

Mailed:  
September 29, 2010  
Bucher

**THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB**

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

The Equine Touch Foundation, Inc.

v.

Equinology, Inc.

Cancellation No. 92050044  
against Registration No. 2883802

Thomas R. Kellogg of Strong Stevens & Wyant for The Equine  
Touch Foundation, Inc.

Bruce Napell of Singler Napell & Dillon LLP for Equinology,  
Inc.

Before Bucher, Cataldo and Ritchie, Administrative  
Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

The Equine Touch Foundation, Inc. has petitioned to  
cancel a registration owned by Equinology, Inc. on the  
Principal Register of the mark **EQUINE BODY WORKER** (*in  
standard character format*) for services recited in the  
registration as "providing courses of instruction and

educational testing in the field of equine massage, anatomy, and exercise physiology.”<sup>1</sup>

As grounds for cancellation, petitioner claims that this term should never have been registered for the named services inasmuch as it is a generic designation, or alternatively, that it is a highly descriptive term that has not acquired distinctiveness as a source indicator under Section 2(f) of the Trademark Act. Respondent, in its answer, denied the salient allegations of the petition for cancellation. In addition, respondent asserted petitioner’s “unclean hands” as an affirmative defense.

***Preliminary matters***<sup>2</sup>

The parties to this litigation, without asking for the involvement of TTAB attorneys or complying with the usual understandings of our Accelerated Case Resolution (ACR) procedures, have stipulated to the submission of testimony by declaration, and agreed that documents timely offered

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<sup>1</sup> Registration No. 2883802 issued on September 14, 2004 with a claim of acquired distinctiveness under Section 2(f) of the Trademark Act; Section 8 affidavit (six-year) accepted.

<sup>2</sup> This cancellation proceeding has already resulted in a precedential interlocutory decision. See *Equine Touch Foundation Inc. v. Equinology Inc.*, 91 USPQ2d 1943 (TTAB 2009) [Board accepted petitioner’s service on respondent’s earlier counsel (rather than, as required, on respondent) as defective but curable service].

into evidence during the parties' respective testimony periods would be submitted to the Board along with final briefs. On the other hand, they did reserve the right to object to stipulated evidence on the grounds of competency, relevance and materiality. See TBMP § 705 (2d ed. rev. 2004).

Each party has lodged motions to strike and/or filed other objections to the evidentiary submissions proffered by its adversary. Both have carefully maintained all of these objections in final briefs, and both parties fully briefed respondent's motion to strike new evidence attached to petitioner's reply brief. However, we find that none of the evidence sought to be excluded is outcome determinative. Given this fact, coupled with the sheer number of objections, we see no compelling reason to discuss each specific objection. Suffice it to say, we have considered all the testimony and exhibits submitted and not otherwise excluded. In doing so, we have kept in mind the various objections raised by petitioner and by respondent, and have accorded the subject testimony and evidence whatever probative value it merits.

Finally, petitioner has proffered a letter from Randi Peters who has been disclosed as petitioner's expert

witness. Respondent objects to this purported expert testimony. We agree. In addition to the fact that expert testimony generally is not necessary on the issues of genericness and/or acquired distinctiveness, we are not convinced that this witness has the necessary "scientific, technical, or other specialized knowledge" to qualify as an expert witness. Hence, we have considered this letter much as we have dozens of similar opinions expressed in letters placed into the record by both parties herein.

### ***The Record***

The record consists of the pleadings and the file of the involved registration. In addition, during its assigned testimony period, petitioner submitted the following items: letters addressed to the U.S. Immigration and Naturalization Service; more than thirty-five letters requested by petitioner of others in the equine health field; and copies of materials drawn from Wikipedia and other Internet websites as well as books. Respondent submitted a copy of petitioner's responses to its interrogatories; declarations from others in the equine health field; copies of Internet websites and magazines; course catalogues, brochures, certificates, advertising copy and invoices; as well as copies of cease-and-desist

letters respondent has sent to alleged infringers of its involved service mark, etc.

### ***The Parties***

Petitioner is The Equine Touch Foundation, a Pennsylvania corporation, whose principal officers are John ("Jock") Ruddock, a native of Scotland, and his wife, Ivana Ruddock, a native of the Czech Republic. Petitioner is an active member of the equine health field having pioneered its own non-invasive, hands-on therapy for horses, which is known as "Equine Touch." This involves some manipulation of connective soft tissue, fascia and muscles and other soft tissue, as well as energy work. The record shows that in September 2001, both principals of petitioner taught a course for respondent, Equinology, Inc.

Respondent is Equinology, Inc., a California corporation whose principal officer is Debranne Pattillo. In addition to equine massage therapies, respondent offers equine craniofacial techniques, myofascial release and acupuncture. The application underlying the involved registration was filed on May 13, 2003, based upon Ms. Pattillo's claims of first use anywhere and first use in commerce at least as early as October 1997. In the

initial Office action, the Trademark Examining Attorney refused registration under Section 2(e)(1) of the Act, saying further that the applied-for term, **EQUINE BODY WORKER**, appeared to be the generic name for any person educated in equine massage. Respondent (as the "applicant" in that *ex parte* setting) replied that the majority of the Internet "hits" put forward by the Trademark Examining Attorney were actually references to respondent or to certified graduates of its equine massage courses. Applicant also submitted form declarations from ten persons from within "the field of horse training, care and treatment." The next action by the Trademark Examining Attorney was a publication of the mark for opposition with a claim of acquired distinctiveness under Section 2(f) of the Lanham Act.

Then, consistent with this history, in its answer to the current petition to cancel this mark, respondent states "[t]hat Debranne Pattillo coined the term 'Equine Body Worker' and first began using it in 1997 to refer to persons who had received specific training through her business Equinology ...." Answer at 4, Affirmative Defenses, ¶ 4.

### ***Petitioner's Standing***

Petitioner has argued that it will be placed at a competitive disadvantage, resulting in damage, from respondent's continued registration of its asserted mark. Thus, petitioner has demonstrated that it is a direct competitor of respondent and is a proper party to challenge respondent's registration. Therefore, we find that petitioner has standing to demonstrate that registrant is not entitled to continued registration because petitioners are entitled to fair, non-trademark uses of this term. See 15 U.S.C. § 1064 and *Federal Glass Co. v. Corning Glass Works*, 162 USPQ 279, 282-83 (TTAB 1969).

### ***Genericness***

In the petition for cancellation, petitioner alleges that the registered mark is merely descriptive. However, in supporting evidence<sup>3</sup> and in its final brief<sup>4</sup> petitioner

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<sup>3</sup> For example: Exhibits J-1, J-2, J-3, J-4, J-8, J-11, J-18, J-20, J-22, J-23, J-25, J-27, J-30, J-31 and X.

has frequently used the language of "genericness." Under the circumstances, we feel compelled to resolve the issue of genericness, although petitioner has neither cited to *H. Marvin Ginn Corp. v. International Association of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528 (Fed. Cir. 1986) and its progeny, nor has it raised the two-part inquiry evaluating the category of services at issue and whether the term sought to be registered is understood by the relevant public primarily to refer to that category of services.

As to the word "equine," there is no debate but that this means "of, relating to, or resembling a horse or the

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<sup>4</sup> For example: "A generic or commonly descriptive term" brief at 7; "a strong policy in the law..." to prevent monopolizing of generic names ..." *Id.* at 9; "a generic or common descriptive term cannot become a trademark under any circumstances" *Id.* at 10; "A generic term ... cannot be a trademark" *Id.* at 10; "To bestow a monopoly on a generic term would be contrary to the public interest" *Id.* at 11; "a generic term cannot acquire [distinctiveness]" at 11; "a generic term [refers] to the genus of which the protected product is a species" *Id.* at 11-12; "The service mark 'Equine Body Worker' should never have been registered ... because it is a generic" at *Id.* 12; "The Service Mark is a generic term and as such is not able to be registered as a protected service mark" *Id.* at 22; "'Equine Bodyworker' is a generic term" reply brief at 4; "Generic terms are not registrable, and a registered mark may be cancelled at any time on the grounds that it has become generic" at 6; "The mark at issue is generic" *Id.* at 6; "[T]he term 'Equine Body Work' ... is a generic term" *Id.* at 10; "The mark denotes a genus of which the massage services performed by the Registrant are but a species. The cases are firm in the rule that a generic term cannot be registered." *Id.* at 11.

horse family.”<sup>5</sup> When used in connection with equine massage and other touch therapies for horses, we find the word “equine” to be generic.

As to the term bodywork, respondent simply noted in its answer that “‘body work’ is defined as the ‘process or act of repairing automotive bodies.” Petitioner has submitted for the record various dictionary entries with alternative definitions of “bodywork,” to which we add our own:

**Bodywork** /body·work/ (-wuk”) a general term for therapeutic methods that center on the body for the promotion of physical health and emotional and spiritual well-being, including massage, various systems of touch and manipulation, relaxation techniques, and practices designed to affect the body's energy flow.<sup>6</sup>

**bodywork** — *n* 2. any form of therapy in which parts of the body are manipulated, such as massage<sup>7</sup>

**body·work** *n* : therapeutic touching or manipulation of the body by using specialized techniques  
— **body·work·er** *noun*<sup>8</sup>

**Bodywork** (alternative medicine) is a term used in alternative medicine to describe any therapeutic, healing or personal development technique that involves working with the human body in a form involving manipulative therapy, breath work, or energy medicine. In addition *bodywork* techniques aim to assess or improve posture, promote awareness of the "mind-body connection",

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<sup>5</sup> <http://www.merriam-webster.com/dictionary/equine>

<sup>6</sup> Dorland's Medical Dictionary for Health Consumers, 2007.

<sup>7</sup> Collins English Dictionary - Complete & Unabridged, 10<sup>th</sup> Edition, 2009.

<sup>8</sup> Merriam-Webster's Medical Dictionary, 2007.

or to manipulate a putative "energy field" surrounding the human body and affecting health.<sup>9</sup>

We also note with interest that a variety of practitioners of equine therapies in the area of complementary and alternative healing modalities have moved from massage for humans, for example, to massage for horses.<sup>10</sup> In either setting, the term "bodywork" seems to have quite similar connotations.

In fact, respondent seems to agree that the term "equine bodywork" may be non-registrable. If this were the alleged mark before us, it seems clear from the dictionary definitions that when these separate words are joined to form a compound, the resulting term has a meaning identical to the meaning common usage would ascribe to those words as a compound. *In re Gould Paper Corp.*, 834 F.2d 1017, 5 USPQ2d 1110, 1111-12 (Fed. Cir. 1987) [**SCREENWIPE** is generic for television and computer screen cleaning wipes]. Moreover, a product or service may have more than one generic designation. Hence, we are not persuaded by respondent's argument that inasmuch as there are other

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<sup>9</sup> [http://en.wikipedia.org/wiki/Bodywork\\_\(alternative\\_medicine\)](http://en.wikipedia.org/wiki/Bodywork_(alternative_medicine))

<sup>10</sup> For example, John Ruddock, Petitioner's Exhibit X; "Many of the techniques like massage that are used in football locker rooms are being used in horse training stables today," Respondent's Exhibit 1-R, at 1.

terms that are equally devoid of source-indicating capability,<sup>11</sup> that its alleged mark functions as a source

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<sup>11</sup> For example: "[T]he variety of terms which the declarants use to describe their own practices in the field of horse care contradicts their conclusory assertions that 'Equine Body Worker' is a generic term." Respondent's brief at 1; "Exhibit B indicates that Mr. Ruddock had been employed as a 'body worker.' However, the term 'Equine Body Worker' does not appear." *Id.* at 5. "Dr. Shoemaker's use of the term 'equine complementary medicine' to describe Mr. Ruddock's work is evidence of the existence of numerous terms for such therapy, and is evidence that the Mark is not generic." *Id.*; "[Dr. Zert's] reference to the 'international community of equine practitioners' are further evidence that the Mark is not generic." *Id.* at 6; "Mr. Parelli describes Mr. Ruddock as an 'equestrian body worker' in the paragraph above his signature - evidence of the use and availability of other, equally descriptive terms, and that the Mark is not generic." *Id.*; "The letter ... describes Mr. Ruddock's field as 'alternative equine medicine' and Mr. Ruddock as a 'holistic health specialist.' These descriptions are more evidence of the use and availability of other descriptive terms, and that the Mark is not generic. *Id.*; "The letter describes Dr. Ruddock as working 'in the field of equine complementary medicine.' It also describes Mr. Ruddock as 'an internationally renowned body worker.' Since the letter does not use the Mark, it does not support the Petition. However, it is additional evidence that the Mark is not generic, since Mr. Ruddock is described without using it." *Id.* at 7; "The letter refers to Dr. Ruddock as both an 'equine body worker' and an 'equestrian body worker' again demonstrating that the Mark is descriptive rather than generic." *Id.*; "The letters include alternate terms describing the field: 'hands on equine therapists,' 'Equine Alternate Health Practitioner.' *Id.* at 9; "Prairie Winds (see Exhibit J-30) describing its course in Equine Massage Therapy, which it describes as 'hands-on bodywork.' The article does not use the Mark, or pair 'equine' and 'bodywork,' and is therefore not relevant, except to further demonstrate that the Mark is not generic." *Id.* at 11; "print out from the website [www.naturalhorsetraining.com](http://www.naturalhorsetraining.com) identified as a list of 'Equine Massage/Body Worker Therapists in the United States and Equine Massage/Body Worker Schools.' This exhibit ... is of no probative value, because by definition it clearly includes both persons or schools which list themselves under Equine Massage and those ... which list as Equine Body Workers ... Nothing in the exhibit identifies the category under which any listing falls." *Id.*; "a printout ... from the [www.horseholistics.com](http://www.horseholistics.com) website ... uses the

indicator. Rather, we find that "equine bodywork" is understood by the relevant public primarily to refer to the involved category of services.

While it may seem like a fairly small, logical step to go from the decidedly generic term "equine bodywork" to the phrase "Equine Body Worker" - a term that respondent claims, without clear contradiction, to have coined - our primary reviewing Court appears to place a heavy burden on plaintiff (or the Office) when confronted with the latter phrase. We agree with petitioner's overall argument that this phrase surely appears to be an "apt" name for a person offering the named services. However, the Court of Appeals for the Federal Circuit has stated that "[a]ptness is insufficient to prove genericness." *In re American Fertility Society*, 188 F.3d 1341, 51 USPQ2d 1832, 1836 (Fed. Cir. 1999). In reviewing the record before us, there was no evidence produced that this entire, three-word phrase was ever used by the relevant public to primarily refer to a similar class of services, and especially at any time prior to respondent's alleged adoption in 1997. Hence, on this record, we conclude that petitioner has

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terms 'bodywork' and 'bodyworker' but does not use the Mark. The page does not associate 'equine' with either term [and] is therefore irrelevant." *Id.* at 12.

failed to show that the term "Equine Body Worker" is generic.

### ***Acquired Distinctiveness***

Respondent has conceded that this term is merely descriptive in asserting that the mark has acquired distinctiveness under Section 2(f) of the Act. *Cold War Museum v. Cold War Air Museum Inc.*, 586 F.3d 1352, 92 USPQ2d 1626, 1629 (Fed. Cir. 2009). However, in spite of respondent's having convinced the Trademark Examining Attorney of acquired distinctiveness during *ex parte* examination, petitioner contends that respondent has failed during this *inter partes* proceeding to demonstrate customer recognition of this highly descriptive term, and that its sales and efforts to promote the term as a source identifier for its services are insufficient to support a finding of acquired distinctiveness.

The party seeking cancellation of a Section 2(f) registration must prove by a preponderance of the evidence that the mark has not acquired distinctiveness. *Id.* ("The party seeking to cancel registration of a mark always bears the burden of persuasion, that is, the ultimate burden of proving invalidity of the registration by a preponderance

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of the evidence"), citing *Yamaha International Corp. v. Hoshino Gakki Co., Ltd.*, 840 F.2d 1572, 6 USPQ2d 1001, 1006 (Fed. Cir. 1988). For the reasons discussed above in the section marked "Genericness," we hold that petitioner, while failing to prove that the involved mark is generic, nonetheless has made a *prima facie* showing that the phrase "Equine Body Worker" is not inherently distinctive, and the burden therefore shifts to respondent to show that its mark has acquired distinctiveness. *Id.*

We note that 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 (TTAB 1993), citing to *Neapco Inc. v. Dana Corp.*, 12 USPQ2d 1746, 1747 (TTAB 1989).

We turn then to consider whether respondent's evidence is sufficient to establish acquired distinctiveness.

Respondent's continuous use since 1997 is a fairly lengthy period, but not necessarily conclusive or persuasive on the question of the sufficiency of a 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), particularly where, as here, we deem the mark to be highly descriptive. 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 declarations establish that more than 1000 persons have taken respondent's courses since 1996, and more than 500 of them have been certified as "Equine Body Workers." It is difficult, however, to assess the level of this success in the equine massage training and related educational efforts in the equine health industry, in the absence of additional information such as respondent's market share or how its educational courses rank relative to others in this industry. The sales figures submitted for this period of 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, even if deemed to be significant, the sales figures show only the popularity of respondent's range of services (e.g., equine massage therapies, equine craniofacial techniques, myofascial release, acupuncture, etc.), not that the relevant customers of horse massage services have come to view the term "Equine Body Worker" 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).

Respondent alleges almost \$200,000 in fourteen years (1996 to 2009) in total advertising expenditures promoting the Equine Body Worker certification courses. Even if we construed much of this as being directed to the involved mark, these advertising expenditures over this period of time are a moderate sum. Even much more substantial advertising and promotional expenditures are not always sufficient to support a finding of acquired distinctiveness. See *Braun Inc. v. Dynamics Corp.*, 975 F.2d 815, 24 USPQ2d 1121, 1133 (Fed. Cir. 1992); and *Brunswick Corp. v. British Seagull Ltd.*, 28 UDPQ2d 1197, 1202-03 (TTAB 1993).

More importantly, it is noted that only three of respondent's signature courses involve Equine Body Worker certification. Many more of Equinology's courses are in anatomy, neurology, biomechanics, saddle fitting and other modalities for horses. In this context, the description actually seems to include all marketing expenditures for Equinology, Inc., including website development and other promotional activities not solely directed to the involved mark. While we note that many of the advertisements and catalogues list the involved mark somewhere within the advertisement, it is generally not presented as the most prominent feature thereof. Thus, it is unclear how much of the website and advertising expenses should in fairness be allocated to the courses directed to Equine Body Worker certification.

Moreover, the amounts spent by respondent on marketing itself only suggest the total level of effort for the entire enterprise. They certainly do not demonstrate that the efforts have borne fruit on the recognition of the highly descriptive designation, Equine Body Worker. See *In re Pingel Enterprises Inc.*, 46 USPQ2d 1811 (TTAB 1988); and *In re Pennzoil Products Co.*, 20 USPQ2d 1753 (TTAB 1991).

As noted earlier, during the *ex parte* prosecution of respondent's application that matured into the subject registration, respondent's counsel prepared ten form declarations as its evidence of acquired distinctiveness. A sample declaration form is reproduced below:

I, NICOLE ROMBACH, declare as follows:

I have worked with and/or owned horses and worked in the field of horse training, care and treatment for 20 years. I am familiar with the horse training and care industry: I regularly attend horse shows (where I talk to others in the industry), and I keep up with trade publications.

Based on my experience in the industry, including innumerable conversations with others, and my reading of the trade press, the term "Equine Body Worker" is commonly understood to refer to one who has received training from Debranne Pattillo at Equinology. The first use of the term that I am familiar with was by Equinology to describe persons who had received its certification. I use the term "certified Equine Body Worker" in my publicity in order to let potential clients know that I have taken Debranne's classes at Equinology.

To my knowledge, the term "equine massage" is the general term used by people in the industry, and Equine Body Worker is only used to refer to the particular practices taught by Equinology.

I declare under the penalty of perjury of the laws of the United States that the foregoing is true and correct of my own personal knowledge.  
Executed this 02<sup>nd</sup> day of February, 2004



We consider these declarations submitted during the *ex parte* prosecution as part of the evidence in this proceeding. *Cold War Museum Inc. v. Cold War Air Museum Inc.*, 92 USPQ2d at 1628 ("Specifically, Section 2.122(b) provides that the record in a cancellation automatically includes the file of the registration at issue.").

In this same vein, turning to customer testimonials submitted as part of respondent's case in this litigation,

respondent submitted the declarations of Keli Hendricks (professional horse trainer), Sarah E. Quentin (veterinarian), Liz Heinrich (veterinary technician and owner of a horse care business) and Joanna Robson (veterinarian). Each declarant has had a close relationship with respondent over a period of years, each one associates the terms Equine Body Worker and the initialisms "EBW" with certified graduates of respondent courses, and each assumes that equine therapists and masseuses from other programs cannot use this particular designation.

Interestingly, the thirty-five declarations submitted by petitioner were signed by equine professionals of similar training, tenure and vocation to respondent's declarants - only they were executed by those having close relationships with petitioner. Perhaps not surprisingly, these dueling statements reach diametrically opposed conclusions. For that reason, we cannot find either set of declarations determinative in our decision.

As to media coverage, the record contains largely illegible copies of newspaper and magazine articles, including "The Bod Squad: Learning Equine Body Work with



Equinology, Inc.," an article of June 2003 in *California Riding Magazine*, a regional, monthly periodical; a November 2007 article in the *Marin Independent Journal*, and articles from *The Press-Democrat* (Santa Rosa, CA).<sup>12</sup> While we cannot be sure of the circulation of these periodicals, this level of minimal local coverage is not so very impressive when compared with other reported cases having a successful, nation-wide demonstration of acquired distinctiveness.

As to any attempts by third parties to use this designation, the fact that respondent has issued two cease-and-desist letters is hardly persuasive of frequent conflicts. To the contrary, what is more surprising about this number is that respondent has not located more persons in the field of horse care and massage who had inadvertently used this highly descriptive designation. As seen *infra* in the section on petitioner's alleged "unclean hands," there is little reason to think that petitioner in updating its website in recent years is doing anything more than using what it considers to be a highly descriptive term in a non-trademark, fair use manner.

In short, petitioner argues that even if respondent may have been the first one to use this designation, it was

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<sup>12</sup> Respondent's Exhibits 1-P, 1-Q and 1-R.

highly descriptive upon adoption in 1997, and in the alternative to a finding of genericness, that respondent has failed to demonstrate customer recognition of this term as a source identifier for its services, and that its sales and efforts to promote this term are insufficient to find the requisite level of acquired distinctiveness to support registration on the Principal Register under Section 2(f). See *Minnesota Mining & Mfg. Co. v. Addressograph-Multigraph Corp.*, 155 USPQ 470, 472 (TTAB 1967). We agree with this assessment, finding that respondent has failed to demonstrate acquired distinctiveness for this highly-descriptive phrase.

***Respondent's defense: Petitioner's "Unclean Hands"***

Finally, petitioner's charges of "unclean hands" are not persuasive:

The evidence is clear that Petitioner thereafter altered its website by inserting the terms "bodywork" and "equine bodywork" where they did not originally occur: In the version of The Equine Touch website from December 2005<sup>13</sup> (Exhibit 1-M at Bates No. 322), the sentence "The Equine Touch was the first Equine discipline to be recognized ...." appears. In the December 2006 version of the website (Exhibit 1-N) the sentence

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<sup>13</sup> We note that we are simply accepting respondent's dates for petitioner's various versions of its website as accurate without being able to confirm from the copies in the record when these pages were updated or accessed.

has been re-worded: "The Equine Touch is the first equine bodywork discipline to be recognized ...." In Exhibit Y the sentence has been re-worded again: "Equine Touch Levels are the first recognized standards to be developed in the field of Professional Equine Bodywork ...."

On closer examination, we find that the above allegation as to petitioner's alterations in the website changes reflected in 1-N is not quite accurate. Petitioner's new paragraph #1 in December 2006 (using present tense) is added dealing with "education credits," and uses a generic term respondent has not registered (and arguably *could not register*), namely, *equine bodywork*. Paragraph #2 is the same as the leading paragraph in the answer in 1-M, with the addition of the word "also" (following onto new paragraph #1). Similarly, the February 2009 version uses "*Equine Bodywork*" in another newly inserted paragraph describing petitioner's standards of instruction. What follows are relevant portions of these website pages containing evolving answers to the unchanging question:

<p><b>Q: <i>Is Equine Touch recognized by any known associations or bodies?</i></b></p>
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Answer of December 2005 (Exhibit 1-M):  
"The Equine Touch was the first Equine discipline to be recognized by: ..."

Answer of December 2006 (Exhibit 1-N):  
New ¶ #1: "The Equine Touch *is* the first equine *bodywork* discipline in the United Kingdom to be awarded National Education Credits ..."  
¶ #2: "The Equine Touch was *also* the first Equine discipline to be recognized by: ..."

Answer of February 2009 (Exhibit Y):  
"Equine Touch Levels are the first recognized standards to be developed in the field of Professional Equine *Bodywork* ..."

We turn then to another example respondent has described as support for a finding of petitioner's "unclean hands":

Similarly, both the December 2005 and December 2006 versions of the website (Exhibits 1-M and 1-N), include a quote from Lyle "Bergy" Bergeleen describing The Equine Touch without using the Mark: "In all my years I have never seen anything as powerful and effective, gentle, simple, act so quickly and yet be long lasting as The Equine Touch." However, in Exhibit Y (the 2009 version of The Equine Touch Website), at page 2, the quote from Mr. Bergeleen has been altered, and now reads "In all my years I have never seen an Equine Bodywork system as powerful and effective, gentle, simple, act so quickly and yet be long lasting as The Equine Touch." [emphasis supplied]

Again, the February 2009 version uses "Equine *Bodywork*" and not respondent's claimed mark. Certainly respondent cannot contend that a competitor should not be able to update its website. This latest version uses more words, but arguably it is much more precise by narrowing

the indefinite meaning of "anything" (which could include "anything"!) to systems of equine bodywork.<sup>14</sup>

In any cases, we do not find that petitioner, as plaintiff in this action, comes with "unclean hands."

*Decision:* The cancellation is sustained, and Registration No. 2883802 will be cancelled in due course.

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<sup>14</sup> However, we do question the need for petitioner to use (or indeed, the wisdom of its using) upper-case letters E and B for this generic designation (e.g., an Equine Bodywork system ...).