

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Mailed:  
February 29, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE  
**Trademark Trial and Appeal Board**

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*Perfect Memorials LLC*

*v.*

*United Priority Distributors*

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Opposition No. 91209028  
to application Serial No. 85722100

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Peter G. Nikolai of Nikolai & Mersereau PA for Perfect Memorials LLC.

Paul Godfread of Godfread Law Firm PC for United Priority Distributors.

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Before Cataldo, Taylor and Ritchie,  
Administrative Trademark Judges.

Opinion by Taylor, Administrative Trademark Judge:

United Priority Distributors, a sole proprietorship comprised of Susan Fraser, (“Applicant”) seeks registration of WEEPING ANGEL, in standard characters, as a mark for goods identified as “funerary urns” in International Class 20.<sup>1</sup>

Perfect Memorials LLC (“Opposer”) has opposed registration of the asserted mark on the ground that the term WEEPING ANGEL is merely descriptive of the

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<sup>1</sup> Application Serial No. 85722100, filed September 6, 2012, alleging July 25, 2010 as the date of first use anywhere and in commerce.

identified goods and has not become distinctive of them. Opposer particularly alleges that for several years it has sold, distributed and advertised in interstate commerce urns and other memorials used to celebrate and honor the deceased and that it has widely sold and distributed, and advertised, an urn incorporating the public domain sculpture of a weeping angel. Not. of Opp. ¶¶ 1 and 10.<sup>2</sup> Opposer further alleges that in 1894 Sculptor William Wetmore Story created a work of sculpture known as the “The Angel of Grief”; that others have referred to that sculpture as “the weeping angel” or the “the weeping angel of grief”; that the Angel of Grief sculpture is in the public domain and, accordingly, Opposer and others are free to sell goods incorporating or copying the Angel of Grief sculpture; and that the term “weeping angel” as applied to funeral urns ... conveys the immediate idea of the “quality” of Applicant’s goods in that they are urn sculptures showing a weeping angel or, alternatively, that Applicant’s funeral urn is the Angel of Grief Sculpture commonly known as the weeping angel. Not. of Opp. ¶¶ 2, 4, 6, 7 and 12.<sup>3</sup>

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<sup>2</sup> 1 TTABVUE 3 and 5.

<sup>3</sup> 1 TTABVUE 4-6.

Opposer attached to its Notice of Opposition Exhibits A through D, consisting of copies of over 250 webpages in support its descriptiveness claim. While a plaintiff, or defendant for that matter, may attach exhibits to its pleadings, with two exceptions not applicable here, they are not evidence on behalf of that party unless they are properly identified and introduced as evidence during the party’s testimony period. Trademark Rule 2.122(c); 37 CFR § 2.122(c); *see also Home Juice Company. v. Runclin Companies, Inc.*, 231 USPQ 897, 898 (TTAB 1986) (exhibits attached to the parties’ pleadings are not in evidence and given no consideration); *Intersat Corp. v. International Telecommunications Satellite Organization*, 226 USPQ 154, 155 n.3 (TTAB 1985) (exhibit attached to pleading not evidence on behalf of party to whose pleading exhibit is attached unless identified and introduced in evidence as exhibit during period for taking testimony). Unless properly resubmitted during Opposer’s testimony periods, the exhibits have not been further considered.

Applicant, in its answer, has denied the salient allegations in the notice of opposition, except that Applicant admits that “Opposer sells memorials,”<sup>4</sup> that “Opposer has sold and distributed an urn ... which is very similar to Applicant’s products sold under the WEEPING ANGEL trademark,”<sup>5</sup> and that “the specimen submitted by Applicant shows a copy of the Angel of Grief Sculpture.”<sup>6</sup> Applicant also has asserted the affirmative defenses of trademark infringement, palming off and unclean hands.<sup>7</sup>

Evidentiary Matters

*Matter Introduced Into Record by Notice of Reliance*

We note, first, that both Opposer and Applicant seek to make of record solely by notice of reliance portions of earlier-filed and decided motions for summary judgment, indicating in their respective notices their intention to rely upon, in pertinent part, “printed publications of general circulation[.]” including those available on the Internet. Opposer includes as Exhibits 1 and 2 to its Notice of Reliance, respectively, copies of Opposer’s Motion and Memorandum of Law in

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<sup>4</sup> Applicant’s Answer at ¶ 1, 8 TTABVUE 2.

<sup>5</sup> Id. at ¶ 10, 8 TTABVUE 3.

<sup>6</sup> Not. of Opp. at ¶ 11, Answer at ¶ 11; 1 TTABVUE 5, 8 TTABVUE 3.

<sup>7</sup> We note that in setting forth the “Statement Of Issues” in its brief, Applicant refers only to its asserted “unclean hands” defense and, accordingly, that is the only affirmative defense we address in this decision. We add, in any event, that the Board does not have jurisdiction over infringement and unfair competition or “palming off” claims or defenses.

As regards the additional allegations under the “Affirmative Defenses” section of the Answer, Applicant’s first “affirmative defense,” i.e., that the notice of opposition fails to state a claim upon which relief can be granted is hereby stricken, inasmuch as the notice of opposition clearly states cognizable claims. As for the remaining allegations, they are more in the nature of amplifications of Applicant’s denials and are treated as such.

Support of Motion for Summary Judgment and Applicant's Combined Opposition and Cross Motion for Summary Judgment, both printed from the TTABVUE website. Opposer attempts to rely on these materials "[t]o show factual assertions which were admitted to by Applicant. The factual statements made in Opposer's Memorandum of law [and Applicant's Opposition] are only relied on to the extent that they show factual admissions against interest made by Applicant pursuant to TBMP § 704.6(b)."<sup>8</sup>

Applicant includes as Exhibits 53 and 54 to its Notice of Reliance, respectively, "Opposer's summary judgment brief" and "Applicant's cross motion for summary judgment brief," with exhibits, apparently both printed from the TTABVUE website.<sup>9</sup> Applicant indicates in its notice of reliance that it intends to "demonstrate factual admissions made by Opposer as well as statements against interest by opposer."<sup>10</sup>

Because the parties apparently have considered the summary judgment materials to be the equivalent of printed publications or official records, we begin by noting that printed publications and official records need not be introduced in connection with the testimony of a witness but may instead be made of record by filing the materials with the Board under cover of one or more notices of reliance during the testimony period.

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<sup>8</sup> 24 TTABVUE 2-3.

<sup>9</sup> While Applicant indicates that Exhibit 53 was "printed from the TTAB website," the notice contains no such indication with regard to Exhibit 54.

<sup>10</sup> 27 TTABVUE 4.

Traditionally, the term printed publications has been considered to include books and periodicals available to the general public in libraries or of general circulation among members of the public or that segment of the public which is relevant under an issue in a proceeding. In addition, and in lieu of the actual “printed publication or a copy of the relevant portion thereof,” a notice of reliance may be accompanied by an electronically generated document which is the equivalent of the printed publication or relevant portion, as, for example, by a printout from the NEXIS computerized library of an article published in a newspaper or magazine of general circulation. In both cases the publication must be competent evidence and relevant to an issue in the proceeding. *See* Trademark Rule 2.122(e), 37 C.F.R. § 2.122(e). Opposer’s motion and Applicant’s cross-motion for summary judgment are not such publications and may not on that basis be made of record by notice of reliance alone.

To the extent the parties consider their respective motion papers introduced by notice of reliance to be official records, the term “official records” as used in 37 CFR § 2.122(e) refers to the records of public offices or agencies, or records kept in the performance of duty by a public officer. These official records are considered self-authenticating, and as such, require no extrinsic evidence of authenticity as a condition to admissibility. *See Conde Nast Publications Inc. v. Vogue Travel, Inc.*, 205 USPQ 579, 580 n.5 (TTAB 1979). The USPTO’s files, such as registration files, are in electronic form and accessible to all via the Internet, and to that extent are official records. *Safer Inc. v. OMS Investments Inc.*, 94 USPQ2d 1031, 1038 (TTAB

2010). However, while the Board's proceeding files are maintained electronically, and are accessible via the Internet by the general public, they contain not only records prepared by "public officials," see *Conde Nast Publications. v. Vogue Travel* 205 USPQ at 580 n.5 (official records are prepared by a public officer), but also copies of motion papers and other filings, such as the parties' summary judgment briefs, which are created and made of record by individuals and entities who are not "public officials." Stated simply, while the parties' filings, including the summary judgment motion papers at issue here, are kept in the Board's database, they are not prepared by "public officials" of the USPTO and are not self-authenticating in nature. Thus, we do not consider such filings "public records," and they cannot be made of record by notice of reliance alone.

Last, both Opposer and Applicant indicated that the summary judgment materials were printed from the TTAB website, and may believe that the materials are admissible as materials from the Internet. In *Safer, Inc. v. OMS Investments, supra*, the Board changed its practice regarding Internet evidence, holding that a document obtained from the Internet may be admitted into evidence pursuant to a notice of reliance in the same manner as a printed publication in general circulation in accordance with 37 CFR § 2.122(e). The document must identify its date of publication or the date it was accessed and printed, and its source (URL). *Edom Laboratories Inc. v. Lichter*, 102 USPQ2d 1546, 1550 (TTAB 2012) (web pages inadmissible for lack of URL and date accessed).

Internet documents that may be introduced by notice of reliance include, for example, websites, advertising, business publications, annual reports, and studies or reports prepared for or by a party or non-party, as long as they can be obtained through the Internet as publicly available documents. This expands the types of documents that can be introduced by notice of reliance beyond printed publications in general circulation, and means that some Internet documents, such as annual reports that are publicly available, can be made of record by notice of reliance when paper versions of the annual reports would not be acceptable as printed publications, because the paper copies are not generally available to the public. *See generally*, Trademark Trial and Appeal Board Manual of Procedure (TBMP) § 704.08(b). Even though the parties' respective motion papers are kept in the Board's TTABVUE database as part of the official proceeding record, and while such proceeding records are mostly available to the general public,<sup>11</sup> the TTABVUE database is simply a repository for all filings in a Board proceeding. As such, most party and non-party filings are subject to bias inherent in prosecuting or defending a position. The public access to these filings does not transform the submissions into "printed publications" and, as previously stated, they are not self-authenticating in nature. As such, it would be inappropriate to expand the holding of *Safer* to include submission of such party filings by notice of reliance alone. Indeed, such an expansion of *Safer* was not contemplated by the Board.

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<sup>11</sup> Confidential filings are not available for viewing by the general public.

Moreover, with regard to the summary judgment motion papers at issue here, given the greater evidentiary latitude afforded while building a summary judgment record,<sup>12</sup> in the absence of a stipulation by the parties, we find them particularly unsuitable to make of record by notice of reliance alone.

Lastly, we point out that neither party's filing includes the required identifying information, i.e., the URL. Therefore, even if the summary judgment brief submissions had been proper materials for filing solely by notice of reliance under *Safer*, they are procedurally deficient. *See Edom Laboratories v. Lichter*, 102 USPQ2d at 1550 (web pages inadmissible for lack of URL and date accessed).

For the reason discussed above, we find that the holding of *Safer* does not extend to TTABVUE records of the parties' previously-filed motions for summary judgment, including any supporting evidentiary materials. Accordingly, Opposer's Exhibit Nos. 1 and 2 and Applicant's Exhibit Nos. 53 and 54 have not been considered in this decision.<sup>13</sup>

### *Evidentiary Objections*

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<sup>12</sup> In a summary judgment motion, materials may be submitted as attachments or exhibits to a party's brief or affidavit in support of the motion and, unlike materials which require authentication prior to submission, are not subject to cross examination. *See generally* TBMP § 528.05(a)(1) (2015) and the authorities cited therein.

<sup>13</sup> Opposer and Applicant filed in-part duplicate submissions. While there is some overlap in the submissions, we do not construe the separate filings as any type of stipulation. The parties could have, but did not, stipulate that any or all of the summary judgment materials be treated as properly of record for purposes of trial. *See, Micro Motion Inc. v. Danfoss A/S*, 49 USPQ2d 1628, 1629 n.2 (TTAB 1998) (parties stipulated that evidence submitted in connection with summary judgment motion shall be deemed of record for trial).



We next consider several evidentiary objections made by Opposer. First, Opposer objects to the introduction of Exhibits 51 and 52 to Applicant's Notice of reliance, arguing that they do not constitute relevant evidence under FED. R. EVID. 402. Exhibit 51 consists of a printout of Registration No. 4305103 owned by Applicant for the mark PEACEFUL PETALS, taken from the Trademark Status and Document Retrieval (TSDR) system. Exhibit 52 consists of screenshots from the website at <http://www.perfectmemorials.com/peaceful-petals-cloisonne-cremation-urn-wood-base-p-9687.html>, showing a "Peaceful Petal Cloisonné Cremation Urn" offered for sale. Applicant did not respond to the objection. However, inasmuch as this proceeding solely involves Applicant's applied-for mark "WEEPING ANGEL," and because as more fully discussed, *infra*, Applicant's unclean hands defense is unavailable, we find these materials irrelevant to the matter at hand. Accordingly, Opposer's evidentiary objection is sustained and we give no further consideration to materials identified as Exhibits 51 and 52.<sup>14</sup>

Opposer also objects to Exhibit 56, a screenshot from an archive version of Opposer's website, and Exhibit 57, a copy of a press release publicized by Yahoo! Finance, ([finance.yahoo.com/news/Perfect-Memorials-Introduces](http://finance.yahoo.com/news/Perfect-Memorials-Introduces)) discussing, *inter alia*, Opposer's products and pricing. Opposer contends that the materials are "hearsay within hearsay" and do not show what Applicant claims they do in its notice of reliance, [i.e., a statement against interest as well as that Opposer's use of

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<sup>14</sup> Opposer also contends that the materials were not produced during discovery, and included with its objections, a copy of the pertinent discovery request. We find the exclusion of these materials also is warranted under that basis.

the WEEPING ANGEL trademark was solely to compare with Applicant]. Applicant only responded to the objection to Exhibit 57, arguing that the materials are covered by exceptions to the hearsay rule, namely that the identified materials include statements against interest, as well being a recorded recollection of matter that Opposer's witness once knew but now cannot remember.

We find the materials identified as Exhibits 56 and 57 are not covered by any hearsay exception provided under Federal Rules of Evidence such that they could demonstrate the truth of the printed matter. The archived material states on its face that the Weeping Angel Cremation Urn offered by Opposer is under "Limited Stock – Not Currently Available." This statement does not demonstrate, as Applicant claims, that the urn was not available prior to October 2011.

As regards the press release, it was issued on a third-party website and states that Opposer's Weeping Angel and Pieta Cremation urns may be ordered at "Industry Low Prices" where "Loved Ones Can Now Save up to 71% on Historic Replica Cremation Urns." There is no specific mention of Applicant or its products and no specific comparison of the parties' respective products. Moreover, Applicant had an opportunity to cross-examine Mr. West, Opposer's owner, and if, as Applicant asserts, it was unsatisfied with Mr. West's responses, Applicant could have interposed objections on the record.

Nonetheless, the documents are properly identified Internet materials and under *Safer Inc. v. OMS Investments, Inc.*, 94 USPQ2d at 1040, are admissible, but only to show what has been printed, not the truth of what has been printed. *See*

*Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1467 n.30 (TTAB 2014). Accordingly, Opposer's objections are overruled. However, we are cognizant of those objections, and the inherent limitations of the Internet materials submitted as Exhibits 56 and 57, and will accord them their appropriate probative weight.

### The Record

The record includes the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file history of the subject application. In addition, and subject to the above, Opposer properly made of record during its testimony and rebuttal testimony periods:

1. The testimony deposition, with exhibits, of its owner, Michael West
2. The testimony deposition, with exhibits, of Mark DeTorre, a survey expert
3. A notice of reliance on:
  - a. excerpts from various publications discussing the Angel of Grief sculpture
  - b. definitions of the terms weep, weeping and angel
  - c. blog entries discussing the Angel of Grief sculpture
  - d. a printout of the involved application<sup>15</sup>
  - e. printouts from various websites to show that the term "weeping angel" is used to describe a variety of monuments and other goods which incorporated images of weeping angels and/or replicas of the Angel of Grief sculpture

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<sup>15</sup> The pleadings and the file of the involved application are already of record. Duplication by both Opposer and Applicant was unnecessary.

f. screenshots of digital downloads from various websites to show that the term “weeping angel” is used to describe a variety of monuments and other goods which incorporated images of weeping angels and/or replicas of the Angel of Grief sculpture

g. A printout from the TESS data base of the USPTO for registration No. 4305353 for the mark ANGEL OF GRIEF, owned by Applicant

h. Webpages from one of Applicant’s websites

i. Applicant’s Amended Answers to Opposer’s First Set on Interrogatories

Applicant, during its testimony period, properly made of record the following:

1. The testimony of its sole proprietor, Susan Fraser<sup>16</sup>
2. A notice of reliance on the following:
  - a. the application for WEEPING ANGEL
  - b. Applicant’s Answer to the Notice of Opposition
  - c. Opposer’s responses to Applicant’s first set of interrogatories
  - d. a screenshot from an archived version of Opposer’s website
  - e. a press release by Opposer dated August 16, 2011 discussing new products and their pricing

Both Opposer and Applicant filed briefs on the case, and Opposer filed a reply brief.

#### The Parties

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<sup>16</sup> Prior to the commencement of the deposition, Opposer’s counsel objected to the taking of this testimony under Trademark Rule 2.121(e), arguing that Applicant failed to timely serve on Opposer its pretrial disclosures notifying Opposer of its intent to call Ms. Fraser as a witness. Opposer, however, elected to cross-exam Ms. Fraser, and did not move to strike the testimony. Accordingly, we have considered Ms. Fraser’s testimony in this decision. *See* Trademark Rule 2.123(e). Notably, Opposer in the description of the record in its brief listed the testimony deposition of Ms. Fraser.

*Opposer*

Opposer offers memorial cremation urns, cremation jewelry and other memorial products. Opposer began offering “Weeping Angel” products in the nature of cremation urns and porcelain ornaments in April of 2011. Opposer promotes and sells its products on the Internet. Opposer never sought trademark protection for its weeping angel products and does nothing to signify the term “Weeping Angel” as a trademark; the capitalization of the term is the format of its website and all products are so capitalized.<sup>17</sup>

Opposer acknowledges that it was familiar with Applicant prior to this proceeding, having previously worked with Applicant. Opposer stopped working with Applicant because it “just didn’t feel like it was necessary to continue the relationship.” Particularly, Opposer “didn’t want to be aligned with the company [Applicant] anymore,” cost was a factor, and Opposer “could directly buy – they’re [Applicant] a middleman”; and by going “directly to the people that were creating the product ... it saved significant money.”<sup>18</sup>

Opposer asserts that the idea for the Weeping Angel products came from different places, such as cemeteries, and not from copying the idea for a “Weeping Angel” urn from Applicant. Opposer only became aware that Applicant considered “Weeping Angel” to be a trademark when Opposer’s listing was “taken down” from Amazon.<sup>19</sup>

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<sup>17</sup> West test. pp. 5-7; 26 TTABVUE 6-8.

<sup>18</sup> West test. p 8; 26 TTABVUE 9.

<sup>19</sup> West test. p. 9; 26 TTAB 10.

*Applicant*

Applicant is a cremation urn company that has been doing business since 2001. Applicant, a sole proprietorship, is owned by Applicant's deponent, Susan Frazier, who also owns In the Light Urns. Applicant and In The Light Urns are related entities; Applicant being the "the buying part" and In the Light Urns "the selling part." The WEEPING ANGEL trademark has been used by Applicant since the summer of 2010, and was chosen based on Applicant's desire to "create a brand with the Angel of Grief monument created in the late 19th century by Mr. Story in Rome for his wife."<sup>20</sup> Applicant's "Weeping Angel" urns are depictions of or inspired by the Angel of Grief monument.<sup>21</sup>

Applicant previously used "Weeping Angel" as a key word as part of Internet advertising.<sup>22</sup> Consumers of Applicant's In The Light Urns may use the search term "weeping angel" to find products that look like a weeping angel.<sup>23</sup>

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<sup>20</sup> Fraser test. p. 8; 28 TTABVUE 9.

<sup>21</sup> Fraser test. pp 34-32; 28 TTABVUE 25-33.

<sup>22</sup> Fraser test. p. 12; 28 TTABVUE 13.

<sup>23</sup> Fraser test. pp. 33-34; 28 TTABVUE 34-35.

Specifically, Ms. Fraser, in amending her response to the question: "So customers of In The Light Urns may use the term weeping angel to find products related to the weep -- to something that looks like a weeping angel" stated:

The question was in pertaining to the words weeping angel in the description for the Angel of Grief. When the word weeping angel was used in the description of the Angel of Grief, it was there as a description, but when the Weeping Angel urn name is used for the urn, it is a brand, and for us, it's extremely important that we brand our names and later we can brand -- we have branded -- tried to brand Weeping Angel, and we call it a depiction of the Angel of Grief, and that was what I wanted to say.

### Standing

To establish standing opposer must show “a real interest” in the proceeding. *See Ritchie 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).

Here, Opposer has demonstrated that it sells funerary urns and is a competitor of Applicant. West test., pp. 5-6, Ex. 1.<sup>24</sup> In addition, Applicant, in its answer, admitted that “Opposer sells memorials,” “has sold and distributed an urn ... which is very similar to Applicant’s products sold under the WEEPING ANGEL trademark. Susan Fraser, Applicant’s sole proprietor, further confirmed our finding with the following testimony:<sup>25</sup>

Q. “Is it fair – okay. Is it fair to say that Perfect Memorials is a direct competitor with United Priority Distributors today?

...

A. Right. We’re both retail companies. We’re both retail companies, so, yes, we are a direct competition.

In view of above, we find that Opposer has established that it is a competitor of Applicant in the funerary memorial industry and, therefore, has demonstrated its standing to oppose the registration of the involved application.

### Background

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<sup>24</sup> 26 TTABVUE 6-7, 21-23.

<sup>25</sup> Fraser test. p. 14; 28 TTABVUE 15. As just noted Applicant and In the Light Urns are related entities, In the Light Urns being the “selling part” of Applicant’s business.

As stated above, Applicant is a cremation urn company, whose “WEEPING ANGEL” funerary urns are depictions of or inspired by a work of sculpture created by William Wetmore Story known as *The Angel of Grief*. *The Angel of Grief* depicts a weeping angel as shown below.<sup>26</sup>



The book *Reminiscences of William Wetmore Story – The American Sculptor and Author* by May Phelps, describes the *Angel of Grief* as a representation of an angel “bitterly weeping over the dismantled altar of his life.”<sup>27</sup> A blog article on the Protestant Cemetery in Rome, where the original *Angel of Grief* is located, refers to the sculpture as the “Weeping Angel.”<sup>28</sup> Another blog article labels photographs of the *Angel of Grief* as “Angel of Grief/Weeping Angel.”<sup>29</sup> Replicas of the *Angel of Grief* located in the Friendship Cemetery in Columbus, Mississippi, Green-Wood Cemetery in Brooklyn, New York, a cemetery in Union City, Ohio, the Grovehill Cemetery in Dallas, Texas and the Hingham Cemetery in Massachusetts have each

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<sup>26</sup> 24 TTABVUE 407; Opposer’s Not. of Rel. Ex. 7.

<sup>27</sup> 24 TTABVUE 64; Opposer’s Not. of Rel. Ex. 4.

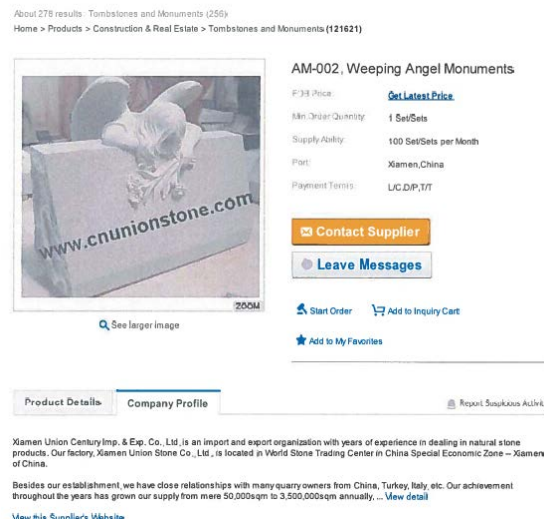
<sup>28</sup> 24 TTABVUE 407; Opposer’s Not. of Rel. Ex. 7.

<sup>29</sup> 24 TTABVUE 77, Opposer’s Not. of Rel. Ex. 18.



been referred to as the “Weeping Angel.”<sup>30</sup> A garden on the campus of Stanford University has been referred to as the “Weeping Angel of Grief Garden.”<sup>31</sup>

Manufacturers of gravestone monuments featuring replicas of the *Story Angel of Grief* use the term “Weeping Angel” to describe their products.<sup>32</sup> These manufacturers include, by way of example, Nationwide Memorials LLC (www.nationwidememorials.com), Interglo Stone (www.interglostone.com), Rising Stone, Xiamen Union Stone Co., Lincheng TTS-Stone Industrial Co., Ltd., Eastwood Stone Co., Ltd., Pingdu Chenghao Stone Craftwork Factory, Laizhou Kingstone Co., Ltd. and Twinkle Stone (Alibaba.com), whose goods are sold via the referenced websites, a sampling of which is displayed below:




[http://www.alibaba.com/product-detail/AM-002-Weeping-Angel-Monuments\\_424467432.html](http://www.alibaba.com/product-detail/AM-002-Weeping-Angel-Monuments_424467432.html)

<sup>30</sup> 24 TTABVUE 423, 432, 436, 441 and 446; Opposer’s Not. of Rel. Exs. 10, 11, 12, 13 and 14. For example, as concerns the statue at Friendship Cemetery, “even after 118 years, the weeping angel of Friendship Cemetery still keeps a silent and poignant vigil....”

<sup>31</sup> 24 TTABVUE 449, Opposer’s Not. of Rel. Ex. 15.

<sup>32</sup> 24 TTABVUE 83-212; Opposer’s Not. of Rel. Exs. 19-23.



See larger image

### Beautiful Weeping Angel Monument

FOB Price: US \$50 - 500 / Set | [Get Latest Price](#)

Min. Order Quantity: 5 Set/Sets

Supply Ability: 2000 Set/Sets per Month

Port: Qingdao

Payment Terms: LC,T/T,Western Union

Contact Supplier

Chat Now!

[Start Order](#)
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Pingdu Chenghao Stone Craftwork Factory, established in 2003, located in the largest stone export base of the North China, is a private enterprise professional in granite tombstones & monuments and granite slabs & tiles. Our company has the absolute advantage in raw materials, for we own G355 and G367 quarries, which can produce about 20000 CBM blocks annually. In order to guarantee the quality, we learn the newest craft, employ excellent technical workers, and keep the principle of "Quality... [View detail](#)

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[http://www.alibaba.com/product-detail/Beautiful-Weeping-Angel-Monument\\_1462706500.html](http://www.alibaba.com/product-detail/Beautiful-Weeping-Angel-Monument_1462706500.html)

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Upright Monuments

Cemetery Memorial and Cremation Benches

Carved Angel Tombstones

Granite Vases and Cremation Urns


Ceramic Photograph Plaques

Bronze Grave Markers and Plaques

Engraving Designs

Home > [Slant Style Headstones](#) > 631A-FT Gray Granite Weeping Angel Slant Style Headstone

### High Quality Solid Gray Granite Slant Style Carved Angel Memorial




631A-FT Gray Granite Weeping Angel Slant Style Headstone  
Item# tfgrgrweansl


Like Be the first of your friends to like this.

#### Product Description

This absolutely stunning slant style headstone features a intricately detailed angel holding a bouquet of flowers and weeping over the front of the memorial. The three dimensional angel is carved on the front as well as the back of the monument. This lovely headstone can be ordered in any size, but is shown here measuring thirty inches left to right, eighteen inches from the top of the wing to the bottom. The bottom part of the slant measures 10 inches thick and where the angel is connected it measures 18 inches thick. The slant face measures approx 14 inches.



631A-TF Gray Granite Weeping Angel Slant Style Headstone Back View  
 The Back View of this stunning slant style memorial showcases the intricate carving and detail to attention on the three dimensional angel's wings, hair, and feet.



631A-TF Gray Granite Slant Style Weeping Angel Headstone Side View  
 The side view of the 631A-FT Weeping Angel Slant Style Headstone highlights the quality of craftsmanship and detail carved into the memorial.

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INTERGLO  
STONE

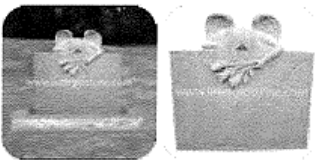
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## Our Products



To enlarge photos, click on the image



### Weeping Angel 2 Headstone

This headstone features a fully carved angel head & wings on top holding flowers. Headstone also available in

[www.interglostone.com/categories/4/products/112/Weeping-Angel-2-Headstone](http://www.interglostone.com/categories/4/products/112/Weeping-Angel-2-Headstone)

Similarly, a vast variety of products offered by third-party entities, including, by way of example, prints, photographs, stickers, statues, earrings, figurines, books,

garden memorials, wall pediments, metal signs, coffee mugs, necklaces, wall decals and greeting cards, that include or replicate the Angel of Grief or depict other images of a weeping angel are described by the wording “Weeping Angel,” and are sold via the websites at [www.redbubble.com](http://www.redbubble.com), [etsy.com](http://etsy.com), [www.ebay.com](http://www.ebay.com), <http://www.google.com/shopping> and [amazon.com](http://amazon.com).<sup>33</sup> Representative samplings follow:

1/16/13 Weeping Angel Statue Digital Collage Sheet JPG by indigochylid


Tweet Like 0

1340 views  
14 admirers

\$1.75 USD Only 1 available

Add to Cart

Favorite



<http://indigochylid.etsy.com> Weeping Angel Statue Collage sheet

If you have a question please convo me and I'll be happy to help.

~ ♥ IndigoChylid Resources

Have any questions? Contact the shop owner.

Ships from United States		
SHP TO	COST	WITH ANOTHER ITEM
Everywhere Else	\$0.00 USD	\$0.00 USD

[www.etsy.com/listing/34181255/weeping-angel-stature-digital-collage?utm\\_source=googleproduct&utm\\_medium=syndication&utm\\_campaign=GPS&gclid=COu...](http://www.etsy.com/listing/34181255/weeping-angel-stature-digital-collage?utm_source=googleproduct&utm_medium=syndication&utm_campaign=GPS&gclid=COu...)

<sup>33</sup> 24 TTAB 214-340; Opposer’s Not. of Rel. Exs. 24-45.

10/29/13 weeping angel | eBay







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Shop by category: weeping angel | All Categories | Search

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Categories: Clothing, Shoes & Accessories (256); Unisex Clothing, Shoes & Accessories (137); Men's Clothing (109); Women's Clothing (25); Costumes, Reenactment, Theater (5); More; Collectibles (157); Science Fiction & Horror (58); Religion & Spirituality (23); Decorative Collectibles (9); Fantasy, Mythical & Magic (3); More; Toys & Hobbies (87); Action Figures (44); TV, Movie & Character Toys (16); More; Home & Garden (42); Home Decor (23); Yard, Garden & Outdoor Living (14); Greeting Cards & Party Supply (5); Jewelry & Watches (26)

610 results for weeping angel | Follow this search

	Dr Who Weeping angel costume	18h left Wednesday 9AM	<b>\$15.00</b> 0 bids Buy It Now Free shipping
	Doctor Who Weeping Angel 1.21 Scale Statue Figure Collection #4	Top Rated Plus	<b>\$15.99</b> Buy It Now
	Newly listed Solar Lighted Weeping Angel Memorial Garden Stone Resin Yard Decor NEW B296		<b>\$17.95</b> Buy It Now
	Weeping Angel Keychain, 3D double-sided inspired by Doctor Who From Canada		<b>\$17.95</b> Buy It Now Free shipping
	Doctor Who The Eleventh Doctor Projected Weeping Angel screaming variant MIP	Top Rated Plus	<b>\$79.99</b> Buy It Now
	TEEFURY WEEPING CHERUBS MENS T-SHIRT L LARGE DOCTOR DR WHO ANGELS STONE GREY	Top Rated Plus	<b>\$19.99</b> Buy It Now

Popular: Fashion Creative \$21.95 Buy It Now; NEW! Doctor Who Costume \$26.05 Buy It Now Free shipping

www.ebay.com/sch/i.html?\_sacat=0&\_from=R40&\_nlw=weeping+angel&\_pgn=4&\_skc=150&rt=nc

Page 8 of about 6,130 results (0.32 seconds)

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Show only In stock nearby New items

Any category Music Books Decor Greeting Cards Bumper Stickers More

Any price Up to \$30 \$30 - \$50 \$50 - \$70 Over \$70

\$ to \$ Go

Any store Redbubble AllPosters.com AllSculptures.com Etsy - Seller Perfect Memorials More



Stretched Canvas Print: Lopez's Crying Angel, 14x16in.

Title: Crying Angel (Size:14x16). We have more Mouse Lopez Posters. Choose from our catalog of over 500,000 posters!

\$119.99

1 special offer \$129.98 with est. tax & shipping AllPosters.com 701 reviews



Weeping Angels Don't Blink Sci-Fi T-Shirt

Great high quality shirt is made with a digital direct to garment print. Select Size from drop down box.

\$17.99

\$23.94 with est. tax & shipping T Shirts I Want



Weeping Angels Barbie make-over Ooak

Two used Barbie dolls have been transformed into characters inspired by recurring adversaries from one of my favorite TV shows. In order to turn ...

\$85.00

\$93.00 with est. tax & shipping Fisyr - Seller



Mourning Angel Urn Statue White Resin Finish Crying Angel Weeping ...

Click Here. Double your traffic. Get Vendio Gallery - Now FREE! MOURNING ANGEL URN STATUE HOME DECOR WHITE RESIN FINISH It is our prime goal to ...

\$119.00 used

Free shipping Bonanza - Botega Distributing



Weeping Angel Leaning On Celtic Cross (Marble White) - 1GX13P4

Unicorn Studio provides houseware and gift items made of porcelain, namely, dinnerware, dishes, mugs, cups, plates, creamer pitchers, sugar bowls ...

\$53.32

Free shipping Allegro Holiday decor



Doctor Who TARDIS - Big shoulder bag / nebula / Dalek / Weeping Angel

Please read my shop policies carefully BEFORE ordering http://www.etsy.com/shop/FeerieDoll/policy messenger bag, with my ...

\$43

Etsy - feeriedoll



Weeping Angel - Doctor Who - Watercolor Art Pendant Necklace

An original watercolor of a Weeping Angel from Doctor Who. Don't blink. Hand painted by me, sealed under a glass insert and sealed in a metal ...

\$40

Etsy - tresaudra

Doctor Who Weeping Angel Dress

\$120



10/30/13 Amazon.com: Weeping Angel Wall Pediment [Kitchen]: Patio, Lawn & Garden


amazon Prime Peter's Amazon.com Today's Deals Gift Cards Sell Help

Search All "Weeping angel" Go Hello, Peter Your Account Your Prime Cart Wish List

Patio, Lawn & Garden Best Sellers Savings & Deals Grills & Outdoor Cooking Patio Furniture Outdoor Décor Gardening Mowers & Landscaping Tools Home Improvement

### Weeping Angel Wall Pediment [Kitchen]

by Design Toscano  
Be the first to review this item



List Price: ~~\$62.00~~  
Price: **\$50.90** ✓Prime  
You Save: **\$12.00** (19%)

**Only 4 left in stock (more on the way).**  
Ships from and sold by Amazon.com. Gift-wrap available.

**2 new from \$50.60**

- Cast in quality designer resin
- Hand finished
- Design Toscano exclusive

Roll over image to zoom in

**Turkey Fryers and Smokers**  
Prepare rich and juicy turkey this Thanksgiving with Smokers & Turkey Fryers from MasterBuilt, Weber, Char-Broil, and more.

Qty: 1

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Buy now with 1-Click®

Order within 4hr 13min to get it:

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Ship to: Peter Nikolai

This is a gift

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2 new from **\$50.60**

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Page 1 of 4

-   
Solar Lighted Weeping Angel Memorial Garden Stone By Collections Etc  
★★★★☆ (55)  
\$14.99
-   
Character Building Weeping Angel Army Builder Pack  
★★★★★ (11)  
\$16.99 ✓Prime
-   
Doctor Who Series 3: Weeping Angel- 5" Poseable Action Figure  
★★★★☆ (3)

www.amazon.com/Weeping-Angel-Wall-Pediment-Kitchen/dp/B005E1WJUN/ref=sr\_1\_56?ie=UTF8&qid=1383146903&sr=8-56&keywords="Weeping+angel"

As shown below, in the specimen submitted by Applicant in support of its application and additionally made of record by Opposer, Applicant seeks to register the wording “WEEPING ANGEL” for funerary urns that highly resemble the Angel of Grief sculpture. Applicant did not use the TM designation when identifying the urns.

The screenshot shows the homepage of 'IN THE LIGHT URNS', a business specializing in cremation urns, jewelry, and keepsakes. The website features a navigation menu with categories like Urns, Cremation Jewelry, Keepsakes, and Sympathy Gifts. A search bar is visible, and the results for 'weeping angel' are displayed. Three items are shown: 'Weeping Angel Wood & Art Urn' for \$599.95, 'Weeping Angel Art Urn' for \$979.95, and 'Weeping Angel Keepsake Art Urn' for \$479.95. The website also displays payment options (VISA, MasterCard, AMEX, Discover, PayPal), a 'My Cart | Checkout | Help' section with contact information, and a 'McAfee SECURE' badge.

Further, a search of the term “weeping angel” in the “Google” database revealed, in pertinent part, that Applicant’s “Weeping Angel” cremation urn has been described by In the Light Urns, “the selling part” of Applicant’s sole proprietor’s business, as “an incredible depiction of the weeping angel monument sculpture made in 1894 by William Westmore Story.”<sup>34</sup> The excerpt is shown below.



**[Weeping Angel™ Keepsake Art Cremation Urn](#)**

Our **Weeping Angel™** Keepsake Art Urn is an incredible depiction of the Angel of Grief monument, sculpture made in 1894 by William Wetmore Story ...

**[Add to Shortlist](#)**

**\$499.95**

Free shipping

**In The Light Urns**

★★★★★ [131 reviews](#)

<sup>34</sup> 24 TTABVue 290; Opposer’s Not. of Rel. Ex. 32.



Mere Descriptiveness

*Applicable Law*

At the outset, we note that Applicant, citing to *No Nonsense Fashions, Inc. v. Consolidated Foods Corp.*, 226 USPQ 502 (TTAB 1985), additionally points to, and has extensively argued with regard to, a three-part test for determining whether a mark is suggestive rather than descriptive. The test includes: (1) the degree of imagination necessary to understand the product; (2) a competitor's need to use the same term; and (3) the competitor's current use of the same or similar terms. Applicant's Br. unnumbered p. 5, 33 TTABVue 6. We note, however, that since this decision issued in 1985, there have been numerous decisions from the Court of Appeals for the Federal Circuit, our primary reviewing court, and from the Board making clear that the test for descriptiveness is whether a term immediately conveys information concerning a significant quality, characteristic, function, ingredient, attribute or feature of the product or service in connection with which it is used, or intended to be used. *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012); *In re Engineering Systems Corp.*, 2 USPQ2d 1075 (TTAB 1986); *See also In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370, 1371 (Fed. Cir. 2004), quoting *Estate of P.D. Beckwith, Inc. v. Comm'r*, 252 U.S. 538, 543 (1920) ("A mark is merely descriptive if it 'consist[s] merely of words descriptive of the qualities, ingredients or characteristics of the goods or services related to the mark.'). We base our decision herein on applicable standard set forth by these post 1985 cases.

As just stated, 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, Chamber of Commerce of the U.S.*, 102 USPQ2d at 1219. 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 goods or services because of the manner of its use; that a term may have other meanings in different contexts is not controlling. *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007) (*citing In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215 (CCPA 1978)). The question is not whether someone presented only with the mark could guess the products or services listed in the description of goods or services. Rather, the question is 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), *quoting In re Tower Tech, Inc.*, 64 USPQ2d 1314, 1316-1317 (TTAB 2002).

Where a mark consists of multiple words, the mere combination of descriptive words does not necessarily create a nondescriptive word or phrase. *In re Phoseon Tech., Inc.*, 103 USPQ2d 1822, 1823 (TTAB 2012); *In re Associated Theatre Clubs Co.*, 9 USPQ2d 1660, 1662 (TTAB 1988). 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. *Oppedahl*, 71 USPQ2d at 1371. However, a mark comprising a combination of merely descriptive components is registrable if the combination of terms creates a unitary mark with a nondescriptive meaning, or a double entendre with one meaning being non-descriptive, or if the composite has an incongruous meaning as applied to the goods or services. *See In re Colonial Stores Inc.*, 394 F.2d 549, 157 USPQ 382 (CCPA 1968) (SUGAR & SPICE for “bakery products”); *In re Shutts*, 217 USPQ 363 (TTAB 1983) (SNO-RAKE for “a snow removal hand tool having a handle with a snow-removing head at one end, the head being of solid uninterrupted construction without prongs”).

Opposer makes numerous arguments in support of its position that the applied-for mark is merely descriptive of the identified goods, including that: (1) the term “Weeping Angel” is the colloquial title of the Angel of Grief sculpture; (2) the term “Weeping Angel” is a common descriptor of products that either incorporate *the Angel of Grief* or depict other images of angels expressing grief; and (3) the ordinary meaning of “Weeping Angel” describes a funerary urn that looks like the Angel of Grief sculpture. Opposer also contends that survey evidence demonstrates that the applied-for WEEPING ANGEL mark is descriptive, and that Applicant, itself, has conceded that “Weeping Angel” is descriptive of the Angel of Grief sculpture. In addition to the evidence recounted in the background section of this decision, Opposer also has supported its assertion that the designation

“Weeping Angel” merely describes Applicant’s identified goods with the following definitions:

“weep” – “manifest ... grief”<sup>35</sup>

“weeping” – “The action of WEEP *verb*; an instance of this.”<sup>36</sup>

“angel” – “a conventional representation of a celestial angel, figured with wings and usually a long robe.”<sup>37</sup>

*The DeTorre Survey*

In reviewing Opposer’s evidence, we first consider the uncontradicted DeTorre survey.<sup>38</sup> This was a national quantitative online survey conducted by Mark DeTorre of MSG Minnesota, Inc., using a “Teflon” format.<sup>39</sup> The survey sample consisted of 402 males and females who would consider cremation and who

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<sup>35</sup> SHORTER OXFORD ENGLISH DICTIONARY 3605 (5th ed. 1973), 24 TTABVUE 69.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 79; 24 TTABVUE 74.

<sup>38</sup> 26 TTAB 44-82.

<sup>39</sup> A “Teflon” survey refers to the format of the survey used in *E. I. du Pont de Nemours & Co. v. Yoshida International, Inc.*, 393 F. Supp. 502, 185 USPQ 597 (E.D.N.Y. 1975) to demonstrate that “Teflon” was not generic. Professor McCarthy describes a “Teflon” survey as a mini-course in the generic versus trademark distinction, followed by a mini-test involving at least one brand name and one generic item to see whether the survey participants understand the distinction. J. Thomas McCarthy, 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 12:16 (4th ed. 2013).

In designing a TEFLON-type survey, both the initial “mini-test” and the other marks and generic names in the list must be carefully constructed and tailored to the facts of a particular case.

*Id.* See also *Jacob Zimmerman v. National Association of Realtors*, 70 USPQ2d 1425, 1435-36 n.15 (TTAB 2004) (flaws in the design and administration of the survey, including the mini-test, resulted in the survey having limited probative value).

resided in diverse geographical areas.<sup>40</sup> DeTorre test. p. 20-21, Exh. 3. The stated objective of the survey was to determine if the term “Weeping Angel” is descriptive of an urn which depicts an angel expressing grief (Survey Report, p. 4)<sup>41</sup> or, put another way, “to determine if potential customers of funeral urns interpreted the term ‘Weeping Angel’ as a generic, descriptive, or suggestive trademark for the funeral urns sold by United Priority Distributors—under methodology.” *Id.*<sup>42</sup>

The survey participants were first given an explanation of the differences between a trademark and a common name, as demonstrated by the following: “A common name is one that can be applied to a range of products that are in the same or similar category. A trademark is the name of the specific product. For example, CHEVROLET is a trademark for a specific line of cars, but AUTOMOBILE is a common name for any car.” The participants were then tested for the concepts by asking two additional questions, one of which was: “Given this explanation, would you say that KODAK is a trademark or a common name?” and “Given this explanation, would you say BLENDER is a trademark or a common name?” All of the participants answered both questions correctly.

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<sup>40</sup> The participants were culled from a consumer panel of people provided by Research Now, a company that, for a fee, provides access to a panel consisting of over 4 million consumers from 38 countries who have been prescreened by demographics. Panel members are invited to participate in surveys via email. Eligible panel members for this study were adults (18+) and living in the United States with 1063 people that “came into” Question 1.

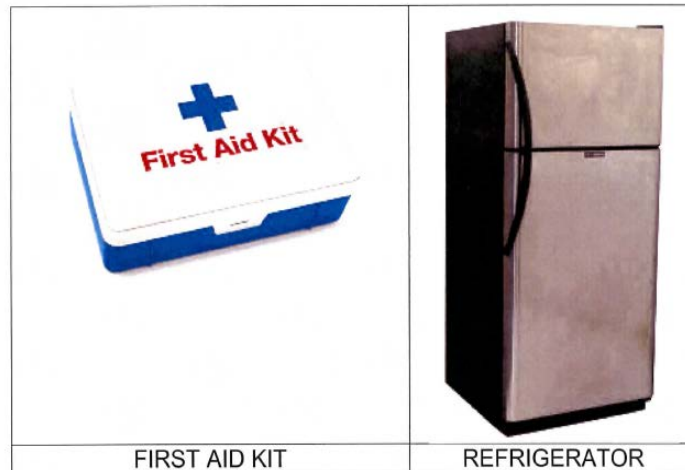
<sup>41</sup> 25 TTABVUE 47.

<sup>42</sup> *Id.*

The participants were then advised of the nature of the survey, i.e., that it was a survey of generic, descriptive and suggestive brand names and were shown examples of each type of names, on a rotating basis. The examples included:

Generic trademarks are common names of goods and/or services or a category of goods and/or services. Examples of trademarks that are considered to be generic are:

**ROTATE LIST.**



[NEXT]

On the other hand, descriptive trademarks describe the qualities or characteristics of the goods and/or services for which the trademark is used. Examples of trademarks that are considered to be descriptive are:

**ROTATE LIST.**



[NEXT]

Finally, suggestive trademarks suggest a quality or characteristic of the goods or services. In doing so, suggestive trademarks require some imagination, thought, or perception to reach a conclusion as to the nature of the goods. The following trademarks can be considered suggestive:

**ROTATE LIST.**



[NEXT]

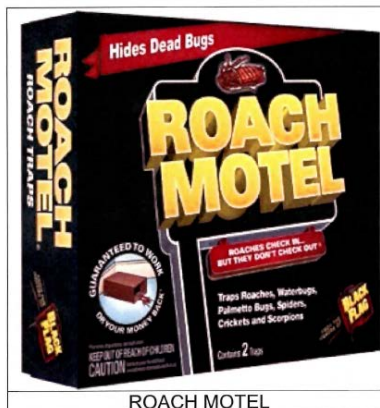
With these definitions and examples in mind, next you will be shown another set of names. For each, please indicate whether you believe the name to be a generic, descriptive, or suggestive name. **DISPLAY DEFINITIONS OF GENERIC, DESCRIPTIVE, AND SUGGESTIVE ON SCREEN FOR EACH Q6 EVALUATION FOR REFERENCE.**

**ROTATE BRANDS A/B/C.**

The participants were then shown the three names listed below separately and “at random and in no particular order,” and asked to indicate whether they believe the name shown on each of three products to be generic, descriptive, or suggestive.

The names follow:

6A1. Please indicate whether you believe the name shown below to be a generic, descriptive, or suggestive name.



- Generic ..... 1
- Descriptive ..... 2
- Suggestive ..... 3
- Don't know ..... 4

6A2. Why do you believe that? **NOT REQUIRED.**

6B1. Please indicate whether you believe the name shown below to be a generic, descriptive, or suggestive name.



- Generic ..... 1
- Descriptive ..... 2
- Suggestive ..... 3
- Don't know ..... 4

6B2. Why do you believe that? **NOT REQUIRED.**

6C1. Please indicate whether you believe the name shown below to be a generic, descriptive, or suggestive name.



- Generic ..... 1
- Descriptive ..... 2
- Suggestive ..... 3
- Don't know ..... 4

6C2. Why do you believe that? **NOT REQUIRED.**

The results of the survey are displayed in the table below:

Two-tailed T-Test & Z-Score on 3 pairs	ENTER									Confidence Threshold for Yellow Flags 1.96						95% confidence=1.96 [CAPITALS] 90% confidence=1.645 [lowercase]										
	A: GENERIC			B: DESCRIPTIVE			C: SUGGESTIVE			A/B		B/C		A/C		MEAN			%							
	Variable Name	N=	%	Mean	SDev	N=	%	Mean	SDev	N=	%	Mean	SDev	T-V	Z-S	T-V	Z-S	T-V	Z-S	A	B	C	A	B	C	
ROACH MOTEL	402	3%			402	33%			402	58%			####	9.23	####	7.35	####	####	####	####	####	####	####	####	A	BA
SUPER GLUE	402	39%			402	37%			402	22%			####	0.58	####	4.73	####	5.33	####	####	####	####	####	C	C	
WEEPING ANGEL URN	402	13%			402	60%			402	25%			####	####	####	####	####	5.71	####	####	####	####	####	AC	A	

As indicated in the results table, 60% of the participants found WEEPING ANGEL URN to be descriptive of Applicant's goods while another 10% found the



designation to be generic. While the figures seem impressive on their face, we find the survey fundamentally flawed such that the results can be given only limited weight.

The critical defect lies in how Applicant's mark was set out in the survey. The name to be considered and tested by the survey participants should have been WEEPING ANGEL, Applicant's applied-for mark, and not WEEPING ANGEL URN. Given the structure and syntax of the phrase WEEPING ANGEL URN, as well as the uniform font, it is highly likely that the phrase WEEPING ANGEL was perceived by participants as modifying the word "urn," the generic identity of Applicant's goods, by imparting a fuller description of a significant characteristic of, as opposed to merely suggesting, the pictured product.

In short, we find that the DeTorre survey is entitled to little, if any, probative value in determining whether the applied-for designation WEEPING ANGEL merely describes a feature or characteristic of Applicant's identified funerary urns.

Nonetheless, based on the entirety of the record evidence properly before us, we find that the wording "Weeping Angel" identifies a primary characteristic or feature of the identified funerary urns. We note, first, that as shown by the definitions of record, Applicant has combined the descriptive term "weeping," previously defined as "manifesting grief," with the descriptive word "angel," previously defined as "a conventional representation of a celestial angel, figured with wings and usually a long robe." The combination of these terms does not result in a unitary term with a new and unique commercial impression. When the

wording “weeping angel” is considered, as a whole, the merely descriptive components retain their descriptive significance. Put another way, the ordinary meaning of the wording “weeping angel” describes an attribute of Applicant’s urns or of any product that incorporates a depiction or representation of an angel who is manifesting grief.

Moreover, the record clearly demonstrates that the wording “weeping angel” is routinely used by those in the consumer product industry, particularly the funeral monument sector, to describe products that include or incorporate a depiction of a grieving or weeping angel. We find so whether or not the depiction is intended to be a replica of the *Angel of Grief* sculpture or other, similarly positioned, angel figures. Although we recognize that none of the evidence shows that the wording “Weeping Angel” is used by third-parties (other than Opposer) in connection with funerary urns specifically, it is nonetheless highly probative of how consumers would perceive the term when used in connection with goods that include representation of or depict “weeping angels,” particularly in view of the wide range of products with which that the term is used descriptively. Indeed, Applicant has admitted that at least some of its urns are copies of the Angel of Grief Sculpture<sup>43</sup> which is often referred to as a “weeping angel,” and even has used the

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<sup>43</sup> Not. of Opp. at ¶ 11, Answer at ¶ 11; 1 TTABVUE 5, 8 TTABVUE 3.

term descriptively to not only advertise its goods, but as a search term for use by consumers seeking funerary urns that include or comprise weeping angel figures.<sup>44</sup>

After careful consideration of all the evidence and arguments made by the parties, even if not specifically mentioned in this decision, we conclude, for the reasons discussed above, that the wording “Weeping Angel,” when viewed as a whole, would be understood in the context of Applicant’s identified funerary urns to merely describe, without need of conjecture or speculation, a significant feature or attribute thereof, namely that they take the form of or include a representation of a weeping angel. Nothing requires the exercise of imagination, cogitation, mental processing or gathering of further information in order for prospective customers of Applicant’s identified goods to perceive readily the merely descriptive significance of the wording WEEPING ANGEL as it pertains to these goods.

Applicant’s primary argument supporting its position that the applied-for designation is only suggestive of the identified funerary urns is that at the time it adopted and began using the applied-for WEEPING ANGEL mark, “no other businesses in the funerary industry were using the name ‘weeping angel’ nor anything similar in connection with urns.” Applicant’s br. unnumbered page 8.<sup>45</sup> This point is not persuasive. Even if Applicant was the first to use the wording “WEEPING ANGEL” in connection with funerary urns particularly, that fact is not

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<sup>44</sup> Under cross-examination, Ms. Fraser stated: “Well had I been able to get my trademark completed, it would have been under the Weeping Angel urn only. Here this [Weeping Angel] is a search term used in the industry on the Internet to get people to find like urns.” Fraser test. pp. 32-33; 28 TTABVUE 34-35.

<sup>45</sup> 33 TTABVUE 9.

dispositive on the issue of descriptiveness. See *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 122, 72 USPQ2d 1833 (2004) (trademark law does not countenance someone obtaining “a complete monopoly on use of a descriptive term simply by grabbing it first”) (citation omitted); *In re Greenliant Sys. Ltd.*, 97 USPQ2d 1078, 1083 (TTAB 2010); *In re National Shooting Sports Foundation, Inc.*, 219 USPQ 1019, 1020 (TTAB 1983). “[T]he Board ... must assess each mark on the record of public perception submitted with the application.” *In re Nett Designs Inc.*, 236 F.2d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001). See also *McCormick & Co., Inc. v. Summers*, 354 F.2d 668, 148 USPQ 272, 276 (CCPA 1966) (“[R]egistrability of a mark must be determined on the basis of facts as they exist at the time when the issue of registrability is under consideration.”); *In re Hoffman House Sauce Co.*, 137 USPQ 486, 487 (TTAB 1963) (registrability of the mark must be determined on the basis of all the facts as they exist at the time such issue is under consideration).

In sum, Opposer has established that the wording “Weeping Angel” when used in connection with “funerary urns” is merely descriptive of a significant feature thereof, namely, that they embody or include an image of a mourning angel.

#### Acquired Descriptiveness

Opposer also has argued extensively that Applicant’s applied-for mark WEEPING ANGEL has not acquired secondary meaning. Although neither pleaded by Applicant nor addressed in Applicant’s brief, we will briefly address this issue for sake of completeness.

To be clear, it is Applicant that has the burden to establish, by a preponderance of the evidence, a *prima facie* case that the wording “weeping angel” has become distinctive and serves to identify the source of Applicant’s goods. *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 Bongrain International Corp.*, 894 F.2d 1316, 13 USPQ2d 1727 (Fed. Cir. 1990).

Being generous, the only probative evidence relevant to the issue of acquired distinctiveness of record goes to length of use. In that regard, a reading of Ms. Fraser’s testimony establishes that Applicant has been using the wording WEEPING ANGEL since the summer of 2010, i.e., a period of a little over five years. Fraser test. p. 7.<sup>46</sup> The Trademark Act provides that the USPTO may accept five-years use as *prima facie* evidence of distinctiveness. However, such use must

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<sup>46</sup> 28 TTABVUE 8. We note particularly the following question and response:

Q. Okay. Your business, United Priority Distributors, has been using the trademark Weeping Angel. Do you recall how long you’ve been using that trademark?

A. Since the summer of 2010.

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.

*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, including, for example, Winston Brands (www.google.com)<sup>47</sup>, Napco (amazon.com)<sup>48</sup>, Rising Stone, Xiamen Union Stone Co., Lincheng TTS-Stone Industrial Co., Ltd., Eastwood Stone Co., Ltd., Pingdu Chenghao Stone Craftwork Factory, Laizhou Kingstone Co., Ltd. and Twinkle Stone (Alibaba.com)<sup>49</sup>, have used the same or similar wording in relation to similar or related goods. 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 “WEEPING ANGEL” to describe funerary and garden memorials that are comprised of or include representations of weeping or mourning angels. Because

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<sup>47</sup> 24 TTABVUE 285.

<sup>48</sup> 24 TTABVUE 303.

<sup>49</sup> 24 TTABVUE 83-101.

Applicant's use is not "substantially exclusive," Applicant may not rely on five years' use to show that the applied-for mark has acquired distinctiveness. We accordingly find that the applied-for mark has not acquired distinctiveness in connection with the identified goods.

Affirmative Defense

This brings us to Applicant's "unclean hands" defense. Applicant argues that:

Opposer's motivation for opposing registration of Applicant's trademark is to allow Opposer to continue to sell its products in a way that is likely to cause confusion among consumers. ... Opposer's standing is predicated on its attempts [sic] sell goods under a name it knew was identical to a trademark already in use by Applicant. Opposer demonstrated that it knew by issuing a press release comparing the price on its Weeping Angel urns to other Weeping Angel urns. Opposer has made other attempts to copy Applicant's trademarks and use them as its own product names. Opposer [sic] use of the Weeping Angel trademark is simply a part of its larger practice of copying the names of its competitors. As such, Opposer's claims should be barred under the doctrine of unclean hands. [citations to the record omitted]

Applicant's br. unnumbered pp. 10-11.<sup>50</sup> An affirmative defense is "[a] defendant's assertion raising new facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all allegations in the complaint are true." *H.D. Lee Co. v. Maidenform Inc.*, 87 USPQ2d 1715, 1720 (TTAB 2008) citing Black's Law Dictionary, p. 430 (7th ed. 1999). However, it has been held that where a proceeding is based on descriptiveness, the equitable defenses of laches, acquiescence or estoppel do not apply because it is in the public interest to preclude registration of

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<sup>50</sup> 33 TTABVUE 11-12.

merely descriptive designations. See *TBC Corp. v. Grand Prix Ltd.*, 12 USPQ2d 1311, 1313 (TTAB 1989) (citing to) *Southwire Company v. Kaiser Aluminum & Chemical Corporation*, 196 USPQ 566, 573 (TTAB 1977). “Unclean hands” is an equitable defense in the nature of laches or acquiescence and is likewise unavailable in proceedings based on descriptiveness. As such, no matter Opposer’s motives in filing this opposition, the registration of descriptive terms as marks is contrary to the public interest and, thus, Applicant’s “unclean hands” defense is not well taken.

**Decision:** Opposer’s opposition to the registration of the mark in application Serial No. 85722100 on the ground of mere descriptiveness is sustained.