

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: March 28, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

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In re Imperative Care, Inc.

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Serial No. 90192571
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of Knobbe, Martens, Olson & Bear, LLP,
for Imperative Care, Inc.

Bridgett G. Smith, Trademark Examining Attorney, Law Office 115,
Daniel Brody, Managing Attorney.

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Before Cataldo, Wolfson, and Goodman, Administrative Trademark Judges.

Opinion by Wolfson, Administrative Trademark Judge:

Imperative Care, Inc. (“Applicant”) seeks registration on the Principal Register of the term ADVANCED FIBER TECHNOLOGY (in standard characters; FIBER TECHNOLOGY disclaimed) for “Medical catheters for use in the peripheral, coronary, and neuro vasculature; Component parts of medical catheters,” in International Class 10.¹

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¹ Application Serial No. 90192571 was filed on September 18, 2020, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s assertion of a bona fide intent to use the mark in commerce.

The Trademark Examining Attorney refused registration of Applicant's mark under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that the mark merely describes Applicant's medical goods "as utilizing fiber technology [that is] beyond the elementary or introductory level." 12 TTABVUE 8.²

When the refusal was made final, Applicant appealed and requested reconsideration. 1 TTABVUE. Reconsideration was denied, 4-6 TTABVUE, and proceedings resumed. 7 TTABVUE. Applicant and the Examining Attorney filed briefs, 10 and 12 TTABVUE, and Applicant filed a reply brief. 13 TTABVUE. We reverse the refusal to register.

I. Mere Descriptiveness – Applicable Law

Section 2(e)(1) of the Trademark Act prohibits registration on the Principal Register of a mark that, when used on or in connection with the applicant's goods or services, is merely descriptive of them. "A term is merely descriptive if it immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used." *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (quoting *In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)); *see also In re TriVita, Inc.*, 783 F.3d 872, 114 USPQ2d 1574, 1575 (Fed. Cir. 2015); *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987).

² All citations in this opinion to the appeal record are to TTABVUE, the docket history system for the Trademark Trial and Appeal Board. Before the TTABVUE designation is the docket entry number; and after this designation are the page references, if applicable. Citations to the prosecution history of the application are to pages from the Trademark Status & Document Retrieval ("TSDR") database of the United States Patent and Trademark Office ("USPTO").

Descriptiveness is not considered in the abstract but is analyzed in relation to an applicant's identified goods or services, "the context in which the [term] is being used, and the possible significance that the term would have to the average purchaser of the goods because of the manner of its use or intended use." *In re Bayer*, 82 USPQ2d at 1831. For descriptiveness, "the question is not whether someone presented only with the mark could guess the goods and services listed in the identification. Rather, the question is whether someone who knows what the goods and services are will understand the mark to convey information about them." *In re Fallon*, 2020 USPQ2d 11249, at *11 (TTAB 2020) (quoting *In re Mecca Grade Growers, LLC*, 125 USPQ2d 1950, 1953 (citing *DuoProSS Meditech Corp. v. Inviro Medical Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012)). "On the other hand, if one must exercise mature thought or follow a multi-stage reasoning process in order to determine what product or service characteristics the term indicates, the term is suggestive rather than merely descriptive." *In re Tennis in the Round, Inc.*, 199 USPQ 496, 497 (TTAB 1978); *see also In re Shutts*, 217 USPQ 363, 364-365 (TTAB 1983); *In re Universal Water Sys., Inc.*, 209 USPQ 165, 166 (TTAB 1980).

When two or more merely descriptive terms are combined, the composite mark "is registrable only if the combination of terms creates a unitary mark with a non-descriptive meaning, or if the composite has a bizarre or incongruous meaning as applied to the goods or services." *In re Omniome, Inc.*, 2020 USPQ2d 3222, at *4 (TTAB 2019); *see also DuoProSS Meditech*, 103 USPQ2d at 1758-59 (SNAP SIMPLY SAFER merely descriptive of "medical devices, namely, cannulae; medical,

hypodermic, aspiration and injection needles; medical, hypodermic, aspiration, and injection syringes”); *In re Tower Tech Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002) (SMARTTOWER merely descriptive of commercial and industrial cooling towers); *In re Sun Microsystems Inc.*, 59 USPQ2d 1084, 1088 (TTAB 2001) (AGENTBEANS merely descriptive of computer programs for use in development and deployment of application programs). *Concurrent Tech. Inc. v. Concurrent Tech. Corp.*, 12 USPQ2d 1054, 1057 (TTAB 1989) (“we must consider the descriptiveness of the mark ‘CONCURRENT TECHNOLOGIES CORPORATION’ by looking at the mark as a whole”).

The compound term ADVANCED FIBER TECHNOLOGY will be found merely descriptive if the individual components retain their descriptive meaning in relation to the goods and the combination does not form a mark that has a distinct non-descriptive meaning of its own as a whole. As the Court of Appeals for the Federal Circuit explained:

[W]hen determining whether a mark with multiple components is registrable, “the Board may not ‘dissect’ the mark into isolated elements.” *DuoProSS Meditech Corp.*, 695 F.3d at 1252. “[T]he Board may weigh the individual components of the mark to determine the overall impression or the descriptiveness of the mark and its various components.” *In re Oppedahl & Larson*, 373 F.3d [1174, 71 USPQ2d 1370, 1372 (Fed. Cir. 2004)]. To perform its analysis, the Board “must also determine whether the mark as a whole, i.e., the combination of the individual parts, conveys any distinctive source-identifying impression contrary to the descriptiveness of the individual parts.” *Id.* at 1174-75.

Earnhardt v. Kerry Earnhardt, Inc., 864 F.3d 1374, 123 USPQ2d 1411, 1414 (Fed. Cir. 2017). *See also Oppedahl & Larson*, 71 USPQ2d at 1372 (holding that even if

multiple portions of a mark individually are merely descriptive of an aspect of the goods, “the PTO must also determine whether the mark as a whole, i.e., the combination of the individual parts, conveys any distinctive source-identifying impression contrary to the descriptiveness of the individual parts”); *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1515-16 (TTAB 2016) (“We must, however, consider the mark as a whole and ask whether the combination of the component words of Applicant’s mark ‘conveys any distinctive source-identifying impression contrary to the descriptiveness of the individual parts.’”) (quoting *Oppedahl & Larson*, 71 USPQ2d at 1372).

II. Analysis

Applicant’s goods are medical catheters and component parts of medical catheters. The Examining Attorney argues that the mark ADVANCED FIBER TECHNOLOGY immediately describes medical catheters using fiber technology that is “greatly developed beyond an initial stage.” 12 TTABVUE 12. “Based on fact that the goods are medical catheters and component parts therefore, which reasonably would be presumed to contain fiber-based technology and that the applicant has agreed to a disclaimer of the wording FIBER TECHNOLOGY, the only term in question is the term ADVANCED.” Examining Attorney’s Brief, 12 TTABVUE 9. To this end, the Examining Attorney introduced dictionary evidence showing the meaning of the individual terms, third-party websites discussing fiber and fiberoptic catheters, and 13 third-party registrations “in which the term [TECHNOLOGY or ADVANCED] has been determined descriptive for goods similar to those in application.” 12 TTABVUE 13.

Specifically, she introduced the following:

- A Merriam-Webster dictionary definition for **ADVANCED** as:
 - 1: far on in time or course;
 - 2a: being beyond others in progress or ideas;
 - 2b: being beyond the elementary or introductory;
 - 2c: greatly developed beyond an initial stage;
 - 2d: much evolved from an early ancestral type.³
- A Merriam-Webster dictionary definition for the “Medical Definition” of **TECHNOLOGY** as:
 - 1: the science of the application of knowledge to practical purposes : applied science;
 - 2: a scientific method of achieving a practical purpose.⁴
- A printout from the lawinsider.com website purporting to define the term “advanced technology.”⁵ The definitions appear to be informal and as such have little probative value. For example:

The image shows three screenshots of dictionary definitions for the term "Advanced technology" from the website lawinsider.com. Each screenshot includes a definition, a "Sample 1" button with an external link icon, a "Based on 1 documents" note, a "Save" button with a star icon, and a "Copy" button with a document icon.

Advanced technology means a technology which has a technological level higher than that of existing technologies of the same type in Vietnam, and has been applied in reality to improve productivity and quality of products which are outstanding and environmentally-friendly.

Advanced technology means engineering techniques or technologies and production or maintenance processes of high quality in line with production certification standards or repair station certification standards, as the case may be, as well as utilization of specialized, highly-skilled and knowledge-centric personnel and technology relating to sophisticated or specific system or equipment.

Advanced technology means new and emerging technology in digital media, telecommunications, sensor and optic technology, and information technologies.

³ February 12, 2021 Office Action, TSDR 34.

⁴ February 12, 2021 Office Action, TSDR 31.

⁵ May 11, 2022 Office Action, TSDR 41-47.

The Examining Attorney also provided evidence showing that fiber optics are used in catheters; that the term “technology” may be used in connection with catheters; and that advances in catheter technology have been made. Examples showing that fiber optics are used in catheters are:

- An online article describing endoscopes as optical devices “used to study hard-to-reach cavities of mechanisms, machines, and equipment” and noting that when “optical fiber [is] used for image transmission,” “such an endoscope is called a[n] . . . endoscopic fiber catheter.” ENDOSCOPIC FIBER CATHETER AND ITS APPLICATIONS, February 12, 2021 Office Action, TSDR 21-27.⁶
- An online article discussing uses of fiberoptic catheters for image transmission in the medical field, such uses including to “measure mixed venous oxygen saturation” and to “detect possible brain ischemia.” FIBEROPTIC CATHETER, February 12, 2021 Office Action, TSDR 8-20.
- An online paper from SPIE.Digital Library entitled “Optimally spaced fiber catheter for excimer laser coronary angioplasty (ELCA)” describing improvements to optical fiber catheter tips. September 15, 2021 Office Action, TSDR 31-33.
- An online paper from the National Institutes of Health Grantome website entitled “Hollow Fiber Catheter for Drug Delivery into the Prostate” describing a fiber catheter for “improved injection distribution into the prostate.” September 15, 2021 Office Action, TSDR 34-36.
- An online article detailing the results of a study conducted of cardiac endoscopic fiber catheters. ENDOSCOPIC FIBER CATHETER MAKES CARDIAC PROCEDURES SAFER, February 12, 2021 Office Action, TSDR 2-4.
- An online article from the National Library of Medicine describing a “new fiberoptic ‘transducer tipped’ catheter.” September 15, 2022 Office Action, TSDR 21-22.

Other articles and papers use the term ADVANCED to describe catheters, without

⁶ Because this article was included in the February 12, 2021 Office Action, there was no need for the Examining Attorney to include it a second time with the September 15, 2021 Office Action.

specifying whether they use fiberoptics:

- An online article from biomerics.com entitled “Advanced catheters – What you need to know about this growing medical device market.” May 11, 2022 Office Action, TSDR 25-28.
- An advertisement at www.edwards.com for the Swan-Ganz catheter advertises “advanced catheters with fast CCO.” September 15, 2021 Office Action, TSDR 12-20.

Still other articles and papers use the term TECHNOLOGY to describe catheters, without specifying whether they use fiberoptics:⁷

- Pages from www.3pinnovation.com under the heading “Case Studies/ Catheter Technology” describing patents obtained by the company for a “new catheter technology that uses the same valve technology as in a squeeze catch up bottle.” September 15, 2021 Office Action, TSDR 5-7.
- Pages from www.leoni-healthcare.com offering “miniature cables” under the heading “catheter technology.” The article also included a picture of “catheter technology devices” that show fiber optics. September 15, 2021 Office Action, TSDR 8-9.
- An online article from the University of Michigan entitled “Device Uses Telescoping System to Achieve Complete Recanalization in Stroke Victims,” describing a “new platform for minimally invasive treatment of stroke patients” that uses catheters, which the team named the “Vortex Catheter Technology.” September 15, 2021 Office Action, TSDR 10-11.

Some articles and papers use the terms ADVANCED and TECHNOLOGY to describe catheters, without clarifying whether they use fiberoptics:

- Pages from the website www.heraeus.com touting “Advanced Catheter Technologies” from Heraeus Medical Components. September 15, 2021 Office Action, TSDR 2.

⁷ Pages from www.itexico.com/blog/what-is-advanced-technology under the heading “The Future of Advanced Technology” lists, as a sample of innovations, self-driving cars, virtual reality, and artificial intelligence, but does not refer to catheters. May 11, 2022 Office Action, TSDR 34-40.

- An online article from the National Library of Medicine entitled “Advanced catheter technology: is this the answer to overcoming the long learning curve in complex endovascular procedures.” May 11, 2022 Office Action, TSDR 29-32.
- An online article from NAI at www.nai-group.com touting the advantages of fiber optics technology in medicine, stating, “the increased use of medical fiberoptic technology has also advanced medical technology overall[.]” February 12, 2021 Office Action, TSDR 5-7.
- An online article from Machine Solutions entitled “Industry Leading Catheter Tipping Equipment” asserting that “advanced technology” is needed to “consistently achieve[] catheter tipping and end forming application complexities.” May 11, 2022 Office Action, TSDR 48-53.

Finally, the Examining Attorney has submitted one Supplemental Register registration for the mark ADVANCED MICROCURRENT TECHNOLOGY for medical devices that produce electric currents for healing wounds, pain relief, tissue regeneration and the like,⁸ and thirteen Principal Register registrations for composite marks containing the term TECHNOLOGY or ADVANCED (or both) wherein such terms have been disclaimed.⁹ These registrations are active in Class 10 for various medical goods; there are two that include “catheters” and a disclaimer of ADVANCED:

- Reg. No. 6279650 for the mark A ANA THE ADVANCED NEUROVASCULAR ACCESS and design; disclaimer of ADVANCED NEUROVASCULAR ACCESS;¹⁰ and
- Reg. No. 5981384 for the mark VASFLEX ADVANCED CATHETER SOLUTIONS; disclaimer of ADVANCED CATHETER SOLUTIONS.¹¹

⁸ May 11, 2022 Office Action, TSDR 7-9.

⁹ September 15, 2021 Office Action, TSDR 37-54 and May 11, 2022 Office Action, TSDR 2-25.

¹⁰ May 11, 2022 Office Action TSDR 4-6.

¹¹ May 11, 2022 Office Action TSDR 22-23.

Applicant argues that the term ADVANCED “does not immediately convey knowledge of any particular quality, feature, function or characteristic of Applicant’s medical devices because the term has multiple definitions as applied to Applicant’s Goods.” Appeal brief, 10 TTABVUE 5. Specifically, Applicant argues that the term ADVANCED is ambiguous in that it at most “connotes a vague desirable characteristic but does not describe any of Applicant’s Goods with immediacy or particularity.” *Id.* at 6. Applicant contends the mark as a whole is suggestive.

When considering whether the mark ADVANCED FIBER TECHNOLOGY immediately provides specific information about medical catheters, it is necessary to look to the mark as a whole. In doing so, however, we take note that Applicant has disclaimed the wording FIBER TECHNOLOGY based on a requirement by the Examining Attorney. This constitutes a concession by Applicant of the mere descriptiveness of the phrase in relation to Applicant’s goods. *In re DNI Holdings Ltd.*, 77 USPQ2d 1435, 1442 (TTAB 2005) (“it has long been held that the disclaimer of a term constitutes an admission of the merely descriptive nature of that term ... at the time of the disclaimer.”); *see also Quaker State Oil Refining Corp. v. Quaker Oil Corp.*, 453 F.2d 1296, 172 USPQ 361, 363 (CCPA 1972) (disclaimer is an admission of descriptiveness at the time the disclaimer was made). Because the disclaimer acts as an admission of descriptiveness, we focus on the meaning of the term ADVANCED in connection with medical catheters in the context of Applicant’s ADVANCED FIBER TECHNOLOGY mark to determine whether the mark as a whole is merely descriptive.

That a term may have other meanings in different contexts is not controlling on the question of descriptiveness. *In re RiseSmart Inc.*, 104 USPQ2d 1931, 1933 (TTAB 2012) (citing *In re Chopper Indus.*, 222 USPQ 258, 259 (TTAB 1984)); *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979). However, if the term has different meanings in connection with the specific goods at issue, it may be considered so vague or ambiguous that relevant consumers will not perceive the term as immediately describing a quality or feature of the goods. *See, e.g., Concurrent Tech.*, 12 USPQ2d at 1057 (finding CONCURRENT TECHNOLOGIES CORPORATION not merely descriptive in connection with computer products) and *In re Men's Int'l Prof. Tennis Council*, 1 USPQ2d 1917 (TTAB 1986) (finding MASTERS to be a general term that does not immediately describe tennis tournament services).

To demonstrate that the wording ADVANCED is an imprecise term in connection with the goods, Applicant submitted printouts from the TRADEMARK ELECTRONIC SEARCH SYSTEM (TESS) database of eleven registrations in Class 10 for marks including the word ADVANCED without a disclaimer. Generally, third-party registrations may be used to show the meaning of a term much as a dictionary is used. *See Specialty Brands, Inc. v. Coffee Bean Distrib., Inc.*, 748 F.2d 669, 223 USPQ 1281, 1285 (Fed. Cir. 1984) (“[T]hird-party usage can demonstrate the ordinary dictionary meaning of a term of the meaning of a term to those in the trade”) (internal citation omitted); *Top Tobacco LP v. North Atlantic Operating Co.*, 101 USPQ2d 1163, 1173 (TTAB 2011) (third-party registrations indicate term CLASSIC has suggestive meaning as applied to tobacco products); *In re Nashua Corp.*, 229 USPQ 1022, 1023

(TTAB 1986) (“Third-party registrations may provide some evidence as to the meaning of a mark or portion of a mark in the same way dictionaries are used.”); *cf. Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015) (third-party use and registration of a term may be an indication that a term has a suggestive or descriptive connotation in a specific industry).

Although the registrations submitted by Applicant cover medical goods, none of the registrations are for catheters.¹² In comparison, of the eight registrations submitted by the Examining Attorney that include “catheters” as part of the goods, only two include a disclaimer of ADVANCED (as part of a longer phrase), as noted above. Based on the entirety of the third-party registration evidence, we find that ADVANCED does not have a normally understood and recognized descriptive meaning when used on or in connection with catheters.

Turning to the use-based evidence, none use the terms “advanced fiber” or “advanced fiber technology” per se. Also complicating the immediacy required to find the mark merely descriptive, are the uses of the term ADVANCED to describe general advantages within the field of fiberoptic technology, or uses of the word “advanced” to describe patient conditions. For example, the Edwards advertisement for the

¹² The marks are: ADVANCED LAB (Reg. No. 6093487), ADVANCED BIODATA LABS (Reg. No. 5944954), ADVANCED CIRCULATORY (Reg. No. 5392152), ADVANCED EXPOSURE FOR ADVANCED PROCEDURES (Reg. No. 4998910), ADVANCED TRAVEL LANCETS (Reg. No. 4248882), ADVANCED CUTTING TECHNOLOGY (Reg. No. 4125205), ADVANCED DIABETES SUPPLY (Reg. No. 3196374), ADVANCED ENDODONTIC SYSTEMS (Reg. No. 3113791), ADVANCED DENTAL SYSTEMS (Reg. No. 3113789), ADVANCED ERE (Reg. No. 3769839), and ADVANCED DENTAL MATERIALS (Reg. No. 3887327).

Swan-Ganz catheter describes a pulmonary artery catheter that targets “complex patient conditions” with “advanced hemodynamic parameters.”¹³ The article from NAI specifically notes that while there are advancements, there are also “drawbacks” and “certain restrictions” involved in using “medical fiberoptic technology.”¹⁴ The article from the National Library of Medicine entitled “Advanced catheter technology: is this the answer to overcoming the long learning curve in complex endovascular procedures” describes the difficulty in developing a high level of skill among physicians who use catheters, concluding that “advanced endovascular catheters, although more intricate, do not seem to take longer to master.”¹⁵

We are not persuaded by the Examining Attorney’s argument that ADVANCED “has become a term of art in the industry to indicate a higher level of technology” and is thus merely descriptive. We find the term ADVANCED does not forthwith convey, with sufficient particularity, the purpose, function or use of Applicant’s goods, or describe any significant aspect, feature or quality of the goods with sufficient particularity. *See Goodyear Tire & Rubber Co. v. Cont’l Gen. Tire, Inc.*, 70 USPQ2d 1067, 1069 (TTAB 2003) (citing *In re TMS Corp. of the Am.*, 200 USPQ 57, 59 (TTAB 1978)) (to be merely descriptive, the “immediate idea must be conveyed forthwith with a degree of particularity”). Mental steps are necessary to connect the wording ADVANCED FIBER TECHNOLOGY with medical catheters that contain fiber optics

¹³ September 15, 2021 Office Action, TSDR 12-20.

¹⁴ February 12, 2021 Office Action, TSDR 5-7.

¹⁵ May 11, 2022 Office Action, TSDR 29-32.

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and provide a higher level of technology, and consumers would not understand the mark's meaning without the exercise of some degree of thought or imagination. Accordingly, we find that the mark is not merely descriptive of Applicant's goods.

Decision: The refusal to register Applicant's mark ADVANCED FIBER TECHNOLOGY is reversed.