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PRECEDENT OF THE TTAB

Mailed: September 17, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re United States of America Supplements, LLC*

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Serial No. 87737243  
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Gene Bolmarcich of the Law Offices of Gene Bolmarcich,  
for United States of America Supplements, LLC.

Ira Goodsaid, Trademark Examining Attorney, Law Office 101,  
Ronald R. Sussman, Managing Attorney.

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Before Taylor, Shaw and Pologeorgis,  
Administrative Trademark Judges.

Opinion by Pologeorgis, Administrative Trademark Judge:

United States of America Supplements, LLC (“Applicant”) seeks registration on the Principal Register of the mark USA SUPPLEMENTS and design (USA SUPPLEMENTS disclaimed), as displayed below, for “dietary and nutritional supplements” in International Class 5.<sup>1</sup>

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<sup>1</sup> Application Serial No. 87737243, filed on December 28, 2017, based on an allegation of use in commerce under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), claiming August 15, 2016 as both the date of first use and the date of first use in commerce. The description of the mark reads as follows: “The mark consists of The letters ‘USA’ in large white block letters superimposed on a background of a solid red, slightly right-tilted, rectangular shape, all above the thin black word ‘SUPPLEMENTS’ in a thin font, superimposed on a white,



The Trademark Examining Attorney refused registration of Applicant's mark under Section 2(e)(2) of the Trademark Act, 15 U.S.C. § 1052(e)(2), on the ground that Applicant's mark, in its entirety, is primarily geographically descriptive of the identified goods. After the Examining Attorney made the refusal final, Applicant appealed to this Board. We affirm the refusal to register.

I. Primarily Geographically Descriptive – Applicable Law

In order for registration to be refused under Section 2(e)(2) of the Trademark Act, on the ground that the mark is primarily geographically descriptive of Applicant's identified goods, it must be established that:

1. the primary significance of the term in the mark sought to be registered is the name of a place generally known to the public;
2. the source of the goods is the place named in the mark; and
3. the public would make an association between the goods and the place named in the mark by believing that the goods originate in that place.

*In re Newbridge Cutlery Co.*, 776 F.3d 854, 113 USPQ2d 1445, 1448 (Fed. Cir. 2015); *see also In re Societe Generale des Eaux Minerals de Vittel S.A.*, 824 F.2d 957, 3 USPQ2d 1450, 1451-52 (Fed. Cir. 1987); *In re Hollywood Layers Online*, 110 USPQ2d 1852, 1853 (TTAB 2014). The third inquiry, or goods-place association, can be

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slightly right-tilted, rectangular shape bordered in black." The colors red, white and black are claimed as a feature of the mark.

presumed when the goods do in fact emanate from the place named in the mark. *Hollywood Lawyers Online*, 110 USPQ2d at 1853; *In re JT Tobacconists*, 59 USPQ2d 1080, 1082) (TTAB 2001) (“[W]here there is no genuine issue that the geographical significance of a term is its primary significance, and where the geographical place named by the term is neither obscure nor remote, a public association of the goods or services with the place may ordinarily be presumed from the fact that the applicant's goods or services come from the geographical place named in the mark.”). As clarified by the Federal Circuit, the refusal applies “only to those marks for which the geographical meaning is perceived by the relevant public as the primary meaning and ... the geographical significance of the mark is to be assessed as it is used on or in connection with the goods.” *Newbridge Cutler*, 113 USPQ2d at 1448. Moreover, the addition of highly descriptive matter to a geographic term does not detract from the mark’s primary significance as being geographically descriptive. *See In re U.S. Cargo, Inc.*, 49 USPQ2d 1702 (TTAB 1998); *In re Cambridge Digital Systems*, 1 USPQ2d 1659 (TTAB 1996).

In this case, Applicant voluntarily disclaimed the literal portion of its applied-for mark, i.e., the wording USA SUPPLEMENTS, at the time it filed its application. By doing so, Applicant conceded that this wording is primarily geographically descriptive. *Cf. In re Pollio Dairy Prods. Corp.*, 8 USPQ2d 2012, 2014 (TTAB 1988) (“By its disclaimer of the word LITE, applicant has conceded that the term is merely descriptive as used in connection with applicant's goods.”).

The issue before us then is whether the stylization of the lettering of the wording USA SUPPLEMENTS and the inclusion of a design element consisting of two parallelograms appearing in the colors red and white are inherently distinctive so that the mark may be registrable and, if not, whether Applicant has demonstrated that the stylization of the lettering and the design have acquired distinctiveness.

As the Board stated in *In re Sadoru Group, Ltd.*, 105 USPQ2d 1484, 1486 (TTAB 2012) (citing *In re Guilford Mills Inc.*, 33 USPQ2d 1042, 1043 (TTAB 1994)):

A display of descriptive or otherwise unregistrable matter is not registrable on the Principal Register unless the design features of the asserted mark create an impression on the purchasers separate and apart from the impression made by the words themselves, or if it can be shown by evidence that the particular display which the applicant has adopted has acquired distinctiveness.

We therefore initially look to the stylization of the wording USA SUPPLEMENTS to determine if it creates a separate and inherently distinctive impression. We note in this regard that the determination of whether the stylization of a term that is otherwise unregistrable is inherently distinctive is a subjective one based on the first impression of the viewer. *See In re Jackson Hole Ski Corp.*, 190 USPQ 175, 176 (TTAB 1976) (“[D]istinctive display’ is in the eyes of the beholder, and usually depends upon the viewer’s first impression of the matter in question.”).

Applicant essentially argues that the stylization of the lettering of the literal portion of its mark is sufficiently unique and distinctive. Applicant relies on four Board decisions, discussed more fully below, to support its position.

We disagree. Unlike the stylizations of the marks used in the cases relied upon by Applicant, the block lettering which Applicant characterizes as being inherently distinctive does not make Applicant's applied-for mark registrable because it is not so striking that it creates an inherently distinctive impression apart from the wording itself. Instead, we find that the stylization is minimal and gives the impression simply that the words appear in block letters.

With regard to the cases cited by Applicant, we find that each one is distinguishable from the current case for the following reasons:

- *In re Jackson Hole Ski Corp.*, 190 USPQ 175 (TTAB 1976) found that JACKSON HOLE was displayed in a highly stylized fashion such that the letters “JH” appeared larger than the other letters, and were displayed together like a person’s initials. There are no larger letters forming what could be initials in Applicant’s mark.
- *In re Clutter Control Inc.*, 231 USPQ 588 (TTAB 1986) concerned the mark, CONSTRUCT-A-CLOSET, with the letter “C” in the words stylized in a tube shape that nearly enclosed “CONSTRUCT” and “CLOSET.” The words in Applicant’s mark do not form an unusual shape.
- *In Re Grand Metro Foodservice Inc.*, 30 USPQ2d 1974 (TTAB 1994) involved the mark MUFFUNS in stylized script for muffins. "Muffins" was disclaimed. The misspelling and stylized script emphasized the “FUN” in MUFFUNS. The mark at issue has no misspelling or double entendre.
- *In Re Venturi, Inc.*, 197 USPQ 714 (TTAB 1977 ) considered THE PIPE in stylized letters that entailed a smoker’s pipe forming the first letter “P” for smokers pipes. In the present case, no stylized letters form an object.

In any event, it is well settled that each case must be decided on its own merits. The determination of registrability of a mark in another case does not control the merits in the case now before us. *See In re Nett Designs Inc.*, 51 USPQ2d 1564, 1566

(Fed. Cir. 2001); *see also In re Kent-Gamebore Corp.*, 59 USPQ2d 1373 (TTAB 2001); *In re Wilson*, 57 USPQ2d 1863 (TTAB 2001). In this case, we find that the block-style lettering comprising the wording USA SUPPLEMENTS does not convey to the consumers any source-indicating function. Thus, we find that the stylization of the lettering is not inherently distinctive.

We next turn to the design element of Applicant's mark, namely, the two parallelograms stacked on top of each, one in the color red and the other in the color white with a black border. As with the stylization of the lettering, Applicant argues that the mark's design element is inherently distinctive. Again, we disagree.

Where, as in this case, an applicant seeks to register a background design that is used in connection with a word mark, that design may be registered as a trademark only if it creates a commercial impression separate and apart from the word mark in conjunction with which it is used. *See In re Northland Aluminum Prods., Inc.*, 777 F.2d 1556, 227 USPQ 961, 964 (Fed. Cir. 1985); *In re American Academy of Facial Plastic and Reconstructive Surgery*, 64 USPQ2d 1748, 1753 (TTAB 2002). If the background design is inherently distinctive, it may be registered without evidence that it is recognized as a trademark (i.e., without proof of secondary meaning); if it is not inherently distinctive, such proof is essential. *In re E. J. Brach & Sons*, 256 F.2d 325, 118 USPQ 308, 310 (CCPA 1958).

Keeping these principles in mind, we note that common geometric shapes such as circles, ovals, rectangles, triangles, diamonds and stars, when used as backgrounds for the display of word or letter marks, are not regarded as trademarks for the goods

to which they are applied absent evidence of distinctiveness of the design alone. *See In re Raython Co.*, 282 USPQ 317 (TTAB 1979) and cases cited therein; *cf. In re Chemical Dynamics, Inc.*, 839 F.2d 1569, 5 USPQ2d 1828, 1829 (Fed. Cir. 1988). We find that Applicant's parallelogram design falls into this category of background design. There is nothing about the design element that functions as a mark apart from the wording. In other words, the design element merely serves as a background carrier for the literal portion of Applicant's mark. Indeed, the mark at issue is similar to those in *In re Benneton Group S.p.A.*, 48 USPQ2d 1214 (TTAB 1998) (holding green rectangular background design not inherently distinctive; evidence of acquired distinctiveness insufficient) and *In re Anton/Bauer, Inc.*, 7 USPQ2d 1380 (TTAB 1988) (holding parallelogram designs used as background for word marks not inherently distinctive; evidence of record insufficient to establish acquired distinctiveness pursuant to §2(f)). Moreover, the fact that the parallelograms in Applicant's mark appear in the colors red and white, the latter with a black border, does not change the standard by which Applicant's mark is judged. *See Benneton Group*, 48 USPQ2d at 1216. We find that Applicant's red and white parallelograms fall into the category of a background design requiring proof of acquired distinctiveness for purposes of registration. *Id.*

Having found that the stylization of the lettering of the literal portion of Applicant's mark, parallelogram design element and colorization do not create separate and inherently distinctive impressions, we must now determine whether the stylization and design components, including the colors red, white and black, used in

Applicant applied-for mark have acquired distinctiveness. “To establish secondary meaning, or acquired distinctiveness, an applicant must show that in the minds of the public, the primary significance of a product feature or term is to identify the source of the product rather than the product itself.” *Coach Svcs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1729 (Fed. Cir. 2012) (internal quotation marks omitted). We determine whether Applicant's asserted mark has acquired distinctiveness based on the entire record, keeping in mind that “[t]he applicant ... bears the burden of proving acquired distinctiveness.” *In re La. Fish Fry Prods., Ltd.*, 797 F.3d 1332, 116 USPQ2d 1262, 1264 (Fed. Cir. 2015) (citation omitted); *Yamaha Int’l Corp. v. Hoshino Gakki Co., Ltd.*, 6 USPQ2d 1001 (Fed. Cir. 1988). Evidence of acquired distinctiveness can include the length of use of the mark, advertising expenditures, sales, survey evidence, and affidavits asserting source-indicating recognition. *See In re Bongrain Int’l Corp.*, 894 F.2d 1316, 13 USPQ2d 1727 (Fed. Cir. 1990). The amount and character of evidence required to establish acquired distinctiveness depends on the facts of each case and the nature of the mark sought to be registered. *See Roux Labs., Inc. v. Clairol Inc.*, 427 F.2d 823, 166 USPQ 34, 39 (CCPA 1970). Typically, more evidence is required where a mark is such that purchasers seeing the matter in relation to the offered goods or services would be less likely to believe that it indicates source in any one party. *Bongrain*, 13 USPQ2d at 1729 n.9.

We initially note that Applicant does not seek registration of its applied-for mark under Section 2(f) of the Trademark Act nor did it argue in its appeal brief that the



mark has acquired distinctiveness. Nonetheless, we look to the record to ascertain whether any evidence exists to determine whether Applicant's mark has acquired distinctiveness. Applicant has not submitted any evidence to demonstrate that its mark has acquired distinctiveness. The only evidence of record which may be considered is the length of time Applicant has purportedly used its mark. Although Applicant's application claims that Applicant first used its mark in commerce on August 15, 2016, Applicant did not submit any evidence to establish such first use. *See* Trademark Rule 2.122(b)(2), 37 C.F.R. 2.122(b)(2) ("The allegation in an application for registration, or in a registration, of a date of use is not evidence on behalf of the applicant or registrant; a date of use of a mark must be established by competent evidence.") Accordingly, Applicant may only rely on the filing date of its application, i.e., December 28, 2017, as its constructive first use date. *See e.g., Levi Strauss & Co., v. R. Josephs Sportswear, Inc.*, 30 USPQ2d 1328, 1332 (TTAB 1994) (an application filing date for a use-based application can establish first use of a mark). Use of Applicant's mark since December 28, 2017, standing alone, is insufficient evidence to establish that Applicant's mark has acquired distinctiveness as an indicator of source of Applicant's identified goods. Accordingly, we find that the stylization of the lettering in of the literal portion of Applicant's mark, as well as the design component and colorization, have not acquired distinctiveness in connection with Applicant's identified goods.

## II. Conclusion

We have carefully considered all arguments and evidence of record, including any not specifically discussed. We find that although Applicant has voluntarily disclaimed the geographically descriptive wording in its mark, i.e., USA SUPPLEMENTS, we nonetheless find that Applicant's mark, in its entirety, is primarily geographically descriptive of Applicant's identified goods under Section 2(e)(2) of the Trademark Act because the stylization of the lettering of the literal portion of the mark, as well as the design element consisting of two parallelograms, one in the color red and the other in the color white with a black border, are not inherently distinctive nor does the record support that these elements have acquired distinctiveness.

**Decision:** The refusal to register Applicant's USA SUPPLEMENTS and design mark under Section 2(e)(2) of the Trademark Act is affirmed.