

This Opinion is not a
Precedent of the TTAB

Mailed: September 11, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Wave Neuroscience, Inc.
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Serial No. 90630144
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Farah P. Bhatti and J. Rick Tache of Buchalter, a Professional
Corporation, for Wave Neuroscience, Inc.

Roger McDorman, Trademark Examining Attorney, Law Office 109,
Michael Kazazian, Managing Attorney.

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Before Zervas, Cataldo and Stanley,
Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

Wave Neuroscience, Inc. (“Applicant”) seeks registration on the Principal Register of the proposed standard character mark BRAINCARE for the following goods and services (collectively, Applicant’s Identified Goods and Services):

Downloadable computer operating programs and
downloadable computer operating software for
neuromodulation devices and devices for the analysis of
brainwave activity; downloadable computer programs and
software for the analysis of neurological disorders and
brainwave activity in International Class 9;

Medical devices, namely, neuromodulation devices for the treatment of neurological disorders and electroencephalogram (EEG) apparatus for the analysis of brainwave activity in International Class 10;

Medical, scientific, and clinical research in the fields of neurological disorders, treatment of neurological disorders, neuromodulation technology, analysis of brainwave activity, and cognitive performance; online non-downloadable software for the analysis of neurological disorders and brainwave activity; software-as-a-service featuring operating programs and computer operating software for neuromodulation devices and devices for the analysis of brainwave activity in International Class 42; and

Medical clinics in the field of analysis and treatment of neurological disorders, brainwave activity, and cognitive performance in International Class 44.¹

The Examining Attorney refused registration under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that the mark is merely descriptive of Applicant's Identified Goods and Services. After the Examining Attorney made the refusal final, Applicant appealed to this Board and requested reconsideration. The Examining Attorney denied the request for reconsideration, the appeal was resumed and both Applicant and the Examining Attorney filed a brief. We affirm the refusal to register.

¹ Application Serial No. 90630144 was filed on April 7, 2021, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), claiming a bona fide intention to use the proposed mark in commerce.

References to the briefs on appeal refer to the Board's TTABVue docket system. Page references to the application record refer to the online database of the USPTO's Trademark Status & Document Retrieval ("TSDR") system. All citations to documents contained in the TSDR database are to the downloaded .pdf versions of the documents in the USPTO TSDR Case Viewer. See *In re Peace Love World Live, LLC*, 127 USPQ2d 1400, 1402 n.4 (TTAB 2018).

In the absence of acquired distinctiveness,² Section 2(e)(1) of the Trademark Act prohibits registration on the Principal Register of “a mark which, (1) when used on or in connection with the goods of the applicant is merely descriptive . . . of them.” 15 U.S.C. § 1052(e)(1). A term is “merely descriptive” within the meaning of Section 2(e)(1) 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 Com. 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). By contrast, a mark is suggestive if it requires imagination, thought, and perception to arrive at the qualities or characteristics of the goods or services. *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987). Suggestive marks, unlike merely descriptive terms, are registrable on the Principal Register without proof of acquired distinctiveness. *See Nautilus Grp., Inc. v. Icon Health & Fitness, Inc.*, 372 F.3d 1330, 71 USPQ2d 1173, 1180 (Fed. Cir. 2004).

Whether a mark is merely descriptive is determined in relation to the goods or services for which registration is sought, not in the abstract or on the basis of guesswork. Descriptiveness must be evaluated “in relation to the particular goods [or services] for which registration is sought, the context in which it is being used, 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 or intended use.” *In re Chamber*

² Applicant has not asserted acquired distinctiveness.

of *Com.*, 102 USPQ2d at 1219 (quoting *In re Bayer*, 82 USPQ2d at 1831). In other words, we evaluate whether someone who knows what the goods or services are will understand the mark to convey information about them. *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012); *In re Tower Tech Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002).

Evidence that a term is merely descriptive to the relevant purchasing public “may be obtained from any competent source, such as dictionaries, newspapers, or surveys,” *In re Bayer AG*, 82 USPQ2d at 1831, as well as “labels, packages, or in advertising material directed to the goods [or services].” *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978). It may also be obtained from websites and publications, and, in the case of a use-based application, an applicant’s own specimen of use and any explanatory text included therein. *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1710 (Fed. Cir. 2017); *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1565 (Fed. Cir. 2001).

When two 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 and unique commercial impression. If each component retains its merely descriptive significance in relation to the goods or services, 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). Thus, “[i]n considering a mark as a whole, the 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*, 71 USPQ2d at 1372.

The Examining Attorney argues that the proposed mark is merely descriptive of “things or activities that are used or provided for the purpose of caring for, i.e., analyzing, studying, treating, training, and otherwise determining the condition and/or furthering the well-being of, the brain.”³ The Examining Attorney relies on the following:

Definitions:

- Brain
 - the portion of the vertebrate central nervous system enclosed in the skull and continuous with the spinal cord through the foramen magnum that is composed of neurons and supporting and nutritive structures (such as glia) and that integrates sensory information from inside and outside the body in controlling autonomic function (such as heartbeat and respiration), in coordinating and directing correlated motor responses, and in the process of learning.⁴

³ Examining Attorney’s brief, 11 TTABVUE 5.

⁴ Meriam Webster Dictionary, August 29, 2021 Office Action, TSDR 9.

- Care
 - Attentive assistance or treatment to those in need.⁵
 - The provision of what is necessary for the health, welfare, maintenance, and protection of someone or something.⁶
 - Charge, supervision.⁷

Website evidence:⁸

- The Oregon Health & Science University (OHSU) Brain Institute⁹ stating, “The best in brain care, powered by discovery[.] We turn relentless research into the latest therapies. Find out why U.S. News & World Report ranks us No. 1 in the Northwest for neurology and neurosurgery.”¹⁰
- Community Health Network states, “Neurosurgical Brain Care” and “Neurosurgeons are specially trained to assess, diagnose and surgically treat brain disorders that

⁵ The American Heritage Dictionary of the English Language, August 29, 2021 Office Action, TSDR 9.

⁶ Lexico.com (US Dictionary), August 29, 2021 Office Action, TSDR 13.

⁷ Merriam-Webster Dictionary, August 29, 2021 Office Action, TSDR 19.

⁸ Applicant argues that the probative value of articles downloaded from the Internet is limited because “there is no reason to believe that members of the general public, other than the author, are aware of the evidence that has been made of record.” (9 TTABVUE 21.) As mentioned above, for purposes of evaluating a trademark, material obtained from the Internet is generally accepted as competent evidence. *See In re Bayer*, 82 USPQ2d at 1833. In addition, “[e]xamining attorneys are not required to establish that evidence from online sources or websites have significant web traffic.” TMEP § 710.01(b) (citing *In re Wal-Mart Stores, Inc.*, 129 USPQ2d 1148, 1156-57 (TTAB 2019)). Applicant has not pointed to any evidence that would suggest that a member of the general public would **not** be aware of the article.

⁹ Applicant argues that some of the Examining Attorney’s examples use BRAIN CARE as a source identifier. (Applicant’s brief, 9 TTABVUE 23.) None uses BRAIN CARE alone as a source identifier, and if any examples include BRAIN CARE in a trademark, they are merely descriptive or generic terms – some trademark owners include merely descriptive terms as part of their trademarks. *See, e.g.*, TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1213 (May 2024) regarding USPTO disclaimer practice.

¹⁰ December 17, 2023 Denial of Req. for Recon., TTABVUE 6 - 10.

may include brain tumors, brain trauma, tremors or other neurological conditions”¹¹

- Northeast Regional Medical Center, under the heading “Brain Care” states, “Neurologic specialists at Northeast Regional Medical Center care for a wide range of conditions that affect the brain. ... Neurologists and other professionals deliver care that ranges from prevention to acute intervention and long-term management for conditions”¹²

- Mindstep states, “Medically-backed, jam-packed brain & mental health care” in connection with a mobile software application, for “tackl[ing] brain and mental health issues head-on.” One user describes being drawn to Mindstep’s “fun, positive approach to brain care.”¹³

- NeuroTrax has a page heading “Brain Care” and states that it is a “cloud-based computer application for brain wellness” and “includes a series of tests and associated reports for clinicians to monitor brain fitness, as well as data-driven recommendations for brain training.”¹⁴

- Intermountain Health has a page heading “Brain Care in Provo,” and states it “offer[s] comprehensive care for conditions related to the brain.”¹⁵

- Penn Highlands Healthcare has a page heading “World-Class Brain Care Close to Home” and “Expert Brain Care at Penn Highlands Healthcare” and states, “When it comes to your brain, you want the very best care.”¹⁶

- Nicklaus Children’s Hospital Brain Institute states that it is “the nation’s first comprehensive medical program dedicated solely to the care of the developing brain,” and it provided “39 Years of Pediatric Brain Care including

¹¹ *Id.* at TTABVUE 12.

¹² *Id.* at TTABVUE 15.

¹³ *Id.* at TTABVUE 20-27.

¹⁴ *Id.* at TTABVUE 30-31.

¹⁵ *Id.* at TTABVUE 36.

¹⁶ *Id.* at TTABVUE 39-40.

programs, treatments, and procedures in pediatric neurology, pediatric neurosurgery, epilepsy, and autism.”¹⁷

- The Lancet, in an article titled “Brain health begins with brain care,” describes “a comprehensive tool for brain care ... composed of 12 components, each a modifiable risk factor for at least one of the three most common non-communicable diseases: dementia, stroke, and depression.”¹⁸

- MentalHealthSpace.org featuring an article titled “10 ways to take care of your brain,” and a section heading titled “Brain Care” – with information about the methods and importance of caring for and maintaining the health of the brain and maximizing cognitive performance.¹⁹

- The University of Utah featuring its “Aging Brain Care Program,” described as offering evaluation, diagnosis, management, and education for memory and thinking disorders.²⁰

- The Brain Care Clinic offers treatment involving neurofeedback for improving brain health and cognitive performance.²¹

- Eskenazi Health – under the heading “Aging Brain Care, the website addresses The Eskenazi Health Aging Brain Care program” “primary care providers in the specialized diagnosis and management of patients with cognitive impairment caused by conditions such as Alzheimer’s disease, delirium and cognitive and emotional problems....” The site also has links to “Personalized Brain Care Plan” and “Brain Care Management Services.”²²

¹⁷ *Id.* at TTABVUE 43-49.

¹⁸ April 2, 2023 Final Action, TSDR 7.

¹⁹ *Id.* at TSDR 16-20.

²⁰ *Id.* at TSDR 28.

²¹ *Id.* at TSDR 39-40.

²² August 29, 2021 Office Action, TSDR 40-44.

- Christus Health – contains the heading “Brain Care” for brain conditions relating to Alzheimer’s disease and strokes.²³
- The Children’s Hospital of Pittsburgh has a “Brain Care Institute” for “complete care for children with brain problems.”²⁴
- Fairview’s webpage is titled “Neurosciences and Brain Care” and addresses “innovative treatment programs using the latest technology provide outstanding care for our patients with conditions affecting the brain ... and nervous system.”²⁵

In view of this evidence, the Examining Attorney concludes that in the context of the brain and its care (via the monitoring, analysis, and/or treatment thereof), the proposed mark describes the nature, or a feature, purpose, or characteristic, of the goods and services.²⁶

Turning to Applicant’s arguments in support of registration, Applicant states, “[a] suitable starting place is the dictionary, [because] ‘[t]he dictionary definition of the word is an appropriate and relevant indication ‘of ordinary significance and meaning of words’ to the public.” (citing *Am. Heritage Life Ins. Co. v. Heritage Life Ins. Co.*, 494 F.2d 3, 11 n. 5 (5th Cir. 1974)).²⁷ It argues as follow regarding the term “care”:

BRAIN does identify a part of the body but the term CARE is not used to identify software, hardware, medical, scientific or clinical research, or medical services. A

²³ *Id.* at 45-46.

²⁴ *Id.* at 47.

²⁵ *Id.* at 50-51.

²⁶ Examining Attorney’s brief, 11 TTABVUE 8.

²⁷ Applicant’s brief, 9 TTABVUE 22. Elsewhere in its brief Applicant contradicts itself and states, that the dictionary evidence “does nothing to show that consumer would be aware of any of these definitions” *Id.* at 9 TTABVUE 16.

consumer looking to obtain medical services related to neurological disorders will not see the term CARE and find that it has any meaning and will not be able to identify the services being provided through use of BRAINCARE.²⁸

We find the definitions in the record for “care” are similar, aptly defined as “[a]ttentive assistance or treatment to those in need.”²⁹ Applicant does not propose a definition of its own. The webpages submitted by the Examining Attorney apply this definition, and use the word in contexts related to mental health. *See, e.g.*, “home-based health care, regular screening for cognitive efficiency is a valuable tool for ... mental health practitioners ...,”³⁰ “[a]ddressing behavioral health is as important as physical health, and care providers need tools that can engage people in monitoring their own brain health”;³¹ and “improved diagnosis and care for people with Alzheimer’s disease”³² Applicant’s argument also ignores the other evidence in the record showing use of the combined term “braincare” or “brain care.”

Applicant adds:

[T]he evidence provided by the Examining Attorney which purportedly shows the definitions of the terms “brain” and “care” include so many different definitions that it could relate to just about anything. This evidence does nothing

²⁸ *Id.* at 9 TTABVUE 17. Applicant has not supported its argument with any evidence. Attorney argument unsupported by evidence is not persuasive. *See Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (citing *Enzo Biochem, Inc. v. Gen-Probe, Inc.*, 424 F.3d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005) (“Attorney argument is no substitute for evidence.”)).

²⁹ Lexico.com, August 29, 2021 Office Action, TSDR 13.

³⁰ *Id.* at TSDR 23.

³¹ *Id.* at TSDR 25.

³² *Id.* at TSDR 34.

to show that consumers would be aware of any of these definitions and find that the term is descriptive.³³

This argument has no merit because, as mentioned, descriptiveness is evaluated “in relation to the particular goods [or services] for which registration is sought, the context in which it is being used, 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 or intended use.” *In re Chamber of Com.*, 102 USPQ2d at 1219 (quoting *In re Bayer*, 82 USPQ2d at 1831). “That a term may have other meanings in different contexts is not controlling.” *Robinson v. Hot Grabba Leaf, LLC*, 2019 USPQ2d 149089, at *5 (TTAB 2019) (citing *In re Canine Caviar Pet Foods, Inc.*, 126 USPQ2d 1590, 1598 (TTAB 2018)). Also, as mentioned, the definitions are similar.³⁴

We now consider the combined term BRAINCARE or BRAIN CARE. Applicant argues:

Even to someone who is using Applicant’s Goods or Services, the term may suggest the nature of the same, but it does not definitively identify the goods or services. Does BRAINCARE identify a type of software? No. Does BRAINCARE identify a medical device? No. Does BRAINCARE identify medical, scientific or clinical research? No. Does BRAINCARE identify medical services? No, it merely suggests the same.

The problem with this argument is that the Examining Attorney’s refusal is one of mere descriptiveness, not genericness. “A generic term ‘is the common descriptive

³³ Applicant’s brief, 9 TTABVUE 12.

³⁴ To be clear, evidence that a term is merely descriptive to the relevant purchasing public “may be obtained from any competent source, such as dictionaries” *In re Bayer AG*, 82 USPQ2d at 1831.

name of a class of goods or services.” *Princeton Vanguard, LLC v. Frito-Lay N. Am., Inc.*, 786 F.3d 960, 114 USPQ2d 1827, 1830 (Fed. Cir. 2015) (quoting *H. Marvin Ginn Corp. v. Int’l Ass’n of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986)). BRAINCARE does not need to be the common descriptive name for a type of software, a medical device, medical, scientific or clinical research, or medical services, to be refused registration as merely descriptive.

Applicant adds, “[t]he term BRAINCARE does not specifically describe any of Applicant’s Goods or Services but is merely suggestive of the same.”³⁵ Applicant explains that BRAINCARE “cannot be descriptive as it has no known meaning”;³⁶ that “no definition of BRAINCARE as a whole was provided”;³⁷ and that the term is “not used descriptively by third parties or consumers.”³⁸

The Examining Attorney’s evidence undercuts Applicant’s argument. The webpages with “brain” juxtaposed with “care” consistently use the two-word term to identify a particular type of care, *i.e.*, care for preserving or enhancing mental acuity. The evidence is specific to research and clinical analysis and treatment services, which are identified in Applicant’s identification of services. In some instances, the term is used as a heading, without explanation of the meaning of the term, suggesting that it needs no definition. With regard to Applicant’s goods, they pertain to analyses

³⁵ Applicant’s brief, 9 TTABVUE 17.

³⁶ *Id.* at 9 TTABVUE 13.

³⁷ *Id.* at 9 TTABVUE 23.

³⁸ *Id.* at 9 TTABVUE 21.

of brainwave activity and neurological disorders – the applied-for term indicates what the goods are intended to be used for.



Applicant submitted third-party registrations for marks that include the terms BRAIN and CARE, or CARES to show that the USPTO has not considered BRAIN CARE or BRAINCARE as merely descriptive.³⁹ The following third-party registrations have no probative value for the reasons stated:

- Supplemental Register Registration No. 5521407 for BRAINCARE covers “nutritional supplement shakes,” goods unrelated to the goods and services involved in this appeal.
- Principal Register Registration No. 5490962 for BRAIN CARE CENTER and design for “medical services” disclaims BRAIN CARE CENTER as a merely descriptive or generic term.
- Registration No. 5461510 for the mark CAREMIBRAIN and design registration covers goods and services unrelated to Registrant’s mark.

The following third-party Principal Register registrations remain:

Mark	Serial/Reg. No.	Goods/Services
#BRAINCARESAVESLIVES	90283474	Education services, namely, training military service members and first responders to understand how psychological trauma affects the form and function of the brain and how these professionals can engage in self-directed brain hygiene and providing curricula in connection therewith; Educational services, namely, conducting classes in the field of psychology trauma, brain function and the healing effects of self-guided brain hygiene; Training services in the

³⁹ February 28, 2022 Response, TSDR 19-44; July 2, 2023 Req. for Recon., TSDR 12 – 19. Applicant also submitted copies of third-party applications – application evidence shows nothing more than that the application was filed with the USPTO. *In re Binion*, 93 USPQ2d 1531, 1535 n.3 (TTAB 2009).

Mark	Serial/Reg. No.	Goods/Services
		field of brain physiology, psychology, social work, neurotechnology.
	6486785	Medical apparatus, devices and instruments for monitoring intracranial pressure (ICP) and intracranial pressure (ICP) pulse morphology, and brain compliance for detecting and monitoring accumulation of cerebrospinal fluid, and for use in diagnosing and monitoring brain conditions and diseases. Medical services.
BRAIN CARES ⁴⁰ and 	6069056 and 6117511 (BRAIN disclaimed)	Providing a website featuring information about health and wellness, namely, how to practice the habits associated with living a Brain Healthy Lifestyle.

Some of these registrations contain matter additional to BRAINCARE, thereby distinguishing the marks. Also, the word CARES in the two BRAIN CARES marks has a connotation with the identified services different from that of CARE in the applied-for mark for Applicant’s Identified Goods and Services. And these four registrations are too few in number to persuade us that the USPTO considers BRAIN CARE or BRAINCARE as a suggestive term for Applicant’s Identified Goods and Services.

Upon consideration of all of the evidence of record and Applicant’s arguments, we conclude that Applicant’s proposed mark merely describes a purpose for Applicant’s Identified Goods and Services, without thought or conjecture. When considered

⁴⁰ The registrations for BRAIN CARES and BRAIN CARES and design identify the same registrant.

separately, the two terms in the mark, BRAIN and CARE, each describe a purpose for Applicant's Identified Goods and Services, namely, that they are used for, or involve, the care of the brain. When combined, the terms retain their meaning and do not convey "any distinctive source-identifying impression contrary to the descriptiveness of the individual parts." *In re Oppedahl & Larson*, 71 USPQ2d at 1372.

Applicant argues that "any doubt on the point must be resolved in Applicant's favor"⁴¹ The record in the present case leaves us with no doubt that the proposed mark merely describes a purpose for Applicant's Identified Goods and Services.

Decision: The refusal to register Applicant's proposed mark under Section 2(e)(1) is affirmed.

⁴¹ Applicant's brief, 4 TTABVUE 24.