990); and *In re American Greetings Corporation*, 226 USPQ 365 (TTAB 1985). On the other hand, if a mark requires imagination, thought, and perception to arrive at the qualities or characteristics of the goods or services, then the mark is suggestive. *In re MBNA America Bank N.A.*, 340 F.3d 1328, 67 USPQ2d 1778, 1780 (Fed. Cir. 2003).

A composite of descriptive terms is registrable only if it has a separate, non-descriptive meaning. *In re Colonial Stores, Inc.*, 394 F.2d 549, 157 USPQ 382 (CCPA 1968) (holding SUGAR & SPICE not merely descriptive of bakery products). The Examining Attorney argues that the applied-for mark “EARLY HEART ATTACK CARE” describes a feature or purpose of Applicant’s services which includes “promoting public awareness of recognition, evaluation, and treatment of early heart attack symptoms.” Accordingly, we look to the plain meaning of the words, and then, more importantly, the meaning of their combination.

The Examining Attorney submitted definitions of the terms of the applied-for mark, in relevant part as follows:

Early: 1. Of or occurring near the beginning of a given series, period of time, or course of events.
Dictionary.com

Heart Attack: A heart attack usually occurs when a blood clot blocks the flow of blood through a coronary artery – a blood vessel that feeds blood to a part of the heart muscle. . . myocardial infarction.
Mayo Clinic: Diseases and Conditions: Definition; mayoclinic.org

Care: 2. Watchful oversight; charge or supervision; 3. Attentive assistance or treatment to those in need: a hospital that provides emergency care. *The American Heritage Dictionary; ahdictionary.com*

By their plain meaning, we find the terms individually, and as a composite, to be descriptive of Applicant’s applied-for services. The Examining Attorney also submitted evidence of third-party use of the term “EARLY HEART ATTACK CARE” to refer to promotional activities related to the promotion of recognition and treatment of early heart attack symptoms.

Examples include the following:

Cabell Huntington to offer heart screenings: Information and screenings available will include: Blood pressure screenings, blood sugar screenings, heart attack risk, early heart attack care, stroke risk assessment, senior health programs and information. *The Herald Dispatch*; February 14, 2014. Attached to April 6, 2014 Office Action.

Early heart attack care: “These early symptoms may be mild or fleeting,” Karenko said, “It can be easy to dismiss the symptoms; however, contacting a doctor right away can be the first step in receiving appropriate early heart attack care that includes measures that treat underlying conditions, and can be

administered before the heart is damaged by a heart attack. *Grand Rapids Press*; October 13, 2013.

Free health screening for veterans: There will be balance, strength and blood pressure testing. Informational literature will be provided on nutrition, Mercy Home Health, stroke signs and symptoms, early heart attack care, congestive heart failure, chest pain and cancer care. *Northeast Times*; November 5, 2014. Attached to January 26, 2015 Final Office Action.

EMS director: SRMC best choice for heart-attack victim: To the Editor, I am writing to inform people about the importance of early heart attack care and getting to a hospital that can provide the best treatment strategy based on the American Heart Association recommendations. *The Robesonian*; September 16, 2014. Attached to January 26, 2015 Final Office Action.

Lunch and learn focuses on heart attacks: Presenters will be Dr. Robert Harrison, with Northern Carolina Cardiology, and Kellie Norris, RN, MPMC chest pain coordinator. They will also discuss early heart attack care. *Daily Dispatch*; August 6, 2014. Attached to January 26, 2015 Final Office Action

State News Service: "There are risk factors for heart disease no one can control, such as advanced age and genes," he says. "It's important to know the signs of a heart attack and to seek early heart attack care when symptoms occur, to minimize heart muscle loss." To learn more about heart health and chest-compression-only CPR, visit the Sarver Heart Center website. *State News Service*. June 17, 2014. Attached to January 26, 2015 Final Office Action.

To rebut this evidence, Applicant submitted a declaration from its Chief Executive Officer, Wil Mick, asserting that Applicant is the source of the mark. Mr. Mick states that Applicant operates EARLY HEART ATTACK CARE as "a program" which is used by more than 1100 healthcare facilities throughout the United States. Mr. Mick noted that Applicant provides these facilities with "staff and patient education and awareness" in connection with

the program. Applicant included a list of accredited facilities as Exhibit A to the declaration.

Applicant argues repeatedly, including in its brief, that consistent with the Mick declaration and attached exhibit, “each and every example relied upon by the Examining Attorney in support of her refusal is in fact a reference to Applicant’s mark.” 7 TTABVUE 9. We note, however, that the references included above do not mention Applicant or any of its accredited facilities. Furthermore, all of the dozens of media references included by the Examining Attorney mention the term in a descriptive manner, in lower case, indicating that public perception of the term “EARLY HEART ATTACK CARE” in reference to promoting public awareness of recognition and treatment of early heart attack symptoms is merely descriptive.

Based on the plain meaning of the term as a whole as well as the third-party evidence, and taking into account the declaration and other rebuttal evidence submitted by Applicant, we find that Applicant’s composite term “EARLY HEART ATTACK CARE,” when viewed in relation to Applicant’s promotional services, immediately conveys that Applicant provides public awareness and other collaborative services regarding the recognition and treatment of early heart attack symptoms. While doubt is resolved for Applicant, we have no doubt that both those in “the scientific, research and provider communities” and those in the “public” as identified by Applicant would understand, without thought or imagination, that “EARLY HEART

ATTACK CARE” refers to Applicant’s collaboration and promotional services. *See In re Tower Tech Inc.*, 64 USPQ2d at 1316-17; *see also In re Conductive Services, Inc.*, 220 USPQ 84, 86 (TTAB 1983). Therefore, we find that the mark is merely descriptive of the identified services, and we affirm the refusal to register.

Acquired Distinctiveness

Having found the applied-for mark to be merely descriptive, we consider Applicant’s alternative claim of acquired distinctiveness. The burden is on Applicant to prove acquired distinctiveness. *See Yamaha International v. Hoshino Gakki*, 840 F.2d 1572, 6 USPQ2d 1001, 1006 (Fed. Cir. 1988). To prove that its mark has acquired distinctiveness under Section 2(f) of the Trademark Act, an applicant may submit any “appropriate evidence tending to show the mark distinguishes [defendant’s] goods,” which evidence the examining attorney would have the burden of disproving. *Yamaha International v. Hoshino Gakki*, 6 USPQ2d at 1010, *quoting* Trademark Rule 2.41(a), 37 C.F.R. § 2.41(a). Such evidence includes the duration, extent and nature of the use of the mark in commerce, advertising expenditures, letters or statements from the trade or public, and other appropriate evidence. Trademark Rule 2.41(a), 37 C.F.R. § 2.41(a). *See also In re Steelbuilding.com*, 415 F.3d 1293, 75 USPQ2d 1420, 1424 (Fed. Cir. 2005) (acquired distinctiveness may be shown by copying, unsolicited media coverage and consumer surveys).

Our precedent dictates that “[t]he amount and character of the evidence, if any, required to establish that a given word or phrase ... ‘has become distinctive’ of the goods necessarily depends on the facts of each case and the nature of the alleged mark.” *Roux Laboratories, Inc. v. Clairol Inc.*, 427 F.2d 823, 166 USPQ 34, 39 (CCPA 1970). *See also In re Steelbuilding.com*, 75 USPQ2d at 1424 (“no single factor is determinative ... the determination examines all of the circumstances involving the use of the mark”). With respect to the nature of the alleged mark, “the applicant’s burden of showing acquired distinctiveness increases with the level of descriptiveness; a more descriptive term requires more evidence of secondary meaning.” *In re Steelbuilding.com*, 75 USPQ2d at 1424. In this case, due to the plain meaning of the terms, the reference thereto in Applicant’s own identification of services, and the large number of third-party descriptive uses, we find the applied-for mark to be highly descriptive. Thus Applicant has a heavier burden in showing acquired distinctiveness.

As noted above, Applicant submitted the declaration of its Chief Executive Officer, Wil Mick. Mr. Mick states that Applicant has operated EARLY HEART ATTACK CARE as “a program” continuously since 1991. He noted that participation in the program by member hospitals “provides staff and patient education and awareness of the importance of recognizing symptoms of heart disease.” He further stated that “[a]t this time, there are approximately 1,100 accredited hospitals in which we require EARLY

HEART ATTACK CARE training for employees and their respective communities.” The list is included as exhibit A to the Mick declaration.

Without providing any specific numbers or industry context, Mr. Mick stated that “Large sums of money have been expended since the early 1990’s to advertise and promote the EARLY HEART ATTACK CARE services.” He also stated that promotional materials are “widely available on the Internet” and are mailed directly to approximately 1,500 attendees of Applicant’s annual “Congress.” Notably, Mr. Mick declared that “The EARLY HEART ATTACK CARE mark is not used by any other entity or organization in connection with providing services” and that the mark is “widely recognized by the relevant consumers as associated with SCPC’s services.”

Applicant submitted examples of uses of its applied-for mark by third parties. While several of these capitalize the term Early Heart Attack Care, and appear to recognize it as a program, only a few appear to credit the program as being from a particular source:

Early Heart Attach [sic] Care Oath:
Join the Society of Cardiovascular Patient Care in the battle to
defeat heart disease as the number one cause of death
worldwide by taking the EHAC Oath.
<https://ufhealth.org>;
Attached to January 8, 2015 Response to Office Action, p30

Emory Woodruff Health Sciences Center: According to the
Society of Chest Pain Centers (SCPC), about 50% of sudden
cardiac deaths happen outside of a hospital, which indicates
health attack victims either are not acting on symptoms or lack
awareness of what they are. The SCPC has launched the Early
Heart Attack Care (EHAC) campaign to raise awareness that

heart attacks have beginnings and these “beginning symptoms” occur in more than 50 percent of heart attack patients.
advancingyourhealth.org;
Attached to January 8, 2015 Response to Office Action, p.45.

Early Heart Attack Care with UnityPoint Cedar Rapids: Take the EHAC oath and commit to taking action; Learn more online at the Society of Cardiovascular Patient Care.
unitypoint.org;
Attached to January 8, 2015 Response to Office Action, p.49.

Northwest Hospital: EARLY HEART ATTACK CARE (EHAC): Because the majority of heart damage occurs within the first two hours of a heart attack, seeking early treatment is vital. If you believe your or someone you are with is having a heart attack, call 911. *Information adapted from the Society of Cardiovascular Patient Care and used with Permission.*
lifebridgehealth.org;
Attached to July 1, 2015 Request for Reconsideration, p.12.

Applicant further relies on the cancelled registration of its predecessor, Registration No. 2092920 for E.H.A.C. EARLY HEART ATTACK CARE EARLY RECOGNITION AND RESPONSE CHEST PAIN CENTER, and design. We note that the cancelled registration disclaims the exact term that Applicant seeks to register here, “EARLY HEART ATTACK CARE.” As the Examining Attorney pointed out in the July 16, 2014 Office Action, a claim of acquired distinctiveness cannot be based solely on wording disclaimed in a prior registration. *Kellogg Co. v. Gen. Mills, Inc.* 82 USPQ2d 1766, 1771, n.5 (TTAB 2007); *see also In re La. Fish Fry Prods. Ltd.*, 797 USPQ2d 1332, 116, USPQ2d 1262 (Fed. Cir. 2015). We further do not find a cancelled registration to be very availing. *See In re BankAmerica Corp.* 229 USPQ 852, 853 (TTAB 1986); *Unitec Indus, Inc. v. Cumberland Corp.*, 176 USPQ 62

(TTAB 1972) (“an expired or cancelled registration is not evidence of use either as of the date of registration or the application or as of the date of first use alleged therein.”).

Finally, Applicant submitted a Wikipedia entry for the Society of Chest Pain Centers, which states that the Society of Cardiovascular Patient Care was previously the Society of Chest Pain Centers. The article discusses the Early Heart Attack Care program:

Early Heart Attack Care and Community Education: In addition to accreditation and process improvement for hospitals, the Society of Chest Pain Centers utilizes outreach communication to inform the medical community and the community at large about Early Heart Attack Care (EHAC). Developed in 1985, this education is shared worldwide to help people recognize the early signs in order to prevent a heart attack from occurring in themselves or others.

Attached to July 1, 2015 Request for Reconsideration, p.19

The article further discusses the education involved in the accreditation program.

Based on the uncontradicted evidence, we find that Applicant created an “Early Heart Attack Care” program, and that it has and continues to accredit hundreds of institutions with related educational information. However, Applicant has not carried its burden of showing that the term has acquired distinctiveness as a source-identifying mark. The record does not indicate that most institutions, or their patients, associate the “EARLY HEART ATTACK CARE” (EHAC) promotional services, for which Applicant seeks registration, as being a mark for such services, rather than being the term for

a medical protocol, akin to Cardiopulmonary Resuscitation (CPR). Indeed, the large number of third-party descriptive uses in the record indicate that use by Applicant is not substantially exclusive. See *In re Franklin County Historical Society*, 104 USPQ2d 1085, 1093 (TTAB 2012); *Nextel Communications Inc. v. Motorola Inc.*, 91 USPQ2d 1393, 1408 (TTAB 2009).

Accordingly, considering the highly descriptive nature of the applied-for mark, and that Applicant's use is not substantially exclusive, we find that despite evidence of its creation and development of a promotional program by that name, Applicant has not established acquired distinctiveness of the term EARLY HEART ATTACK CARE for "promoting collaboration within the scientific, research and provider communities to achieve advances in the field of recognition, evaluation, and treatment of early heart attack symptoms; promoting public awareness of recognition, evaluation, and treatment of early heart attack symptoms; promoting public interest and awareness of recognition, evaluation, and treatment of early heart attack symptoms."

Decision: The Board affirms the refusal to register.