

**THIS OPINION IS NOT A
PRECEDENT OF
THE T.T.A.B.**

Mailed: January 11, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

H & H Industries, Inc.;
Interlectric Corporation; and
Osram Sylvania Inc.

v.

LTG, Ltd.

Consolidated Cancellation Nos. 92042050;
92042382; and 92042496

Geoffrey M. McNutt of McNutt Law and B. Brett Heavner of
Finnegan, Henderson, Farabow, Garrett & Dunner, L.L.P. for
H & H Industries, Inc.;

Wayne L. Lovercheck of Quinn, Buseck, Leemhuis, Toohey &
Kroto, Inc. for Interlectric Corp.; and

Lawrence E. Abelman of Abelman, Frayne & Schwab for Osram
Sylvania, Inc.

Craig A. Peterson of Craig A. Peterson, Ltd. and Jeffrey D.
Shewchuk of Shewchuk IP Services, LLC for LTG, Ltd.

Before Walters, Walsh and Cataldo,
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

H & H Industries, Inc., Interlectric Corporation, and
Osram Sylvania, Inc. ("petitioners") have petitioned to

cancel Registration No. 2638129, owned by LTG, Ltd.

("respondent") for the mark described as follows:

The mark consists of the single color gold as applied to the end caps of the goods. The dotted outline of the goods is intended to show the position of the mark and is not a part of the mark. The drawing is lined for the color gold, which is claimed as the mark.

The registration issued on October 22, 2002 with a claim of acquired distinctiveness under Section 2(f) of the Trademark Act. The goods are identified therein as "fluorescent lamps" in International Class 11.

As grounds for cancellation, petitioners allege that respondent's asserted mark has not acquired distinctiveness under Section 2(f) of the Trademark Act, and that the asserted mark is functional and therefore incapable of registration under Section 2(e)(5) of the Trademark Act. Respondent, in its answer, denied the salient allegations of the petition for cancellation. In addition, respondent asserted certain "affirmative defenses" that are more in the nature of amplifications of its denials.

Relevant Procedural History

On December 24, 2003, petitioner H & H Industries, Inc. ("H & H") filed a motion for summary judgment in Cancellation No. 92042050 on the above noted grounds. As part of its response in opposition thereto, respondent asserted that it provides its goods "to the service lighting market, which refers to lighting for commercial, industrial,

and business operations" (response to summary judgment motion, p. 2). Respondent further asserted that it

learned that gold-colored end caps are sometimes found on tanning lamps and movie/film lighting products. With this Reply, Respondent filed a motion to amend its registration to clarify the appropriate channels of trade for its fluorescent lights by excluding the markets for the tanning and movie lighting industries.

(*Id.* at 1-2). To that end, respondent filed an unconsented motion to amend the identification of goods in its subject registration to "fluorescent lamps for use other than in connection with the tanning and movie lighting industries." Petitioner H & H filed a response in opposition to respondent's motion to amend.

In an order issued on August 26, 2004, the Board found that

in view of respondent's acknowledgement that others use gold end caps for lamps or lighting products in the movie and tanning industries, there is no genuine issue of material fact that respondent's mark has not acquired distinctiveness for the color gold for end caps for sun tanning lamps and for high intensity lamps used in the motion picture industry. Accordingly, petitioner is entitled to summary judgment on this basis.

(August 26, 2004 order, p. 4). However, in that same order the Board deferred until trial determination of respondent's motion to amend its identification of goods. As a result, the Board denied petitioner H & H's motion for summary judgment, noting nonetheless that

if after trial we determine that the proposed amendment to respondent's identification

is unacceptable, the registration will be cancelled on the basis that there is no genuine issue that, for at least some of the goods in the registration, the mark has not acquired distinctiveness, and does not identify the source of sun tanning lamps and high-intensity lighting products used in the motion picture industry.

(*Id.* at 5).

Subsequently, the Board granted the parties' stipulated motion to consolidate the above cancellation proceedings in an order issued on March 3, 2005.

The Record

The record consists of the pleadings and the file of the involved registration. In addition, during their assigned testimony period, petitioners took the depositions, with accompanying exhibits, of the following individuals: Alan Howerton, the Chief Executive Officer of petitioner H & H;
Frederick Howerton, an employee of petitioner H & H;
Warren Gertsch, Executive Vice President of petitioner Interlectric Corp. ("Interlectric");
Richard Neubert, an employee of petitioner H & H and former employee of Dura-Test;
Jack Jiang, owner of Paclantic and former employee of Dura-Test;
David Krailo, an employee of petitioner Osram Sylvania, Inc. ("OSI");

Thomas Dugan, Product Marketing Manager of petitioner OSI;
and

Gerald Hagerman, Senior Sales Operations Manager of
petitioner OSI.

In addition, petitioners filed the stipulated declaration testimony, with accompanying exhibits, of the following individuals: Glen Boss; Elizabeth Webster; Michael Napoli; and Joseph Laudano; as well as stipulated evidence consisting of a printed catalog.¹ Petitioners also filed notices of reliance upon the following: printed advertisements and publications available to the general public; portions of articles from printed publications available to the general public obtained from a computer database; respondent's replies to petitioners' first set of requests for admissions and copies of documents submitted by respondent in response to petitioners' requests for production; portions of the discovery deposition of William Rastedt; and the prosecution history of a trademark registration owned by a third party.

Respondent, during its assigned testimony period, took the depositions, with accompanying exhibits, of the following individuals:

¹ We note with approval petitioners' utilization of stipulated evidence in light of the savings in time and expense for the parties as well as the judicial economy afforded the Board thereby. See *Target Brands, Inc. v. Shaun N.G. Hughes*, __USPQ2d__ (TTAB 2007).

William Rastedt, Director of Distribution for respondent;
Donald Northrop, an employee of Dura-Test;
Gerald Schiazzano, an employee of Dura-Test;
William Belgard, Vice President and General Manager of
Radiant Lamp Co.;
Marvin Kanwischer, an employee of respondent; and
Clint Rossland, an employee of respondent. Respondent also
filed notices of reliance upon the following: various
trademark registrations owned by third parties; and portions
of printed publications.

Petitioners and respondent filed briefs, and
petitioners filed a reply brief.

The parties have designated portions of the record and
the briefs as "confidential." Although the numbers play a
significant role in determining whether or not acquired
distinctiveness has been established, we are mindful that,
inter alia, the sales and advertising figures were
introduced under seal. Thus, while we are privy to the
specific figures, we will refer to them in only a very
general fashion. Such figures, had we disclosed them in
this opinion, would assist any reader beyond the parties to
better understand our reasoning in reaching our decision.
The figures, were we able to disclose them, would reveal the
compelling case in support of our decision that this opinion
might not otherwise convey.

The Parties

Petitioner H & H is engaged in selling a wide range of premium quality lamps in the United States to commercial, industrial and institutional customers. H & H does not manufacture such lamps; rather, it has purchased them from various manufacturers throughout its history for resale. Since 1997, H & H has used gold end caps on its fluorescent lamps as a sign of premium quality. H & H does not use the color gold as a trademark to indicate the source of its fluorescent lamps. Between 1997 and September 2005, total sales of H & H's fluorescent lamps with gold end caps were substantial. H & H has promoted its gold end cap fluorescent lamps on its Internet website since 2000, and annually distributes a substantial number of print advertisements promoting such products to various industries.

Petitioner Interlectric, and its predecessor company NEFGLO, first produced gold end cap fluorescent lamps in 1965. Interlectric presently uses gold end caps to designate high quality products for use in various industries, and to conform to an established color-coding system for lights used in the movie industry. Interlectric does not use the color gold as a trademark to indicate the source of its fluorescent lamps. Sales of Interlectric's

gold end cap fluorescent lamps for the years 2003 through 2005 likewise were substantial.

Petitioner OSI produced gold end cap fluorescent lamps to differentiate its very high output ("VHO") lamps for commercial and industrial uses from high output ("HO") lamps from 1972 until the mid 1980s. OSI continues to use gold end caps on fluorescent lamps used for sun tanning purposes. OSI further sells gold end caps as separate components for use on suntan lamps and VHO lamps sold by others. OSI does not use the color gold as a trademark to indicate the source of its fluorescent lamps or end caps therefor. OSI's sales of such end caps from 2001 through 2005 likewise were substantial.

Respondent is engaged in selling long-life fluorescent lamps. Since 1993, respondent has used the color gold on the end caps of its fluorescent lamps "to distinguish its linear fluorescent lamps from other suppliers" (brief, p. 10). Respondent's sales of such fluorescent lamps from 1993 until the time of this proceeding were substantial. Respondent's expenditures on advertising and marketing such fluorescent lamps throughout the same time period have been moderate.

Petitioners' Standing

Petitioners have introduced evidence of use, by themselves and several third parties, of the color gold on

the end caps of a variety of fluorescent lamps. Petitioners further have introduced testimony and evidence that such use is not trademark use, but rather is ornamental use intended to designate premium quality goods and also to conform to color coding requirements of specialty fluorescent lamp markets. Finally, petitioners have argued that they will be placed at a competitive disadvantage, resulting in damage, from respondent's continued registration of its asserted mark. Thus, petitioners have demonstrated that they are competitors of respondent and are proper parties to challenge respondent's registration. Therefore, we find that petitioners have standing to demonstrate that registrant is not entitled to continued registration because petitioners are entitled to ornamental and other, non-trademark, use of the color gold on the end caps of fluorescent lamps. See 15 U.S.C. §1064 and *Federal Glass Co. v. Corning Glass Works*, 162 USPQ 279, 282-83 (TTAB 1969).

Acquired Distinctiveness

Petitioners contend that respondent has not enjoyed substantially exclusive use of the color gold due both to petitioners' use of the identical designation on the end caps of various types of fluorescent lamps as well as third-party use of the identical or similar designations therefor. Petitioners further contend that respondent has failed to

demonstrate customer recognition of the color gold as a source identifier for its fluorescent lamps, and that its sales and efforts to promote the color gold as a source identifier for its goods are insufficient to support a finding of acquired distinctiveness. Thus, petitioners argue, respondent has made an insufficient showing that the color gold has acquired distinctiveness as a mark applied to the end caps of fluorescent lamps. *See Minnesota Mining & Mfg. Co. v. Addressograph-Multigraph Corp.*, 155 USPQ 470 (TTAB 1967).

In that regard, the Supreme Court has held that color alone can function as a trademark. *See Qualitex Co. v. Jacobson Products Co.*, 514 U.S. 159, 39 USPQ2d 1161, 1162 (1995) ("We conclude that, sometimes, a color will meet ordinary legal trademark requirements"). The Supreme Court has also made it clear that "with respect to at least one category of mark -- colors -- we have held that no mark can ever be inherently distinctive." *Wal-Mart Stores Inc. v. Samara Brothers Inc.*, 529 U.S. 205, 54 USPQ2d 1065, 1068 (2000). In view thereof, respondent's contentions regarding the inherent distinctiveness of its asserted mark will be given no consideration. In this case, respondent has obtained registration of the color gold applied to end caps for fluorescent lamps under the provision of Section 2(f) on the ground that it has acquired distinctiveness. Therefore,

respondent must submit sufficient evidence that the color gold has acquired distinctiveness as a mark used on such goods. "Distinctiveness is acquired by 'substantially exclusive and continuous use' of the mark in commerce." *In re Owens-Corning Fiberglas Corporation*, 774 F.2d 1116, 227 USPQ 417, 424 n.11 (Fed. Cir. 1985).

Inasmuch as the trial is complete and petitioners have submitted evidence challenging respondent's claim of distinctiveness, the burden of establishing that the mark has acquired distinctiveness rests with respondent.

Yamaha strenuously asserts in its brief on appeal that the ultimate burden of persuasion under Section 2(f) on the issue of acquired distinctiveness is on Hoshino as applicant. We completely agree. "The burden of proving secondary meaning is on the party asserting it, whether he is the plaintiff in an infringement action or the applicant for federal trademark registration." 1 Gilson, *Trademark Protection and Practice* § 2.09, at 2-72 (1987)....As this court observed while reviewing an opposition proceeding in *Levi Strauss & Co. v. Genesco, Inc.*, 742 F.2d 1401, 1405, 222 USPQ 939, 942 (Fed. Cir. 1984), the "one seeking to register [the proposed trademark] bears the burden of showing secondary meaning under Section 2(f)."

Yamaha International Corp. v. Hoshino Gakki Co., Ltd., 840 F.2d 1572, 6 USPQ2d 1001, 1006 (Fed. Cir. 1988). See also *Saint-Gobain Corp. v. Minnesota Mining and Manufacturing Co.*, 66 USPQ2d 1220, 1232-3, (TTAB 2003). Furthermore, as our principal reviewing court has observed: "By their nature color marks carry a difficult burden in demonstrating

distinctiveness and trademark character." *Owens-Corning*, 227 USPQ at 424.

Acquired distinctiveness is to be tested in a cancellation proceeding as of the registration date of the involved registration or the date the issue is under consideration. Thus, evidence bearing on acquired distinctiveness that is developed after the registration date will be considered. See *Kasco Corp. v. Southern Saw Service Inc.*, 27 USPQ2d 1501, 1506 n.7, citing *Neapco Inc. v. Dana Corp.*, 12 USPQ2d 1746, 1747 (TTAB 1989).

We first consider petitioners' claim that respondent's evidence is insufficient to establish acquired distinctiveness. Respondent's continuous use since 1993 is a fairly lengthy period, but not necessarily conclusive or persuasive on the Section 2(f) showing. In prior cases involving usage of comparable or even longer duration, and with some of these uses even being coupled with significant sales and advertising expenditures (not to mention direct evidence of customers' perceptions), the Board or its primary reviewing court has found a failure to demonstrate acquired distinctiveness within the meaning of Section 2(f). See *In re Andes Candies, Inc.*, 478 F.2d 1264, 178 USPQ 156, 158 (CCPA 1973); and *In re Packaging Specialists, Inc.*, 221 USPQ 917, 920 (TTAB 1984).

Respondent's sales since 1993 suggest that respondent has enjoyed a substantial degree of success with its gold end capped fluorescent lamps. It is difficult, however, to accurately gauge the level of this success in the fluorescent lamp industry in the absence of additional information such as respondent's market share or how its gold end capped products rank in terms of sales in the trade. The sales figures submitted for 9 years, standing alone and without any context in the trade, are not so impressive as to elevate respondent's designation to the status of a distinctive mark. In any event, the sales figures show only the popularity of respondent's product, not that the relevant customers of such products have come to view gold colored end caps on fluorescent lamps as respondent's source-identifying mark. *See In re Candy Bouquet International, Inc.*, 73 USPQ2d 1883, 1889 (TTAB 2004). *Cf. Bose Corp. v. QSC Audio Products Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1309 (Fed. Cir. 2002).

Advertising expenditures over this same period are a moderate sum. More importantly, it is noted that respondent's advertising and promotional materials mainly consist of catalogs, newsletters and holiday cards sent to its sales representatives and not to its customers. Respondent acknowledges that it generally does not advertise directly to its customers and, as such, does not distribute

printed, radio or television advertisements thereto.

Further, while respondent's catalogs display its gold end capped fluorescent lamps, it is not clear therefrom that such end caps are displayed as a trademark so much as a feature of respondent's fluorescent lamps. In addition, many of the catalogs and newsletters distributed by respondent to its sales representatives display numerous products under a variety of marks. Thus, it is unclear how much of the catalog and advertising expenses are allocated to products sold with gold end caps. As a result, the amounts spent by respondent on advertising only suggest the efforts made to acquire distinctiveness, and do not demonstrate that the efforts have borne fruit. See *In re Pingel Enterprises Inc.*, 46 USPQ2d 1811 (TTAB 1988); and *In re Pennzoil Products Co.*, 20 USPQ2d 1753 (TTAB 1991). We also note that even highly substantial advertising and promotional expenditures often are not sufficient to support a finding of acquired distinctiveness. See, for example, *Braun Inc. v. Dynamics Corp.*, 975 F.2d 815, 24 USPQ2d 1121, 1133 (Fed. Cir. 1992); and *Brunswick Corp. v. British Seagull Ltd.*, 28 USPQ2d 1197, 1202-03 (TTAB 1993). Finally, we are not persuaded by respondent's suggestion that the "sales pitches" made by its sales representatives to customers and prospective customers of its products serve in any way to increase customer recognition of gold colored end

caps as a trademark. Simply put, there is no evidence of record to support a finding that such "sales pitches" include the promotion of the color gold as respondent's mark.

Respondent submits, as further evidence of acquired distinctiveness, 28 form affidavits originally prepared by respondent's counsel during prosecution of the application that matured into its involved registration. These include 16 affidavits from individual dealers of respondent's fluorescent lighting tubes and 12 customers thereof. A sample affidavit from a customer of respondent is set out below:

The undersigned being duly sworn states that:

I have ordered fluorescent lighting tubes from LTG, Ltd. as a regular customer since ____.

I am familiar with the gold end caps on the fluorescent lighting tubes sold by [respondent] and recognize the gold end caps as a symbol of quality unique to [respondent's] fluorescent lighting tubes.

When I see gold end caps on fluorescent lighting tubes, I automatically assume they are [respondent's] tubes as opposed to some other brand of fluorescent lighting tubes.

A sample affidavit from a dealer of respondent is set out below:

The undersigned being duly sworn states that:

He/She has been a dealer of LTG, Ltd. fluorescent lighting tubes for the area of ____ since ____.

I am familiar with the gold end caps on [respondent's] fluorescent lighting tubes and recognize it as unique to the fluorescent lighting tubes sold by [respondent] as a symbol of quality and I often refer to the gold end caps as our symbol of quality and of [respondent's] product when dealing with customers.

Petitioners argue that the form affidavits fail to indicate that the customers recognize gold end caps as a trademark identifying the source of respondent's goods, and in addition, fail to indicate the basis for its customers' assumption that fluorescent lamps with gold end caps emanate from respondent. We agree that the form affidavits are unpersuasive for a number of reasons. First, the statements contained therein are entitled to little weight due to their cursory nature and the lack of much basic information regarding the customers or the bases upon which the statements are made. *See In re Pacer Technology*, 338 F.3d 1348, 67 USPQ2d 1629, 1633 (Fed. Cir. 2003). Second, because the affidavits were obtained by respondent from individuals identifying themselves as regular customers for varying lengths of time, the statements contained therein are not necessarily persuasive of the manner in which the average purchaser of fluorescent tubes will perceive the color gold applied to the end caps thereof. *See, for example, In re The Paint Products Co.*, 8 USPQ2d 1863, 1866 (TTAB 1988). Third, we agree with petitioners that nowhere do the affiants state that they recognize the color gold

applied to the end caps of fluorescent lamps as respondent's trademark. Mere statements that the affiants view gold end caps "as a symbol of quality unique to" respondent is not the same as stating that they are recognized as a trademark pointing to respondent as the source of its goods. *See, for example, In re Ferris Corp.*, 59 USPQ2d 1587-1592-92 (TTAB 2001). As such, we are not persuaded by this evidence that the color gold is recognized by respondent's customers as having acquired distinctiveness as a mark for its fluorescent lamps. Nor are we persuaded by the highly similar statements of its dealers that respondent's customers have come to recognize gold end caps as a source identifier for its goods.

Ultimately, this evidence falls short of demonstrating that the color gold has achieved distinctiveness. Given the heavy burden in demonstrating the distinctiveness of color marks, more evidence than what respondent has submitted, especially in the form of persuasive evidence from customers, would be necessary to show that the designation has become distinctive of respondent's goods. To be clear, the record contains insufficient direct evidence that relevant consumers view the color gold on end caps as a distinctive source indicator for applicant's fluorescent lighting products. In other words, the evidence of record does not persuade us that the public associates the color

gold with respondent, or recognizes the designation as a mark identifying goods emanating from respondent.

We next turn to petitioners' contention that respondent's use has not been substantially exclusive. In this connection, we note that in its brief on the merits of these consolidated cases, respondent acknowledges the following uses of the color gold:

petitioner H & H's use on fluorescent lights with gold colored end caps since 1997;

petitioner Interlectric's use on Kino-Flo movie lights with gold colored end caps since 2003;

third-party Literonic's use on fluorescent lamps with gold colored end caps from 1997 to 2000 as a supplier to H & H;

third-party Ushio's use on fluorescent lamps with gold colored end caps since 2001 as a supplier for H & H;

third-party Hitachi's use on fluorescent lamps with gold colored end caps since 2001 as the producer for Ushio;

third-party Voltarc's use on gold colored end caps for use with fluorescent lights since 1998 as a supplier to H & H;

third-party Paclantic's use on fluorescent lamps with gold colored end caps since 2002 as a supplier to H & H;

third-party MaxLite's use on fluorescent lamps with gold colored end caps in 2000, which use was abandoned after respondent took action against it;

third-party Light-Source's use on gold colored end caps for use with fluorescent lights since 2001 as a supplier to H & H;

third-party Neptun Light, Inc.'s use on gold colored end caps for use with fluorescent lights in a 2006 catalog; and

third-party Orion's use on gold colored end caps for fluorescent lights since 2005.

In addition to the above-acknowledged uses, petitioners have introduced testimony regarding use by petitioner OSI of gold end caps on VHO fluorescent lamps from 1972 until 1980 as well as its present use on gold end caps sold as separate components of fluorescent lamps sold by others. As noted above, petitioner H & H has provided confidential sales and advertising figures from 1997 to September 2005 to support its claim of substantial sales and advertising expenditures in connection with gold end capped fluorescent lamps.

Petitioners also have identified uses of the color gold on the end caps of various types of fluorescent lamps by approximately 20 third parties, including those acknowledged by respondent. While there is little evidence bearing on the precise extent of such third-party use, it is clear

nonetheless that there are at least several third parties in addition to petitioners that use the color gold on the end caps of fluorescent tubes.

Thus, we agree with petitioners' assessment that the cumulative effect of their use and the third-party uses of the color gold applied to the end caps of fluorescent lighting products is so extensive that respondent's use fails to qualify as "substantially exclusive" as required under Section 2(f). "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 under such circumstances." *Levi Strauss & Co. v. Genesco, Inc., supra.*

With regard to the acknowledged uses of gold colored end caps, respondent argues that such uses "are either of inconsequential volume or are part of and/or following Petitioner H & H's infringing lead. Petitioners have completely failed to adduce any evidence that any of the [above] uses occurred prior to LTG's adoption of its distinctive mark or while LTG was acquiring secondary meaning in the marketplace" (brief, p. 30). In that respect, the record is not clear on the extent of use made by the petitioners other than H & H or the third party uses

of the color gold on end caps. Nonetheless, such uses are sufficient to be acknowledged by respondent, and further made the subject of testimony on the merits of these cases by petitioners. Further, respondent cites to no authority in support of its contention that such use must have occurred prior to respondent's adoption of the color gold in order to be probative of its failure to make substantially exclusive use thereof.

From the evidence of record, we conclude that petitioners' use has been substantial and that additional third parties have made use of the color gold applied to end caps for fluorescent lights. Such use seriously undercuts respondent's claim of acquired distinctiveness. Though not entirely clear from the record, it is possible that respondent used the color gold on end caps for up to four years prior to petitioners' adoption - or, in at least one case, resumption - of the same designation on various types of fluorescent lamps. However, at least H & H's sales and advertising expenditures related to its gold capped fluorescent lamps has been substantial, and while there is no exact evidence bearing on the extent of additional use of gold end caps by the other petitioners and third parties, such users are too numerous to ignore.

Respondent's Proposed Amendment

As noted above, in coming to its determination on petitioner H & H's summary judgment motion in Cancellation No. 92042050, the Board deferred until final hearing respondent's unconsented motion to amend its identification of goods from "fluorescent lamps" to "fluorescent lamps for use other than in connection with the tanning and movie lighting industries." Turning now to respondent's motion to amend, we find that petitioners have introduced testimony and evidence that they and third parties have made use of the color gold on the end caps of various types of fluorescent lamps used for a variety of purposes. While the record supports a finding that some of those uses are confined to the tanning and movie lighting industries, the use of gold end caps by the following entities acknowledged by respondent, including petitioner H & H, and third parties Litronics International, Ushio, Hitachi, Voltarc, Paclantic, Light Sources, Neptun Light, Inc. and Orion, are not so confined. That is to say, the record in this case supports a finding that, at the very least, this petitioner and these third parties are using gold end caps on fluorescent lamps for general purpose use by a variety of businesses and industries. In addition, there is testimony and evidence of record that certain petitioners and third parties produce and/or sell fluorescent lamps both for general purpose use as well as use in the movie industry. As a result,

respondent's proposed amendment fails to identify a meaningful subcategory of fluorescent lamps. See *Eurostar Inc. v. "Euro-Star" Reitmoden GmbH & Co. KG*, 34 USPQ2d 1266, 1273 (TTAB 1995); and *Penguin Books Ltd. v. Eberhard*, 48 USPQ2d 1280, 1286 (TTAB 1998). In other words, even if we permitted the amendment, we would reach the same ultimate conclusion, and therefore, to do so would be futile. In view thereof, respondent's motion to amend its identification of goods is denied.

We conclude that respondent's use of its designation has not been substantially exclusive, and that the evidence of acquired distinctiveness is insufficient to support registration on the Principal Register under Section 2(f).

Functionality

Finally, we note that petitioners also argue that the asserted mark is functional and therefore incapable of registration under Section 2(e)(5) of the Trademark Act. However, given our determination herein that respondent has failed to make a sufficient showing of acquired distinctiveness under Section 2(f), we decline to reach a determination on the question of functionality in this proceeding.

DECISION: The consolidated cancellations are sustained, and Registration No. 2638129 will be cancelled in due course.