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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	86337802
Applicant	Hologic, Inc.
Applied for Mark	3D MAMMOGRAPHY
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Date	09/22/2016

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant: Hologic, Inc.)
)
)
Consolidated Trademarks:) Examining Attorney:
HOLOGIC 3D MAMMOGRAPHY)
86337786 Filed: July 15, 2014) Jeffrey J. Look
)
3D MAMMOGRAPHY)
86337802 Filed: July 15, 2014)
)
GENIUS 3D MAMMOGRAPHY)
86354289 Filed: July 31, 2014)
)

Attention: Mary Boney Denison,
Commissioner for Trademarks

NOTICE OF APPEAL

Applicant, Hologic, Inc., hereby appeals to the United States Court of Appeals for the Federal Circuit from the Opinion and Order of the Trademark Trial and Appeal Board dated July 22, 2016, denying Applicant’s registrations on the Principal Register of the marks HOLOGIC 3D MAMMOGRAPHY, 3D MAMMOGRAPHY, and GENIUS 3D MAMMOGRAPHY for goods identified in Class 10 as “*mammography imaging system.*” (Exhibit “A”)

Respectfully submitted,

Date: September 22, 2016

/s/ Lawrence R. Robins
Lawrence R. Robins
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CERTIFICATE OF SERVICE

I, Lawrence R. Robins, an attorney with the law firm of Sullivan & Worcester LLP, hereby affirm that the following documents were served approximately contemporaneously on the Clerk of Court for the United States Court of Appeals for the Federal Circuit:

- 1) A cover letter dated September 22, 2016;
- 2) Applicant's Notice of Appeal; and
- 3) The requisite filing fee as required under Federal Circuit Rules 15(a)(1) and 52 and Trademark Rule 2.145(a)(2).

/s/ Lawrence R. Robins _____

Lawrence R. Robins

Date: September 22, 2016

EXHIBIT A

This Opinion is Not a
Precedent of the TTAB

Hearing: June 23, 2016

Mailed: July 22, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

—
Trademark Trial and Appeal Board
—

In re Hologic, Inc.
—

Consolidated:
Application Serial Nos. 86337786, 86337802, and 86354289
—

Lawrence R. Robbins of Sullivan & Worcester LLP for Hologic, Inc.

Jeffrey J. Look, Trademark Examining Attorney, Law Office 108,
Andrew Lawrence, Managing Attorney.
—

Before Mermelstein, Wellington, and Masiello, Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Hologic, Inc. (“Applicant”) seeks Principal Register registrations for the marks **HOLOGIC 3D MAMMOGRAPHY**, **3D MAMMOGRAPHY** and **GENIUS 3D MAMMOGRAPHY**.¹ All marks appear in standard characters and are for goods identified as a “mammography imaging system” in International Class 10.

¹ Respectively, Application Serial Nos. 86337786 and 86337802 (both filed on July 15, 2014), and 86354289 (filed on July 31, 2014). All three applications were filed under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on an allegation of a *bona fide* intention to use the mark in commerce. The same Examining Attorney was responsible for all three applications.

The Examining Attorney has taken the position that 3D MAMMOGRAPHY is merely descriptive of Applicant's goods. Accordingly, he has refused registration of Applicant's proposed mark 3D MAMMOGRAPHY (Application '802) on the ground that the entire mark is merely descriptive under Section 2(e)(1) of the Trademark Act ("the Act"), 15 U.S.C. § 1052(e)(1); and the other two marks (Applications '786 and '289) were refused registration in the absence of a disclaimer of the term 3D MAMMOGRAPHY, under Section 6(a) of the Act, 15 U.S.C. § 1056(a).

After the refusals became final, Applicant filed requests for reconsideration with respect to each application, which were all denied by the Examining Attorney. Applicant then appealed. The appeals have been briefed and are consolidated.² An oral hearing was held on June 23, 2016.

The Record

The Examining Attorney submitted the following materials during the prosecution of each application to support of his contention that 3D MAMMOGRAPHY is merely descriptive of the identified goods:

- Definition for the term "mammography" meaning "1. Radiological examination of the breasts to detect tumor. 2. The procedure performed to produce a mammogram."³

² On November 5, 2015, Applicant filed an appeal brief in each proceeding. On December 11, 2015, the Examining Attorney requested consolidation of the appeals. 6 TTABVUE. In an order dated December 16, 2015, the Board consolidated the appeals. 7 TTABVUE. The Examining Attorney then filed a single brief addressing the three appeals, and Applicant subsequently filed a reply brief doing the same. 8 and 9 TTABVUE, respectively. At oral hearing Applicant and the Examining Attorney agreed that the record in each of the applications is substantially identical. Unless specified otherwise, all citations in this decision are made to Applicant's brief and the record as filed in the '786 appeal.

³ Attached to Office Action issued on October 30, 2014. The provided definition was obtained from the online version of *The American Heritage Dictionary of the English Language*, Fifth Edition (2014) (www.ahdictionary.com). Additional definitions for "mammography" and "3-

- Printouts from a MedlinePlus website (www.nlm.nih.gov) describing the meaning of “Mammography.”⁴
- Dictionary.com website (www.dictionary.reference.com) definition entry for the abbreviation “3-D” meaning “three dimensional.”⁵
- Printouts from various websites,⁶ including articles from news sites such as Fox News and USA Today, containing discussions of “3D mammograms” or “3D mammography.” The following is an excerpted sampling:

“3D Mammograms May Improve Breast Cancer Screening ... Higher detection rates, fewer false alarms seen with newer technology, study says. ... Newer, three-dimensional mammograms may be better at picking up invasive tumors and avoiding false alarms than traditional breast cancer screening methods, a study of 13 U.S. hospitals suggests.”
[from website WebMD, www.webmd.com]⁷

A New Type of Digital Test: 3D Mammography ...

3D mammograms are currently offered in 48 states and over 50 countries. They were originally approved by the FDA only as an add-on to standard film or digital (2D) mammography, but in 2013 the FDA decided that a low-dose 3D digital mammography was accurate enough to be used by itself. 3D mammography provides images of the breast in “slices” from many different angles, whereas 2D mammograms (whether digital or film) make images of the breast from only two angles: from the front and side. In 2D mammograms, the breast is compressed between two plates, which may create images with overlapping tissue. As a result, finding abnormalities may be easier with 3D

D” were obtained from the online Merriam Webster and Collins American English dictionaries and www.medical-dictionary.com, and submitted with the Office Action issued on May 20, 2015.

⁴ Office Action issued on October 30, 2014 at pp. 7-10.

⁵ *Id.* at p. 11. The provided definition is based on the *The American Heritage Abbreviations Dictionary*, Third Edition (2014).

⁶ *Id.* at pp. 15-51.

⁷ *Id.* at p. 15-21.

tests. Also, 2D digital images can be obtained from the 3D mammogram data without the need for a separate test. [from Stop Cancer Fund website, www.stopcancerfund.org]⁸

3D mammograms can better detect invasive cancers, reduce call-back rates ... In a new retrospective study published in the Journal of the American Medical Association (JAMA), researchers revealed that an enhanced version of the procedure known as 3d mammography ... also known as tomosynthesis ... greatly reduced call-backs for women to undergo secondary imaging. [from Fox News website, www.foxnews.com]⁹

New 3-D mammograms have benefits, risks

Q. What is a 3-D mammogram?

A. The technology, called tomosynthesis, provides three-dimensional images of the breast by using a technology similar to CT scans, or computed tomography, says Carol Lee, a radiologist at New York's Memorial Sloan-Kettering Cancer Center and chair of the American College of Radiology's breast imaging commission. The imaging machine moves around the breast in an arc, taking multiple X-rays that a computer forms into a 3-D image. The Food and Drug Administration approved tomosynthesis last year and it's now used in 46 states, according to Hologic, which manufactures the machines.

[from USA Today website, www.usatoday.com]¹⁰

- Printouts of sixty-four articles, obtained from the Lexis/Nexis database, discussing "3D mammography." The following is an excerpted sampling:

The St. Thomas' Players production of "Calendar Girls" is set for later this month at Lee Street Theater, 329 N. Lee St. Because life imitates art -- or is it the other way around? -- female cast members have produced a 2016 calendar to raise money for a **3D mammography** machine at Novant Health Rowan Medical Center. The hospital is sponsoring

⁸ *Id.* at p. 23.

⁹ *Id.* at p. 26-27.

¹⁰ *Id.* at p. 43.

the calendar, and Yatawara Gynecology, Health and Aesthetics is the show's sponsor.

[from Salisbury Post (North Carolina), September 6, 2015]¹¹

Early detection and screenings have made a huge impact in the fight against cancer, and technology such as **3D mammography** ... is the right step that we need to take for our cancer center, for our community [and] for our region in helping to treat and fight breast cancer.

[from The Morning Sun (Pittsburg, Kansas), August 30, 2015]¹²

New 3D-guided breast biopsy technology benefits patients at Derry Imaging Center ... Tomosynthesis, or **3D mammography**, is able to unmask cancers that may be hiding in dense tissue by showing a three-dimensional, layer-by-layer picture of the breast. Since the details are more visible, and not hidden by overlapping tissue as in a flat, 2D mammogram, invasive breast cancers can be detected using tomosynthesis with greater accuracy and with 40 percent fewer false positives and 15 percent fewer callbacks.

[from New Hampshire Sunday News, August 23, 2015]¹³

Grant helps Mount Sinai Aventura purchase new 3D mammography system ... The tomosynthesis **3D mammography** system, which will be installed in the Women's Center this fall, is an advanced screening and diagnostic tool that aids with the detection of breast cancer. When screening, the machine rotates at an arc around the breast, taking multiple X-ray pictures at different angles.

[from The Miami Herald, February 18, 2015]¹⁴

In support of its position that 3D MAMMOGRAPHY is not merely descriptive of a mammography imaging system, Applicant has submitted the following:

¹¹ Attached to Office Action issued on October 30, 2014, at p. 6.

¹² *Id.* at p. 7.

¹³ *Id.* at p. 10.

¹⁴ *Id.* at p. 46.

- A declaration, with exhibits, of James D. Culley, Ph.D., (“Dr. Culley”), Applicant’s Senior Director of Corporate Communications.¹⁵
- Printout from USPTO TESS database for Application Serial No. 85851180 for the mark SENOCCLAIRE.
- Copies of registrations for marks including the terms “MAMMO-” or “IMAGE-” that were purportedly not found to be descriptive and covering imaging- or mammography-related goods.
- Copies of registrations for marks containing the term MAMMOGRAM(S) to show that “the USPTO granted allowance or registration to ... [the marks], without a disclaimer requirement.”¹⁶
- Copy of an article “Very High Contrast and Very High Spatial Resolution 2-D, 2.5-D and 3-D Breast Tissue Visualization under X-ray Dark Field Imaging”¹⁷

Applicable Law

A mark is deemed to be merely descriptive, within the meaning of Section 2(e)(1), if it immediately conveys knowledge of a quality, feature, function, characteristic or purpose of the goods for which it is used. *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007) (citing *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987)); *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). A mark need not immediately convey an idea of each and every specific feature of the goods in order to be considered merely descriptive; rather, it is sufficient that the mark describes one significant attribute, function or property of the goods or services. *In re Chamber of Commerce of the United States of America*, 675 F.3d 1297,

¹⁵ Attached to Applicant’s response filed on April 16, 2015, beginning at p. 15.

¹⁶ *Id.*, quotation at p. 12, registrations at pp. 42-58.

¹⁷ Attached to Applicant’s response filed on August 13, 2015.

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102 USPQ2d 1217, 1219 (Fed. Cir. 2012); *In re H.U.D.D.L.E.*, 216 USPQ 358, 359 (TTAB 1982); *In re MBAssociates*, 180 USPQ 338 (TTAB 1973). Whether a mark is merely descriptive is determined not in the abstract, but in relation to the goods for which registration is sought and the context in which it is being used on or in connection with the goods. *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979).

When two or more merely descriptive terms are combined, the determination of whether the composite mark also has a merely descriptive significance turns on whether the combination of terms evokes a new, non-descriptive commercial impression. If each component retains its merely descriptive significance in relation to the goods, the combination results in a composite that is itself merely descriptive. *See e.g., In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370 (Fed. Cir. 2004) (PATENTS.COM merely descriptive of computer software for managing a database of records that could include patents, and for tracking the status of the records by means of the Internet); *In re Petroglyph Games, Inc.*, 91 USPQ2d 1332 (TTAB 2009) (BATTLECAM merely descriptive for computer game software); *In re Carlson*, 91 USPQ2d 1198 (TTAB 2009) (URBANHOUSING merely descriptive of real estate brokerage, real estate consultation and real estate listing services); *In re Tower Tech*, 64 USPQ2d 1314 (TTAB 2002) (SMARTTOWER merely descriptive of commercial and industrial cooling towers); *In re Sun Microsystems Inc.*, 59 USPQ2d 1084 (TTAB 2001) (AGENTBEANS merely descriptive of computer programs for use in developing and deploying application programs); *In re Putman Publishing Co.*, 39

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USPQ2d 2021 (TTAB 1996) (FOOD & BEVERAGE ONLINE merely descriptive of news and information services in the food processing industry).

Under Section 6(a) of the Act, “[t]he Director may require the applicant to disclaim an unregistrable component of a mark otherwise registrable,” such as a component that is merely descriptive under Section 2(e)(1). Failure to comply with a disclaimer requirement is a basis for refusing registration. *See In re Slokevage*, 441 F.3d 957, 78 USPQ2d 1395, 1399-1400 (Fed. Cir. 2006); *In re Stereotaxis, Inc.*, 429 F.3d 1039, 77 USPQ2d 1087, 1089 (Fed. Cir. 2005).

Analysis

We begin our analysis by determining the relevant consumers of Applicant’s mammography imaging systems. In this regard, the Examining Attorney asserts that the relevant public comprises not only the actual purchasers of mammography imaging systems, but also the doctors who use and prescribe tests using such systems and the patients to whom tests using these systems are recommended.¹⁸ The Examining Attorney points to the declaration of Applicant’s Senior Director of Corporate Communications, Dr. Culley, who averred that “[Applicant] wanted to make it easier for women to identify Hologic’s unique breast cancer screening exam. We coined the trademark so that women could ask for, and doctors could prescribe, the 3D MAMMOGRAPHY brand of breast tomosynthesis.”¹⁹ The Examining Attorney

¹⁸ 8 TTABVue 14.

¹⁹ *Id.*, citing to paragraph 9 of Culley declaration at p. 17 of Applicant’s response filed on April 16, 2015.

reasons that “it is proper to consider the general public to determine the meaning of the mark to these consumers.”²⁰

Applicant, on the other hand, argues that “the significance of Applicant’s mark to the general public at large is irrelevant.”²¹ Applicant states that it “intends to use its Mark in association with a sophisticated and expensive medical device that will never be sold outside of a highly sophisticated and specialized marketplace.”²² Applicant argues that the distinction in the relevant consumer base and their understanding is important because “radiologists and hospital/clinic personnel who purchase radiological equipment, have a very different understanding of the term” and will understand that “‘3D’ in the professional radiological context deals with imaging produced by CT and MRI technology ... [whereas] tomosynthesis, the generic name for Applicant’s technology, is a method for performing high-resolution limited-angle tomography at radiographic dose levels.”²³ In response to the Examining Attorney’s reliance on Dr. Culley’s statement regarding the impetus of Applicant’s decision to use the term 3D MAMMOGRAPHY, Applicant states that Dr. Culley was “simply provid[ing] a real-life example of the definition of a trademark.”²⁴

We agree with the Examining Attorney to the extent that the relevant consumer should at least include women because they will be the ones interested in obtaining

²⁰ *Id.*

²¹ 9 TTABVUE 6.

²² *Id.*

²³ *Id.* at 4.

²⁴ *Id.* at 7.

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mammograms. Moreover, Dr. Culley's declaration made clear Applicant's intention to market mammograms performed with Applicant's equipment to women in need of a mammogram. Applicant's attempt to characterize the sworn statement of its Senior Director of Corporate Communications as merely his "definition of a trademark" is difficult to believe and insufficient to disavow the declaration.

While it is clear that mammography imaging systems are very expensive and are likely to be purchased only by hospitals or medical services providers, we are not always restricted to taking the view that our determination of mere descriptiveness can be made based only on the purchasers and their understanding of the significance of 3D MAMMOGRAPHY. *Cf., Magic Wand Inc. v. RDB Inc.*, 940 F.2d 638, 19 USPQ2d 1551, 1553 (Fed. Cir. 1991) (for purposes of genericness in context of automobile washing services, relevant public includes automobile owners and operators as well as operators and manufacturers of car wash equipment); *In re Artic Electronics Co., Ltd.*, 220 USPQ 836 (TTAB 1983) (arcade customers, as the ultimate users but not the purchasers, are part of the relevant public for purposes of likelihood of confusion). One policy underlying Section 2(e)(1) is to allow use of merely descriptive terminology by third parties in the description of their competing goods. Such parties have an interest in describing their goods and making them known not only to the medical institutions that actually may purchase them but also to doctors and technicians who would use (but not purchase) the equipment and patients to whom tests on such equipment may be recommended. As the evidence clearly shows, mammography imaging is of interest to the general public and particularly to women interested in

undergoing breast cancer screening. Many of the website printouts and news articles discussing mammography imaging machines, including use of the term “3D Mammography,” are directed to potential recipients of mammography imaging services. For example, the WebMD website describes the purported benefits of “3D Mammograms” and the Cancer Prevention & Treatment Fund website offers a “Mammography Guide” in response to the question “Should I ‘upgrade’ to Digital or 3D?” It is reasonable to expect that the women viewing these websites and reading these articles will be influenced in their selection of the type of mammography imaging system they will like to receive. As articulated by Applicant’s own declarant, Dr. Culley, women have a choice and may request from their doctors a specific type of mammography imaging machine.

Having decided that the relevant consuming public includes patients and non-purchasing medical personnel as well as purchasers, the question now is whether the proposed mark 3D MAMMOGRAPHY will be understood as merely describing a ‘quality, feature, function, characteristic or purpose’ of Applicant’s mammography imaging systems. Here, there is ample evidence showing the wording 3D MAMMOGRAPHY will be understood as describing a feature or function of mammography imaging systems. The Examining Attorney has presented printouts from various websites as well as numerous news articles where the exact wording “3D mammography,” or the term 3D in the context of mammography, is used to describe a type of mammography imaging system that is an alternative to a more conventional two-dimensional (or “2D”) imaging system. The manner in which the

term 3D, itself, is used in nearly all of the websites and news articles leaves little doubt that consumers, whether doctors or patients, will perceive the term in the context of mammography as describing the ability to produce a three-dimensional or three-dimensional-like image of the breast. In the quoted excerpts, 3D MAMMOGRAPHY imaging equipment is described as performing “3D tests,” producing “a 3-D image” or “a three-dimensional, layer-by-layer picture,” and being “3D-guided breast biopsy technology.” The excerpts also directly contrast this new technology to conventional “2D mammograms.” The following are two more representative news article excerpts further illustrating the manner in which the term is used and will be understood:

The donation will pay for the purchase of a 3D Mammography Tomosynthesis system that is expected to be available by the end of the year. Tomosynthesis captures images of a breast at multiple angles during a short scan, instantly reconstructing them as 3D images. With 3D mammography, patients benefit from reduced callbacks for additional imaging; earlier detection of breast cancer, especially in younger women with dense breasts; and high-tech breast imaging close to home.

Dr. Mary Hestness, medical director of diagnostic services at St. Francis, said that the new mammography technology will increase the detection of early breast cancers and reduce the need for additional imaging. "This 3D technology provides a clearer picture of the breast, so radiologists can more accurately analyze the size, shape, and location of any suspicious areas. The technology finds more invasive cancers earlier when they are easiest to treat and reduces the frequency of additional imaging," she said.

[from Shakopee Valley News (Minnesota), July 22, 2015]²⁵; and

3-D mammography -- Digital breast tomosynthesis (tomo), also known as 3D mammography, is a revolutionary new screening and diagnostic breast imaging tool to improve the early detection of breast cancer. During the mammography exam, the technologist positions the patient to image the

²⁵ Attached to Office Action issued on October 30, 2014, at p. 20.

breast from different angles and compresses the breast with a paddle to obtain optimal image quality. During the 3D part of the exam, an x-ray arm sweeps over the breast, taking multiple images in seconds. Images are displayed as a series of thin slices that can be viewed by a radiologist as individual images or in a dynamic interactive animation. 3D mammography complements standard 2D mammography. No additional breast compression is required in the 3D portion of the exam, and it only takes a few more seconds.

Approved as an imaging modality by the FDA in early 2011, 3D mammography is used in combination with 2D digital mammography. 3D mammography is the latest advancement in breast health imaging.

[from News Transcript (Manalapan, New Jersey), June 18, 2015].²⁶

Applicant goes to great lengths in explaining that its tomosynthesis technology does not generate “[3D] three-dimensional images,” as that term would be understood by medical imaging professionals.²⁷ In its brief, Applicant asserts that the term 3D really applies only to two other types of medical imaging systems, namely, CT (computerized tomography) and MRI (magnetic resonance imaging). According to Applicant, CT’s and MRI’s “do not merely give the effect of ‘3D’ – [but] they are in fact three-dimensional as understood in the medical community.”²⁸ Applicant states that “the term ‘3d’ may be considered an accurate descriptor of CT and MRI technology,”²⁹ but that Applicant’s particular imaging system utilizes tomosynthesis technology and

²⁶ *Id.* at pp. 24-25.

²⁷ In support of its argument, Applicant cited to an article or paper that, according to Applicant, was published by the American College of Radiology. See 4 TTABVUE 7. However, a copy of the material was not submitted. Accordingly, there is no basis for any statements purportedly made in the document and the Board cannot take notice of such materials based merely on a citation thereto.

²⁸ 4 TTABVUE 7.

²⁹ *Id.*

this does not generate three-dimensional images as that term is understood by medical professionals.

Although medical professionals may be able to make a technical distinction of whether a tomosynthesis mammography imaging machine would produce a “three-dimensional” image or not is irrelevant given that the relevant public is not limited to medical professionals. Rather, the relevant public would include persons viewing health information websites and reading articles concerning mammography imaging machines and primarily women. As discussed above, there are various articles and websites that describe “3D mammography” as meaning an imaging system that has the ability to produce a three-dimensional image or an image giving the effect of having three dimensions. The record further rebuts Applicant’s argument that the wording 3D MAMMOGRAPHY is incongruous; to the contrary, the materials submitted by the Examining Attorney reflect the relative ease with which those terms are used together to describe a feature or purpose of the mammography imaging machines. A second flaw with Applicant’s attempt to distinguish its goods from CT and MRI machines is that Applicant’s identification of goods is “mammography imaging systems,” and this is broad enough to encompass MRI machines.³⁰ In other words, Applicant’s goods, as they are identified in the application, do not exclude the types of machines that Applicant admits have the capacity to produce “three-dimensional images.” Thus Applicant’s admission that 3D is descriptive of MRI

³⁰ According to the MedlinePlus website (www.nlm.nih.gov), a breast MRI exam (although “less commonly done”), is considered one possible test “needed to further examine mammogram findings.” Attached to Office Action dated October 30, 2014 at p. 8.

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technology is an admission that 3D is descriptive of goods within the scope of its identification of goods.

In sum, the record establishes that 3D MAMMOGRAPHY, when considered in relation to mammography imaging systems, immediately informs the relevant public that the machines have the ability to produce a three-dimensional or three-dimensional-like image. Although Applicant may be alone, or nearly so, in manufacturing these types of machines, competitors and others in this field should be free to use the descriptive language “3D MAMMOGRAPHY.” As noted in the seminal case of *In re Abcor*, 200 USPQ at 217:

The major reasons for not protecting such marks are: (1) to prevent the owner of a mark from inhibiting competition in the sale of particular goods; and (2) to maintain freedom of the public to use the language involved, thus avoiding the possibility of harassing infringement suits by the registrant against others who use the mark when advertising or describing their own products.

Applicant is also correct that, to the extent that there is any doubt whether the term 3D MAMMOGRAPHY is merely descriptive of involved goods and services, we should resolve the matter in favor of Applicant. However, in this case, the record supports our aforementioned findings and we have no doubt in this regard.

Decision: The refusal to register the mark in the ‘802 Application is affirmed.

The refusals to register the marks in the ‘786 and ‘289 Applications are affirmed. Our decision with respect to the ‘786 and ‘289 Applications will be set aside if, within thirty days of the mailing date of this order, Applicant submits to the Board a proper disclaimer of 3D MAMMOGRAPHY for each application file. Trademark Rule 2.142(g). The disclaimer should be worded as follows:

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“No claim is made to the exclusive right to use 3D MAMMOGRAPHY apart from the mark as shown.”