

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Hearing:
September 19, 2012

Mailed:
September 30, 2013

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Fair Isaac Corporation

v.

ConsumerInfo.Com, Inc.

Opposition No. 91178303
to application Serial No. 78955572

Timothy M. Kenny, Laura J. Borst and Renee S. Kraft of Fulbright & Jaworski LLP, for Fair Isaac Corporation.

Carol Anne Been, Rebecca Stroder and Katherine L. Staba of SNR Denton US, for ConsumerInfo.Com, Inc.

Before Kuhlke, Cataldo and Taylor, Administrative Trademark Judges.

Opinion by Taylor, Administrative Trademark Judge:

ConsumerInfo.com (“Applicant” or “CIC”), seeks registration on the Principal Register of the mark KNOW YOUR SCORE, in standard character form, for “credit reporting services; credit information provided by electronic means,” and “providing information in the financial and credit fields” in International Class 36.¹ The application includes a claim of ownership of

¹ Application Serial No. 78955572, filed August 18, 2006, alleging September 26, 1998 as the date of first use anywhere and in commerce.

Registration No. 2422711 for the mark KNOW YOUR SCORE for “providing credit report information to perspective [sic] first mortgagers.”²

Fair Isaac Corporation (“opposer” or “FIC”), has opposed registration of the mark on the grounds that the phrase KNOW YOUR SCORE is merely descriptive of the identified services, and has not become distinctive of the services. (Not. of opp. ¶¶ 4 and 5). Opposer particularly alleges that relevant consumers would recognize the proposed mark to refer to “credit scores and credit scoring and reporting services” and that “numerous third parties use the phrase “know your score” or similar phrases when referring to credit scores and credit scoring and reporting services.”³ (Not. of opp. ¶¶ 6 and 7).

ConsumerInfo.com, Inc. (“applicant” or “CIC”), in its answer, has admitted that “Opposer develops and distributes computer software and other analytical tools and provides consulting services and information in the field of credit and credit scoring throughout the United States,” but otherwise has denied the salient allegations of the notice of opposition. As an affirmative defense, applicant asserts that it already owns a federal trademark registration for the identical mark for substantially similar services, namely, Registration No. 2422711, such that the involved application causes no added injury to opposer.⁴ (Answer § 2).

Preliminary Matters

² Issued January 23, 2001, renewed.

³ We note that opposer’s notice of opposition also includes the ground that applicant’s mark is generic of the identified services. This claim, however, only appears on the ESTTA cover sheet portion of the notice, which was filed on July 10, 2007, and neither party argued the issue in its brief. In addition, opposer’s counsel, during the oral argument held on September 19, 2012, indicated that opposer had withdrawn this claim. Accordingly, we give it no further consideration.

⁴ We consider the balance of the allegations set forth under the caption “Affirmative Defenses” to merely amplify applicant’s denials.

The parties stipulated that all documents (bates numbered and produced in discovery) by any party in response to the Requests for Production of Documents are authentic and can be introduced by either party by a notice of reliance. The parties further stipulated that all interrogatory responses and discovery deposition testimony, with exhibits, are authentic and can be introduced by either party by a notice of reliance. Opp. NOR exh. A, App. NOR exh. 1.

While the Board allows parties to stipulate to the manner that evidence is introduced into the record, that evidence must conform to the “form of submission” requirements set forth in Trademark Rule 2.126. In this regard, we note that both opposer and applicant have submitted on CD-ROM the discovery depositions of Michael Balducci, Shon Dellinger and Darcy Sullivan, and exhibits corresponding thereto. At one time evidence could be made of record in this manner pursuant to Trademark Rule 2.126(b). However, by amendment effective August 31, 2007 and applicable to all cases pending or commenced on or after that date, Trademark Rule 2.126(b) no longer accords parties the option of making submissions to the Board in CD-ROM form.⁵ See e.g., *Swiss Watch International Inc. v. Federation of the Swiss Watch Industry*, 101 USPQ2d 1731, 1734 n.5 (TTAB 2012) (petitioner submitted CD-ROM versions of the testimony depositions, as well as the printed versions, and was advised that it was not necessary to submit the CD-ROMs and that the rules no longer provided that testimony can be submitted in this manner). Because the above-noted discovery depositions were not filed on paper or by electronic means as required under the operative Trademark Rule, they have not be considered in

⁵ Notice thereof is posted on the Trademark Trial and Appeal Board (TTAB) page of the USPTO internet website at <http://www.uspto.gov/web/offices/com/sol/notices/72fr42242.pdf>
http://www.uspto.gov/web/offices/com/sol/notices/72fr42242_FinalRuleChart.pdf.

this decision. We also have not considered any of the corresponding exhibits, except to the extent that they also were properly made of record via paper or electronic submission.⁶

Last, both parties filed numerous evidentiary objections on the grounds of relevance, hearsay, lack of foundation, competence and materiality.⁷ Indeed, each has objected to substantially all of the evidence submitted by the other. The Board is capable of weighing the relevance and strength or weakness of the objected-to evidence in the cases litigated before us, including any inherent limitations, and this precludes the need to strike the evidence. Given the circumstances in this case, and the sheer number of objections, we choose not to make specific ruling on each and every objection. Ultimately, except as otherwise noted, we have considered the entire record, keeping in mind the parties' various objections, and have accorded the evidence whatever probative value it merits.

The Record

By operation of Trademark Rule 2.122(b), the record includes the pleadings and the file history of the subject application. 37 CFR § 2.122(b). In addition, and subject to the above, opposer properly made of record during its testimony and rebuttal testimony periods notices of reliance on: interrogatory responses of both parties; dictionary definitions of the terms, "know," "your" and "score"; copies of documents introduced in this proceeding, including creative advertising briefs showing applicant's use or planned use of KNOW YOUR SCORE, internet

⁶ In making this ruling we make clear that exhibits consisting of videotapes or audiotapes of commercials, demonstrations, etc., may be transferred to an appropriate electronic format for submission to the Board and, thus, we have accepted these materials. See generally TBMP §106.03 (3d ed. 2011).

⁷ We specifically note that the parties raised objections to certain depositions and exhibits, i.e., opposer's exhibits E, F and G and applicant's exhibits 4, 5 and 6, that were submitted on CD-ROM. Because of our decision to exclude these depositions and exhibits for the reasons discussed above, we need not consider these objections, except to the extent the evidence was submitted properly and additionally objected to. We further note that in response to an objection raised by opposer, applicant withdrew its reliance on Exhibit 20 to its notice of reliance.

materials purportedly showing descriptive use by applicant of the designation KNOW YOUR SCORE and derivations thereof; copies of applicant's banner ads, photographs of sports venue signage and television and radio advertisements – all showing use by applicant of the designation KNOW YOUR SCORE and asserted derivations thereof; internet materials, including excerpts of articles from newspapers, magazines and websites showing use by third-parties of the term KNOW YOUR SCORE and derivations thereof; copies of cease and desist letters, with responses where applicable, between applicant and opposer as well as third parties; copies of applicant's prior registration No. 2422711 taken from the Trademark Electronic Search System (TESS) database of the USPTO and the underlying application file, and copies of the file wrapper of the underlying application and assignment records concerning Registration No. 2422711.

Applicant, during its testimony period properly made of record a notice of reliance on: applicant's and opposer's responses to interrogatories; copies of applicant's online advertising of the designation KNOW YOUR SCORE, including banner ads; copies of applicant's radio and television ads featuring KNOW YOUR SCORE; photographs of applicant's advertisements for the designation KNOW YOUR SCORE in sports venues and in Times Square; copies of cease and desist letters sent by applicant to third parties relating to the designation KNOW YOUR SCORE; copies of a business plan and a creative brief regarding use by applicant of KNOW YOUR SCORE; photographs showing promotional merchandise bearing the designation KNOW YOUR SCORE; copies of web pages from applicant's website showing use of KNOW YOUR SCORE; copies of articles from various Internet sources discussing the topic of consumer credit and credit scores "without the need to use the phrase and Applicant's mark, 'Know Your Score'; and copies of official records including a copy a claimed Registration No. 2422711 for the mark

KNOW YOUR SCORE and the file wrapper and assignment agreement therefor, and a copy of Registration No. 3339410, for the mark KNOW YOUR SCORE, owned by June Bug Enterprises, Inc. and a copy of the file wrapper therefor.⁸

Both opposer and applicant filed briefs on the case, and opposer filed a reply brief. An oral hearing was held on September 19, 2012.

Standing

To establish standing opposer must show “a real interest” in the proceeding. *See Richie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999). Generally, where a claim of mere descriptiveness is asserted, it is sufficient for the plaintiff to establish that it is a competitor. *Plyboo America, Inc. v. Smith & Fong Co.*, 51 USPQ2d 1633 (TTAB 1999); *No Nonsense Fashions, Inc. v. Consolidated Foods Corp.*, 226 USPQ 502 (TTAB 1985). Opposer, in the notice of opposition, alleged:

1. Opposer is a leading provider of decision management solutions powered by advanced analytics. Among other activities, Opposer develops and distributes computer software and other analytical tools and provides consulting services and information in the field of credit and credit scoring throughout the United States and elsewhere.

Although applicant did not admit to all of the allegations contained in the paragraph, applicant did admit that opposer “provides consulting services and information in the field of credit and credit scoring.” (Answer ¶ 1) In view of the admission, we find that opposer has established that it is a competitor of applicant in the financial information industry and, therefore, has demonstrated its standing to oppose the registration of the involved application.

Mere Descriptiveness

⁸ The evidence relied upon is partially duplicated by the parties. We note that the duplication was unnecessary. To the extent that either party has properly introduced evidence, it is of record for use by both parties for any use permitted by the Federal Rules of Evidence. 37 CFR § 2.120(j); TBMP §704.09.

Opposer contends that when the phrase “know your score” is properly analyzed in relation to the services for which registration is sought, the context in which it is being used, and the significance the term would have to the average purchaser, it can only be deemed descriptive of Applicant’s credit reporting ... services.”⁹ Opp. reply br. p. 9. Opposer specifically argues that the phrase “immediately describes the purpose and important characteristic and function of Applicant’s [credit reporting and provision of information in the financial and credit fields] services, - enabling a consumer to know his or her credit score.” Id. at 13. In support of its claims, opposer has made of record: dictionary definitions of each word in the designation KNOW YOUR SCORE; purported descriptive use of the term KNOW YOUR SCORE and wording derived therefrom by applicant, and third party use of the phrase “know your score” either alone or with other wording, including use by competitors.¹⁰

With regard to the definitions, opposer acknowledges that the wording “know your score” is “unlikely to appear in a dictionary as a single entry,”¹¹ and has submitted definitions of each word in the mark taken from *Merriam-Webster’s Online Dictionary* (www.-merriam-webster.com/dictionary).¹² According to these definitions, the word “know” is a verb meaning

⁹ Opposer also argues that applicant’s slogan “know your score” is merely informative advertising, conveying one significant meaning to average consumers that “they need to know what their credit scores is and what effects [sic] their credit score.” In making this argument, opposer relies on a number of cases where the issue involved whether or not an applied-for designation functioned as a mark. We make clear that the only issue before us is whether or not the designation KNOW YOUR SCORE is merely descriptive of applicant’s services. Whether subject matter functions as a mark is a separate issue from whether the subject matter is merely descriptive of the services.

¹⁰ In articulating its position, opposer maintains that the mere descriptiveness of the mark is demonstrated under the dictionary test, the imagination test, the competitive use test, by extensive third-party use of the phrase “know your score,” and under the competitive need test. (Opp br. pp. 18-24). However, as the Board has reiterated, “the [only] test for descriptiveness is whether a term immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used.” *In re Carlson*, 91 USPQ2d 1198, 1203 (TTAB 2009) (internal citations omitted).

¹¹ Opp. br. p. 18.

¹² Opp. NOR exh. S.

“cognizant or aware” of a fact or information. The word “your” means “of or relating to oneself.” The word “score,” in pertinent meaning, means “a mark used for keeping account,” “a number that expresses accomplishment (as in a game or test) or excellence (as in quality) either absolutely in points gained or by comparison to a standard.”

With particular regard to the meaning of the word “score,” opposer contends that a credit score is a means of keeping account of an individual’s credit worthiness. Opposer further contends that the word “score,” as used in the phrase “know your score” in the context of applicant’s services, is a short form of the term “credit score” and is interchangeable with the term “credit score” in the financial industry. Opposer points to applicant’s use of the terms “score” and “credit score,” interchangeably on its website.

We also take note of the following additional examples in the record interchangeability of the terms “score” and “credit score.” For example, the following ad appears on applicant’s website.

An advertisement banner with a black background. On the left is a black and white photo of a smiling woman with dark hair, wearing a white shirt and a dark tie. To her right is a circular logo with a stylized 'S' and the word 'SCORE' below it. The main text in the banner reads: "Mistakes on your Credit Report can cost you thousands! See if yours is accurate." Below this, in smaller text, it says: "Plus, check your Credit Score anytime with the first & only product that delivers your Score directly to your phone."

Free Credit Report Delivered in 2 Days

- May take up to 2 days to see your Report
- Credit Score not included in this offer
- No membership required

Get Your Instant Credit Report & Score for \$1

- See your Credit Report & Score instantly
- Find out which factors affect your Score
- Be alerted when your Score goes up or down

(<http://www.freecreditreport.com>);

In addition, several articles taken from the LexisNexis® database, and submitted by applicant, show that the media commonly use the term “score” interchangeably with the term “credit score.” Examples include:

Economy Hurting Consumer Credit Scores by Patricia Sabatini.

As the housing market collapsed, jobs disappeared and the economy crumbled, American’ credit scores also took a hit.

Credit scores are used by lenders, insurers and others to judge how risky it is to do business with people. Generally, the higher the score, the lower the rate will be for a mortgage, insurance coverage, credit card and other forms of credit. Scores also may be used by companies to evaluate employment or rental applications. (Pittsburgh Post-Gazette (Pennsylvania), November 30, 2010);

California’s Credit Score Ties For Best in Nation: Consumer debt reduction, scarcer credit help boost marks for most states by Dean Calbreath.

California tied with Massachusetts and New Jersey last month for having the highest credit score in the nation, says a report released by CreditKarma, a San Francisco firm that monitors consumer credit.

The worst scores were in the South. Alabama, Kentucky, Louisiana, Mississippi, Oklahoma, South Carolina and Tennessee all had scores below 650. Arkansas was the worst, with an average score of 636. In general, scores below 620 are considered poor; 620-700 is considered average; 700-760 good; and 760-850 excellent.

(The San Diego Union Tribune, November 13, 2010);

Why Time Changes Consumers’ Credit Scores by Lew Sichelman.

A credit score is a three-digit number that is considered an accurate predictor of whether or not borrowers will repay.

But borrowers’ scores are based on the information contained in their credit record. And because what’s in their file is so fluid, so is their score.

(Bank Investment Consultant, November 2010);

UDALL: NEW CONSUMER PROTECTION LEADER SHOULD MAKE FREE ACCESS TO CREDIT SCORE A PRIORITY

Senator Udall is a long-time advocate for pro-consumer measures that help people take greater control of their fiscal health.

Legislation he authored and included in the Wall Street Accountability bill, which became law this summer, requires credit card companies and others to provide consumers with a free copy of their score if they are turned down for credit or receive a less-favorable interest rate.

(State News Service, October 5, 2010); and

Millions of consumers' credit scores drop; KEEPING COUNT by Suzanne Ziegler, Minneapolis Star Tribune.

Americans' credit scores, the three-digit number that determines whether you'll get a loan and how much you'll pay for it, have taken a beating.

Millions of consumers' scores have dropped, making it more expensive for them to borrow money – or even impossible if the score has sunk low enough.

(The Myrtle Beach Sun-News, June 27, 2009).¹³

Opposer also points to assertedly descriptive uses of KNOW YOUR SCORE and derivatives thereof by applicant. We note, however, that the record reflects that applicant uses the designation KNOW YOUR SCORE in a trademark manner, i.e., set apart from any text, in larger font and clearly delineated with the SM symbol. That said, the record does show use by applicant of slight variations of the term in a descriptive manner. For example, in its radio and television ads, applicant uses the phrase “David Gillialan knows his score. Do you?” Opp. NOR exh. I. And, on one of its webpages, as shown below, applicant uses the phrase “KNOW YOUR CREDIT SCORE! to describe its service. App NOR exh. 7.

¹³ Applicant's NOR, Trial exh. 21.



Last, opposer also has made of record evidence showing use of the phrase “know your score” by the government, competitors, other companies, consumer advocacy groups, consumers and news agencies which show descriptive use of the phrase when used in connection with credit scores and the credit reporting industry. Examples include the following (emphasis added):

An article titled *SURVIVING THE NEW ECONOMY* **Know your score** *Lenders have raised the bar, but good rates are still available by* Steve Hart.

The article discusses the importance of credit scores and, in the tips portion of the article, Mr. Hart suggested obtaining free annual credit reports.

(<http://www.pressdemocrat.com/article/20081026/BUSINESS/8102660304?Title+Know-your-score>);

An article from The Washington Post titled *It Pays to Know Your Score* by Annys Shin, Ylan Q. Mui and Nancy Trejos.

The article discusses the importance of credit scores, and advises one to regularly check your credit reports to make sure they are free from errors and to “make sure you figure out what your score is.”

(http://voices.washingtonpost.com/thecheckout/2008/07/it_pays_to_know_your_score.html);

Screenshots and a transcript of a news report originally aired on CBS News titled **Know Your Score**. The report discusses tips for improving your credit score and advises one to pull their credit report and review it for mistakes.

(<http://www.cbsnews.com/stories/2008/03/23/business/main3960888.shtml>);

An online brochure sponsored by The Consumer Federation of America and Freddie Mac¹⁴ titled **KNOW YOUR SCORE**. The brochure defines and discusses credit scores stating that “THERE’S ANOTHER SCORE THAT’S IMPORTANT AS YOU GO THROUGH LIFE. IT’S CALLED A CREDIT SCORE. AND WHETHER YOU KNOW IT OR NOT, SOMEONE IS ALREADY KEEPING TRACK. The brochure also encourages one to obtain and copy of one’s credit report.

(<http://www.consumerfed.org/pdfs/knowyourscore.pdf>);

A printout of an article from the Credit Fairy titled *Take Charge of Your Credit Report: Know Your Score*. The article discusses ones credit score and explains that it “is determined by a complex mathematical formula that synthesizes all the information contained in your credit report and calculates it into one-number – usually between 300-850. The higher your number – or score – the less investment risk you pose in the eyes of lenders or creditors.”

(<http://www.creditfairy.org/credit-scores/index.php>);

A printout from the California Department of Consumer Affairs titled *Know Your Score*. The article explains what is a credit score and indicates where one can obtain a copy of the credit report and/or report errors.

(<http://www.dca.ca.gov/publications/knowyourscore.shtml>);

A printout of an article from The Brownsville Herald titled *Need Credit? Know your Score* by Sean Gaffney. The article discusses the credit score which is computed by three different sources and quotes Don Mayer, a certified financial planner with Edward

¹⁴ We note that the brochure was available on the internet on August 11, 2010, almost six years after Freddie Mac indicated in an email dated September 27, 2006, in response to a cease and desist letter from applicant, that it would cease use of the phrase KNOW YOUR SCORE on its website. Opp. NOR exh. L; App NOR exh. 10. Notably, the brochure was accessed via the website of The Consumer Federation of America, who also received a cease and desist letter from applicant in 2006, although there is no indication of a response in the record. Opp. NOR exh. M; App. NOR exh. 10.

Jones, who states that “[a] lot of people out there don’t understand the score and they need to learn.”

(<http://www.brownsvilleherald.com/common/prINTER/view.php?db=brownsville&is=103246>);

A print of a news release by the Northern Maine Development Commission titled **Know Your Score: Credit Management and Repair**. The news release announces a seminar that will discuss, among other things, how to access and understand your credit report.

(http://www.nmdc.or/Event/credit_workshop.pdf);

A copy of a brochure from the Nebraska Attorney General’s Office titled *Manage Your Credit* and containing a sub-section titled **Know Your Score**. The brochure discusses how your credit score is calculated, the information available in a credit report and how to correct an error.

(http://www.ago.ne.gov/media/Managing_your_credit.pdf);

An article from ABC News titled **Know Your Score Tips of Getting and Understanding Your Credit Rating**. The article discusses “your FICO or credit score, specifically noting that [t]he score is the sole piece of information three-quarters of all financial institutions use to decide your financial future.

(<http://abcnews.go.com/print?id=87829>);

A notice from University Federal Credit Union sub-titled **Know Your Score** imparting details on how to obtain a copy of your credit report containing your credit score.

(<https://www.ufcu.org/learning/credit/scores/know.php>);

A notice form CarBuyingHelpOnline.com advises one to “[k]now your credit score before you start any other aspect of looking for a car.”

(<http://www.carbuyinghelponline.com/creditreport/creditreport.htm>);

An article from LeaseGuide.com titled Credit Score – **Know Your Score** and Understand It, discussing, among other things, what is a credit score and poor credit scores that result from errors or outdated information about you in your credit history.

(<http://www.leaseguide.com/articles/creditscore.htm>);

An article in SHARE newsletter titled **Know Your Score!** by Bobbie Lison (Green Bay Catholic Charities Budget Counseling). The article states that “[e]verybody knows that credit reports are

the report cards for how well you've handled your finances." It also identifies the three credit bureaus and explains what information they use to calculate your credit score.
(<http://www.sharewi.org/spotlight/2008/September/KnowYourScore.html>);

A blog post by Lesley Scorgie titled *Know Your Score* discussing proactively managing your credit score.
(<http://lesleyscorgie.com/blog/2009/02/know-your-score>); and

An article from debt help and advice entitled **Know Your Score** discussing credit scores and credit reporting.
(<http://debt-help.ath.cx/search/%22know%20your%20score%22>).¹⁵

In response, applicant, citing insufficient evidence, contends that opposer did not meet its burden to show that applicant's applied-for mark KNOW YOUR SCORE is merely descriptive of its identified services. Applicant also contends that its applied-for mark is not merely descriptive of the identified services, but rather is "inherently distinctive as shown by its

¹⁵ Opp. NOR exhs. M, T and W.

Opposer additionally made of record information regarding a series of articles which do not show the phrase KNOW YOUR SCORE or similar wording. Although some of these materials provide useful background information concerning credit scores, they do not demonstrate that the wording KNOW YOUR SCORE at issue herein is understood by consumers to merely describe applicant's services, and are therefore of limited probative value. This evidence includes, for example, the following articles: *What is a Good Credit Score*, <http://www.doughroller.net/credit/what-is-a-good-credit-score/>; *How Do I Know if My Credit Is Good?* by Mark Lima, <http://www.creditscore.net/how-do-i-know-if-my-credit-is-good/#>; *Free Credit Score and Triple Credit Scores*, <http://www.gofreecredit.com>; *Check your credit without hurting your score*, <http://www.mensnow.com/check-your-credit-without-hurting-your-score/>; *7 Ways to Improve Your Credit Score* by Joelle Steffan, <http://creditsesame.com/blog/7-ways-to-improve-your-score/>; *How to Increase Your Credit Score*, <http://everythingfinanceblog.com/2011/01/how-to-increase-your-credit-score.html>; *What's In a Credit Score?* by Christina Couch, <https://getcurrency.com/article/what-s-in-a-credit-score>; and *Unearthing the black magic behind your credit score*, by J.D. Colbert, <http://64.38.12.138/News/2011/000085.asp>.

We further find the results list for a search of the phrase "know your score" on the Google search engine has limited probative value because many of the entries either do not contain sufficient context or discuss goods and services unrelated to the services at issue in this case. However, the actual web pages, where submitted, have probative value in our descriptiveness analysis.

We also did not consider the Facebook page, identified as FIC000158, because it contains no identifying information.

suggestive nature, based on its multiple meanings and the need to use thought and imagination in a multi-step process to understand a connection between the mark and Applicant's services. Further, applicant contends that the inherent distinctiveness of the mark was confirmed by the determination of two PTO examiners." App. br. p. 18. Last, applicant contends that its mark will not foreclose competitors from descriptive use of a necessary phrase. In support of its position, applicant made of record copies of sixty-three magazine, journal and other news outlet articles retrieved from a search of the LexisNexis data, and websites showing that third-parties use a variety of different phrases in discussing credit scores, credit report services and related financial topics. Applicant also submitted a copy of the third-party registration, No. 3339440, for the mark KNOW YOUR SCORE (Principal Register) for "Health information services, namely, providing information on prostate cancer, hypertension, heart disease and other men's health issues; medical evaluation services, namely, conducting patient screening programs for the detection, treatment and management of prostate cancer, hypertension, heart disease and other diseases affecting men's health" and its file wrapper.

Applicant also argues, in the alternative, that its mark has acquired distinctiveness, as more fully discussed *infra*.

Applicable Law

A term is deemed to be merely descriptive of the services within the meaning of Trademark Act Section 2(e)(1), if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the services. *See, e.g., In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987); *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215 (CCPA 1978). A term need not immediately convey an idea of each and every specific feature of the applicant's or registrant's goods or services in order to be considered

merely descriptive; it is enough that the term describes one significant attribute, function or property of the goods or services. *See In re H.U.D.D.L.E.*, 216 USPQ 358 (TTAB 1982); *In re MBAssociates*, 180 USPQ 338 (TTAB 1973). Whether a term is merely descriptive is determined not in the abstract, but in relation to the goods or services for which registration is sought, the context in which it is being used in connection with those goods or services, and the possible significance that the term would have to the average purchaser of the services because of the manner of its use; that a term may have other meanings in different contexts is not controlling. *In re Bright-Crest, Ltd.*, 204 USPQ 591 (TTAB 1979). It is settled that “the question is not whether someone presented with only the mark could guess what the goods or services are. Rather, the question is whether someone who knows what the goods or services are will understand the mark to convey information about them.” *In re Tower Tech Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002).

In the case before us, the mark in issue is in the nature of a slogan. A slogan, phrase or any other combination of words may act as a trademark so long as the slogan or combination is used in such a way as to identify and distinguish the user’s goods or services from those of others. However, a slogan or phrase may be merely descriptive and, thus, unregistrable on the Principal Register in the absence of acquired distinctiveness, if it directly refers to a characteristic of the goods or services with which it is used. The mere descriptiveness analysis is the same for a slogan as it is with any other proposed mark. *See In re Standard Oil Co.*, 275 F.2d 945, 125 USPQ 227 (CCPA 1960). *See generally* J.T. McCarthy, McCarthy on Trademarks and Unfair Competition, §7:22 (4th ed. updated 2013).

Slogans may be descriptive where they are self-laudatory or commonly used in the relevant industry. Where a slogan is not “unique or catchy” but rather informs the purchasing

public about an aspect of the services, it is considered descriptive. As the Board stated in *In re Melville Corp.*, 228 USPQ 970, 971-972 (TTAB 1986) (BRAND NAMES FOR LESS highly descriptive of retail clothing story store):

In an environment where consumers are accustomed to the use by merchants of similar informational phrases, we believe that consumers are not likely to view applicant's slogan as a service but rather as a merchandising slogan using common ordinary words merely to convey information about applicant's services. ... Such a highly descriptive and informative slogan should remain available for other persons or firms to use to describe the nature of their competitive services.

Findings of Fact

Based on the record we find the following facts. The words “score” and “credit score” are used interchangeably in the credit reporting and financial information industries. The phrase “know your score” has been and continues to be routinely used by those in the credit and financial sectors, government, consumer advocacy groups, and media to describe a consumer's need to know what their credit score is, its effect and how to obtain it.

Decision

Based on these findings, we hold that the designation KNOW YOUR SCORE immediately, and without mental gymnastics, informs consumers of the purpose and function of applicant's credit reporting services and provision of information services in the financial and credit fields, namely that they enable a consumer to know his or her credit score or, as applicant puts it, it allows relevant consumers to “know your score.”

We find applicant's arguments to the contrary unpersuasive. First, applicant contends that it plays on the multiple meanings of “score” in the mark by widely promoting the mark and services it identifies at sports stadiums and in other sports contests such that this promotional theme creates a double entendre and challenges the consumer use a mental process to

“extrapolate a connection” between the mark and the services. App. br. p 18. We thus consider whether KNOW YOUR SCORE has a second meaning that evokes a double meaning such that purchasers will readily appreciate that the mark is a double entendre.

“Double entendre” is defined as “ambiguity of meaning arising from language that lends itself to more than one interpretation.” Webster’s Third New International Dictionary (1993) at p. 678. As stated in TMEP § 1213.05(c) (emphasis supplied), “[a] ‘double entendre’ is a word or expression capable of more than one interpretation. For trademark purposes, a ‘double entendre’ is an expression that has a double connotation or significance *as applied to the goods or services*. The multiple interpretations that make an expression a ‘double entendre’ must be associations that the public would make fairly readily, and *must be readily apparent from the mark itself*.”

A mark thus is deemed to be a double entendre only if both meanings are readily apparent from the mark itself. If the alleged second meaning of the mark is apparent to purchasers only after they view the mark in the context of advertising materials or other matter separate from the mark itself, then the mark is not a double entendre. See *In re The Place, Inc.*, 76 USPQ2d 1467, 1470 (TTAB 2005) (THE GREATEST BAR held laudatory and merely descriptive of restaurant and bar services; the Board stating that “[i]f the alleged second meaning of the mark is apparent to purchasers only after they view the mark in the context of the applicant’s trade dress, advertising materials or other matter, then the mark is not a double entendre”); and *In re Wells Fargo & Co.*, 231 USPQ 95 (TTAB 1986) (EXPRESSERVICE held merely descriptive for banking services, despite applicant’s argument that the term also connotes the Pony Express, the Board finding that, in the relevant context, the public would not make that association).

Here, although applicant may have intended that its mark convey a dual sports-themed meaning, the record simply does not establish that consumers of applicant's services would, upon seeing the mark itself, recognize this sports meaning.

Similarly, the single third-party registration for the mark KNOW YOUR SCORE for vastly different health care services does not evidence applicant's contention that KNOW YOUR SCORE will be understood to have multiple meanings. That a term may have other meanings in other contexts is simply not controlling. *Bright-Crest, Ltd, supra*.

We also find unavailing applicant's contention that highly similar derivations of "know your score," e.g., "know the score" have no value in our mere descriptiveness analysis. We find so because this is contradictory to the position applicant takes with regard to policing its mark. Particularly, although applicant asserts on the one hand that the use of derivative phrases should not be considered in assessing mere descriptiveness, it relies, on the other hand, on evidence, discussed *infra*, showing it threatened competitors for use of even broader derivatives as proof of its enforcement of the applied-for mark. Specifically, in its cease and desist letters to opposer and Union Privilege, applicant challenged their respective use of the phrases "Know Your Fico Scores" and "We Want You To Know the Score "or Know the Score" for "credit-report related services or products." Opp. NOR exh. L; App. NOR exh. 10. Applicant simply cannot have it both ways and we find that a minor alteration to the phrase, such as the inclusion of a "the" instead of the term "your" does not significantly alter the overall impression of the third-party designations.

Applicant, also urges us not to consider its "Creative Briefs," which were filed under Seal. While we cannot discuss the specifics of applicant's argument, it is not persuasive. While

we recognize that the documents are solely for internal use, they nonetheless contribute to and confirm our understanding of applicant's intended meaning of its applied-for mark.

Last, we do not find applicant's applied-for mark inherently distinctive merely because two different examining attorneys approved the application for registration. It is settled that the Board is not bound by the decisions of examining attorneys. *See Cineplex Odeon Corp. v. Fred Wehrenberg Circuit of Theatres Inc.*, 56 USPQ2d 1538 (TTAB 2000).

In short, opposer has established that the designation KNOW YOUR SCORE when used in connection with "credit reporting services; credit information provided by electronic means, and providing information in the financial and credit fields" is merely descriptive.

Acquired Distinctiveness

Having found that applicant's mark is merely descriptive, we now address applicant's alternative claim that the proposed mark has acquired distinctiveness. Applicant particularly asserts that, even if its applied-for mark is not found inherently distinctive, the mark has acquired distinctiveness through an extensive advertising program and expenditures resulting in widespread consumer exposure to the mark as well as through substantially exclusive and continuous use for more than five years. Applicant also asserts acquired distinctiveness based on its ownership of Registration No. 2422711 for the mark KNOW YOUR SCORE for "providing credit report information to perspective first mortgagers."

Applicant has the burden to establish, by a preponderance of the evidence, a *prima facie* case that the wording "know your score" has become distinctive. *See Yamaha International Corp. v. Hoshino Gakki Co., Ltd.*, 840 F.2d 1572, 6 USPQ2d 1001 (Fed. Cir. 1988). The greater the degree of descriptiveness, the greater the evidentiary burden on the user to establish acquired distinctiveness. *See Yamaha Int'l Corp., supra*. Highly descriptive terms, for example, are less

likely to be perceived as trademarks and more likely to be useful to competitors than are less descriptive terms. More substantial evidence of secondary meaning thus will ordinarily be required to establish their distinctiveness.

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 Bograin International Corp.*, 894 F.2d 1316, 13 USPQ2d 1727 (Fed. Cir. 1990). With regard to the sales and advertising expenditures, while gross sales and advertising figures may be indicative of applicant's success, they are not necessarily sufficient to prove acquired distinctiveness. *In re Boston Beer Co. L.P.*, 198 F.3d 1370, 53 USPQ2d 1056 (Fed. Cir. 1999) (claim based on annual sales under the mark of approximately eighty-five million dollars, and annual advertising expenditures in excess of ten million dollars, not sufficient to establish acquired distinctiveness in view of highly descriptive nature of the mark). This is particularly so here where the evidence indicates that although applicant spends millions of dollars each year on broadcast TV and radio commercials, and places its advertisements in high-traffic areas such as Time Square, sports stadiums and on its website, the advertising either solely features or additionally features applicant's mark FreeCreditReport.com. As applicant notes in its brief, "[a]pplicant's FreeCreditReport.com website uses applicant's KNOW YOUR SCORE trademark as a slogan, followed by SM, placed prominently under the FreeCreditReport.com[®] mark." (App. Br. p. 24). As such, it is unclear from this evidence whether the relevant consumers view KNOW YOUR SCORE as a distinctive source indicator for applicant's services. Applicant has not compared the quantity and quality of its advertising to that of other entities that provide similar services; that is, we find no information in the record to put those figures into context,

i.e., whether applicant's share of the market is in fact significant and how its marketing expenditures compare to those in the industry generally.

Further, applicant has not provided evidence of unsolicited third-party use of its mark, such as ads, magazine or news articles that reference applicant's mark as an indicator of source for applicant's services.

Applicant also has noted in confidence, so we will not disclose specifics, a substantial number of unique visitors to its website, which it asserts is ranked highly in a list of the most visited sites online, App. Supp. Resp. to Opp. Interrogatories pp. 13-14,¹⁶ and applicant further claims that it retains a "position as a leader in the credit report information industry." (App. br. p. 24). Again, applicant's claims are without context and corroboration.

For these reasons, we cannot ascertain the impact applicant's KNOW YOUR SCORE slogan has made on the consuming public as a result of public exposure and, thus, whether it has acquired distinctiveness as an indicator of source of applicant's identified services.

With respect to applicant's claim of use of the mark for at least five years, we note that the Trademark Act provides that the USPTO may accept such use as *prima facie* evidence of distinctiveness. However, such use must be "substantially exclusive and continuous." Trademark Act § 2(f). In that regard, it has been held that:

In respect of registration, there must be a trademark, i.e., purchasers in the marketplace must be able to recognize that a term or device has or has acquired such distinctiveness that it may be relied on as indicating one source of quality control and thus one quality standard. When the record shows that purchasers are confronted with more than one (let alone numerous) independent users of a term or device, an application for registration under Section 2(f) cannot be successful, for distinctiveness on which purchasers may rely is lacking in such circumstances.

¹⁶ Applicant NOR exh. 3.

Levi Strauss & Co. v. Genesco, Inc., 742 F.2d 1401, 222 USPQ 939, 940-41 (Fed. Cir. 1984); see also *Target Brands Inc. v. Hughes*, 85 USPQ2d 1676, 1682 (TTAB 2007).

The evidence of record shows that numerous third parties have used the same or similar wording in relation to similar or related services. The evidence also reveals that applicant, on at least five occasions, sent cease and desist correspondence to various organizations, including opposer, asserting that these organizations were using the same or a very similar mark to its applied-for KNOW YOUR SCORE mark in connection with credit information services that directly compete with applicant. While demonstrating applicant's efforts to police its mark, this correspondence also shows that these third parties were using the mark at least some of the time during which applicant claims exclusive use, further diminishing any possibility that a significant number of consumers may have formed the connection between the mark and the applicant as a source of the named services necessary to establish distinctiveness. Indeed, the record shows that only two of the organizations agreed to discontinue use and, one of which failed to do so. App. NOR exh. 10.

Additionally, the record shows that a significant number of third parties use the wording KNOW YOUR SCORE, or wording very similar thereto, to communicate the usefulness of knowing one's credit score and the connection between credit scores and credit reporting. In fact, applicant has acknowledged that it is "aware of third party uses of the phrase 'know your score' or which include the words 'know' and 'score' or derivatives of 'know' and 'score'." Applicant's responses to opposer's second set of interrogatories at p. 3.¹⁷ Although absolute exclusivity is not required, see *L.D. Kitchler Co. v Davoli, Inc.* 192 F3d 1349, 52 USPQ2d 1307 (Fed. Cir. 1999), the numerous third-party uses clearly show that others are using the wording

¹⁷ Opp. NOR exh. C.

“KNOW YOUR SCORE” to describe substantially similar credit information services. Because applicant’s use is not “substantially exclusive,” applicant may not rely on its asserted five years’ use to show that the wording in the applied-for mark has acquired distinctiveness.

Finally, we consider applicant’s claim of acquired distinctiveness based on its ownership of Registration No. 2422711 (issued January 23, 2001) for the mark KNOW YOUR SCORE for “providing credit report information to perspective first mortgagors” in Class 36. This mark is registered on the Principal Register in standard character format. Applicant argues that the mark in this registration is the same as the mark herein, and that the services in the registration are closely related to those in the application.

At the outset, we note that Section 7(b) of the Trademark Act provides that a registration on the Principal Register “shall be prima facie evidence of the validity of the registration, registrant’s ownership of the mark and of registrant’s exclusive right to use the mark in commerce in connection with the goods or services specified in the certificate.” *See also In re Electro Products Laboratories, Inc.*, 156 USPQ 54 (TTAB 1967). Thus, Section 7(b) creates the basis for permitting reliance on an existing registration, under certain circumstances, to support a claim that distinctiveness has been transferred to a mark which is essentially the same as the registered mark for essentially the same goods or services.

However, in this case, the services in the application are different from those recited in the registration, and they are also broader in scope. While the services in the application are identified as “providing credit report information to perspective [sic] first mortgagors,” the services in the application are identified broadly as “credit reporting services; credit information provided by electronic means,” and “providing information in the financial and credit fields,” which would include additional and different credit report information.

Ownership of an existing registration does not give applicant the right to register the same mark for different or broader services, even if they are closely related to the services in the registration. *See In re Best Software*, 63 USPQ2d 1109, 1113 (TTAB 2002). *See also In re Loew's Theatres Inc.*, 769 F.2d 764, 768, 226 USPQ 865, 869 (Fed. Cir. 1985) (“Nothing in the statute provides a right *ipso facto* to register a mark for additional goods when items are added to a company’s line or substituted for other goods covered by a registration); *In re Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1142 (Fed. Cir. 1987) (incontestable registration for specific services involving credit cards does not automatically entitle applicant to a registration for broader financial services). It is established that the Board must decide each case on its own facts and record. *In re Netts Design Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001); *In re International Taste Inc.*, 53 USPQ2d 1604, 1606 (TTAB 2000).

We therefore find that the prior registration also does not serve as a basis for applicant’s claim of acquired distinctiveness.

In sum, the record simply does not support a finding that the wording “know your score” has acquired distinctiveness as an indicator of source of applicant’s credit reporting and information services. Accordingly, we find that the mark has not acquired distinctiveness in connection with the identified services.

Decision: Opposer’s opposition to the registration of the mark in application Serial No. 79855572 on the ground that the mark is merely descriptive of the identified services, and has not acquired distinctiveness, is sustained.