This Opinion is Not a
Precedent of the TTAB

Mailed: December 12, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Survival Swim Dev. Network, Inc.
v.
J. Barnett Holdings, LLC

Cancellation No. 92061915

William D. Meyer, of Hutchinson Black and Cook, LLC,
for Survival Swim Development Network, Inc.

Brock A. Hankins and Ava K. Doppelt, of Allen, Dyer, Doppelt & Gilchrist, P.A.,
for J. Barnett Holdings, LLC.

Before Cataldo, Adlin, and Larkin,
Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

Survival Swim Development Network, Inc. f/k/a Infant Aquatics Network, Inc. ("Petitioner")[1] has petitioned to cancel Registration No. 4562130 on the Principal Register for the mark SELF RESCUE in standard characters for "Instructing infants

[1] Petitioner's corporate name was "Infant Aquatics Network, Inc." when this proceeding was filed. Petitioner changed its name in June 2016 to "Survival Swim Development Network, Inc." 22 TTABVUE 20-23. We exercise our discretion to change the caption of the case to reflect petitioner's current name. Trademark Trial and Appeal Board Manual of Procedure ("TBMP") Section 512.02 (June 2017).

and young children in aquatic survival skills; educational services, namely, classes and seminars in the field of water safety and drowning prevention for infants and young children," in International Class 41,[2] owned by J. Barnett Holdings, LLC ("Respondent"). As grounds for cancellation, Petitioner asserts that: (1) the application that matured into the subject registration was filed by someone other than the owner of the mark, and was thus void ab initio; (2) SELF RESCUE is the generic name for the services identified in the registration; and (3) if SELF RESCUE is not the generic name for those services, it is merely descriptive of them and has not acquired distinctiveness. 1 TTABVUE 6-10 (Petition to Cancel ¶¶ 11-18; 25-38).[3] We grant the Petition for Cancellation on the ground that SELF RESCUE is merely descriptive of the identified services and has not acquired distinctiveness.

I. The Record[4]

The record consists of:

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[2] The subject registration issued on July 8, 2014 under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f).

[3] Petitioner also pleaded a claim that the registered mark is functional, 1 TTABVUE 7 (Pet. to Cancel ¶¶ 19-24), but did not pursue that claim in its briefs, and it is deemed waived. *Krause v. Krause Publ'ns Inc.*, 76 USPQ2d 1904, 1906 (TTAB 2005). Respondent's Answer asserted various affirmative defenses, including Petitioner's lack of standing. 4 TTABVUE 5-6 (Ans. Aff. Defs. ¶¶ 1-8). Lack of standing is not an affirmative defense because "'[t]he facts regarding standing . . . are part of [a plaintiff's] case and must be affirmatively proved.'" *Apollo Med. Extrusion Techs., Inc. v. Med. Extrusion Techs., Inc.*, 123 USPQ2d 1844, 1848 (TTAB 2017) (quoting *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982)). Respondent did not address its true affirmative defenses in its brief, and they are also waived. *Harry Winston, Inc. v. Bruce Winston Gem Corp.*, 111 USPQ2d 1419, 1422-23 n.7 (TTAB 2014).

[4] Neither party objected to the admission of any evidence, and any objections have been waived. *See generally* TBMP Section 707.04, and cases cited therein. Except as otherwise indicated below, we have considered all evidence of record for whatever probative value it may have. *See, e.g., Daniel J. Quirk, Inc. v. Vill. Car Co.*, 120 USPQ2d 1146, 1151 n.27 (TTAB 2016).

(1) the pleadings;

(2) the file of Respondent's registration, by operation of Trademark Rule 2.122(b)(1), 37 C.F.R. § 2.122(b)(1);

(3) Petitioner's testimony depositions of Beverly Steinfink, Ginny Ferguson, Joy McGinty, Judy Heumann (with exhibits), Sharon Powers, and Tracey Panzer-Michelle (with an exhibit), all taken upon written questions (26 TTABVUE);

(4) Respondent's testimony depositions of Nadya Davis, JoAnn Barnett, Harvey Barnett, Lisa Beers, Ashleigh Bullivant, Nicole Cahill, Austin Barnett, Kristy Wexler, and Kathleen Smith, all taken upon written questions (29 TTABVUE);

(5) Petitioner's January 30, 2017 Notice of Reliance covering 22 exhibits (22 TTABVUE);

(6) Respondent's April 21, 2017 Notice of Reliance covering 20 exhibits[5] (28 TTABVUE); and

(7) Petitioner's rebuttal Notice of Reliance covering three additional exhibits (36 TTABVUE).

II. Factual Background

Dr. Harvey Barnett, the Barnett Family, and the Barnett Companies

Harvey Barnett, who holds a PhD in psychological foundations and has held various academic positions at the university level, filed Application Serial No. 85585657, which matured into Respondent's registration. H. Barnett Tr. 4:15-5:21.

[5] Exhibits 6, 8-15, 17-19, and part of Exhibit 20 were designated "Confidential Attorney's Eyes Only" under the Standard Protective Order and were filed under seal at 30-32 TTABVUE.

Dr. Barnett began teaching infants and young children aquatic survival skills in 1966 and continued to do so until his retirement. H. Barnett Tr. 6:2-5. He also conducted research and developed theories for working with infants and young children in the water, and prepared curriculum materials and safety protocols for training and certifying instructors to teach water safety skills. H. Barnett Tr. 6:16-7:4. His objective was "to teach infants and young children to handle themselves in the water and to apply my background, my applications, my theories, my scholarship, and my research into assessing a situation so that a child can be taught a variety of aquatic skills." H. Barnett Tr. 6:5-10.

Prior to filing his application in 2012, Dr. Barnett had formed a number of companies that were called, at various times, Infant Swimming Research, Inc., Infant Swimming Resource, LLC, Harvey Barnett, Inc., Instructor Development, LLC, and Respondent Swim-Float-Swim, LLC, which changed its name to J. Barnett Holdings, LLC (collectively the "Barnett Companies"). H. Barnett Tr. 5:2-21, 25-7:4; 11:10-14, 25-12:4; 14:23-17:8; J. Barnett Tr. 6:8-7:12; 20:19-22:10; 25:18-27:14. Dr. Barnett's former wife JoAnn Barnett testified that she has taught water safety to children and has trained instructors since 1982, when she met Dr. Barnett, working first for Infant Swimming Research, and then for Infant Swimming Resource after it was formed in 2002. J. Barnett Tr. 4:13-5:12; 5:22-6:13.[6] The Barnetts' son Austin and daughter Ashleigh Bullivant also work for ISR. Austin oversees ISR's growth, marketing, and

[6] Respondent's witnesses testified that both Infant Swimming Research, Inc. and Infant Swimming Resource, LLC have been referred to as "ISR," but Infant Swimming Research is now inactive, J. Barnett Tr. 26:8-10, and we will refer to Infant Swimming Resource as "ISR."

general operations, while Ashleigh oversees instructor development. A. Barnett Tr. 3:14-4:1; 10:20-11:2; 12:1-4; Bullivant Tr. 4:11-5:5; 18:17-19:1.

Ms. Barnett testified that Respondent was formed in 2002 on the advice of counsel to hold the intellectual property relating to the Barnett Companies, and that Respondent allows ISR, under an unwritten license, to use the intellectual property that ISR licenses to instructors under written licenses. J. Barnett Tr. 6:23-7:12; 22:23-23:8; 27:9-14.

ISR and Its Use of "Self-Rescue" in Instructor Licenses and Materials

ISR currently has 10 employees who support over 500 ISR-trained and certified independent contractor water safety instructors. J. Barnett Tr. 7:13-25; 8:7-9:6; 10:7-11:1. Four of ISR's independent contractor instructors testified at trial. Each confirmed that she had received training in water safety instruction from ISR, had been certified (or re-certified) by ISR, had signed a "License and Confidentiality Agreement" ("LCA") with ISR, and had been given access to the ISR "Branding Guide" through a secure website. Davis Tr. 8:11-9:20; Beers Tr. 4:25-5:23; Wexler Tr. 4:15-21; Ex. 1; 5:14-7:1; Smith Tr. 4:15-6:17; Exs. 1-2; J. Barnett Tr. 10:12-11:1.[7]

[7] Respondent designated the LCAs with instructors Kathleen Smith and Kristy Wexler as "Confidential Attorney's Eyes Only," 33 TTABVUE 2-13, 25-40, but placed a substantively-identical LCA with former instructor Sharon Powers in the publicly-accessible portion of the record as Exhibit 5 to Respondent's Notice of Reliance. 28 TTABVUE 242-254. Respondent's filing of this LCA in the public record and its public acknowledgment that Ms. Smith and Ms. Wexler are licensees waives any claim to confidentiality as to the two other substantively-identical LCAs filed under seal. *Wet Seal Inc. v. FD Mgmt. Inc.*, 82 USPQ2d 1629, 1633 n.6 (TTAB 2007). The Board may also "treat as not confidential that material which cannot reasonably be considered confidential, notwithstanding a designation as such by a party." Trademark Rule 2.116(g), 37 C.F.R. § 2.116(g). While Respondent designated the Branding Guide and an "Instructor Website Key Messaging" document, 30 TTABVUE 285-286, as "Confidential Attorney's Eyes Only," and filed them under seal, we will summarize or paraphrase from those materials to the extent necessary, as we need "to be able to discuss

The "License" paragraph in the LCAs grants the right to use ISR's "Intellectual Property,"[8] and the right to "use the name INFANT SWIMMING RESOURCE® and logo," but does not mention "Self-Rescue." 28 TTABVUE 245-246. Ms. Wexler, an ISR master instructor who trains other instructors, testified that the LCA "gives us permission to utilize the logo and the name Infant Swimming Resource and talks about our duties as an instructor." Wexler Tr. 11:18-12:3.[9]

The term "Self-Rescue" appears in two places in the LCA. The "Description of Duties" paragraph provides, among other things, that a licensee "may teach private 'traditional', non Self-Rescue™ swimming lessons to children over the age of 48 months." 28 TTABVUE 247.[10] The "Covenant Not to Compete" paragraph includes time-limited prohibitions on "teaching water survival, self-rescue or related aquatic skills to infants or young children," and being employed by, rendering any services to, or consulting with, any person or entity "if the services to be provided by Licensee

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the evidence of record, unless there is an overriding need for confidentiality, so that the parties and a reviewing court will know the basis of the Board's decisions." *Noble House Furnishings, LLC v. Floorco Enters., LLC*, 118 USPQ2d 1413, 1416 n.21 (TTAB 2016).

[8] "Intellectual Property" is defined as "certain proprietary concepts, confidential business information and trade secrets relating to specialized methods, procedures and techniques for teaching specialized water survival, swimming and associated aquatic skills to infants and young children under the name 'INFANT SWIMMING RESOURCES®'." 28 TTABVUE 243.

[9] Pages captioned "Professionalism and Branding" were appended to Ms. Wexler's LCA. 33 TTABVUE 37-40. These pages mention "ISR Self-Rescue™ lessons," but focus on the importance of safeguarding "the ISR name" and the "ISR Brand." They list "Branding Do's" and "Branding Don't's," none of which refers to "Self-Rescue."

[10] Ms. Smith's April 5, 2017 LCA, which is presumably the current version of the document, contains the words "non ISR Self-Rescue® swimming lessons." We infer that this portion of the LCA was revised at some point after Respondent's registration issued in 2014.

. . . would involve or relate to in any material way teaching water survival, self-rescue or related aquatic skills to infants or young children." 28 TTABVUE 250.

ISR's Branding Guide uses "Self-Rescue" in two places: in the "ISR Key Words" list (which also includes words and slogans such as "Survival Swimming Lessons," "Water Safety," "Certified," "Not One More Child Drowns," and "Swim-Float-Swim"), and on the "Messaging" page, which contains the statements that "ISR's Self-Rescue™ program was developed by Harvey Barnett, PhD," that "ISR's Self-Rescue™ program teaches children six months to six years how to survive if they were to reach the water alone," and that there are "[o]ver 800 documented cases of a child using ISR's Self-Rescue™ technique to save their [sic] own life." 30 TTABVUE 258-259. The words "Self-Rescue" do not appear in the portions of the Branding Guide discussing the proper use of the ISR logo, name, and brand, 30 TTABVUE 260-263, 266, or the proper use of program typefaces and colors, 30 TTABVUE 264-265, and no instructions are given regarding proper use of "self-rescue."

The Filing and Prosecution of Involved Application Serial No. 85585657

Ms. Barnett testified that she authorized the filing of the application that matured into Respondent's registration because "the term self rescue in the general public's mind is synonymous with the end result of the ISR program." J. Barnett Tr. 11:15-21; 12:1-8. Dr. Barnett filed the application on March 31, 2012 in his own name, however, testifying that he did so because "I was the author of - - I was the author," H. Barnett Tr. 19:5-7, because he was the founder and owner of the Barnett Companies "and the originator of the self rescue technique," H. Barnett Tr. 20: 14-18,

and because a state court in Colorado had ruled in 2011 that he and the Barnett Companies were essentially one and the same entity. H. Barnett Tr. 20:5-13.[11] In the application, he identified himself as "owner" and stated that he controlled "the use of the mark by members as follows: all members must have written permission to use the term SelfRescue prior to their utilizing the term."

The application was initially refused because SELF RESCUE was merely descriptive of the identified services.[12] Dr. Barnett then assigned the application to Respondent,[13] which then traversed the descriptiveness refusal, amended Dr. Barnett's original identification of services to the one in the registration as issued, and submitted a duplicate application, signed by Ms. Barnett, identifying ISR as the owner of the mark.[14]

In a response to a subsequent Office Action, Respondent withdrew the request to amend the owner of the application and requested that "a claim of acquired distinctiveness be entered with respect to its mark,"[15] based solely on the declaration

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[11] The lead plaintiff in the referenced suit, entitled *Judy Heumann, et al. v. Harvey Barnett and Infant Swimming Resource, LLC,* was a licensee of Harvey Barnett, Inc. between 1984 and 1999, Heumann Tr. 15:20-21, and is one of Petitioner's founders. Ms. Heumann and her husband sued to collect a judgment for the attorneys' fees and costs that they had incurred in the defense of a separate suit brought against them by Dr. Barnett and Infant Swimming Research. As the court in the *Heumann* case explained in its February 14, 2011 Ruling and Order following trial, made of record by Petitioner, 36 TTABVUE 142-149, the plaintiffs sought "to pierce the corporate veil and collect the judgment entered against [Infant Swimming Research] from Harvey Barnett and [ISR]." 36 TTABVUE 143. The plaintiffs' counsel in that case is Petitioner's counsel here.

[12] July 17, 2012 Office Action at 1.

[13] The assignment was recorded in the U. S. Patent and Trademark Office on September 13, 2012 under Reel/Frame 4860/0667.

[14] January 17, 2013 Response to Office Action at 1-4.

[15] July 19, 2013 Response to Office Action at 1.

of its counsel, Allison R. Imber, attesting to "substantially exclusive of the mark for almost five years."[16]

The Examining Attorney rejected the Section 2(f) claim because Applicant had not used the mark for five years.[17] Respondent then requested again "that its acquired distinctiveness claim be entered with respect to its mark" on the basis of Ms. Barnett's declaration, as Managing Member of Respondent, attesting to continuous and substantially exclusive of the SELF RESCUE mark since November 26, 2008.[18] The application was subsequently published for opposition and the involved registration issued under the provisions of Section 2(f).

Petitioner

Ms. Heumann testified that "the Infant Aquatics Network had been formed in January 2015 during a meeting of a group of lead [swimming and water safety] instructors," and that this group "was registered as a nonprofit corporation in Texas in July [sic] of 2015" called Infant Aquatics Network, Inc. Heumann Tr. 31:1-4.[19] Petitioner's founders were swimming teachers and other professionals involved in teaching water safety skills. Heumann Tr. 17:21-18:15; 22 TTABVUE 16-19; Steinfink Tr. 13:7-10.

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[16] July 19, 2013 Response to Office Action at 1.

[17] August 7, 2013 Office Action at 1.

[18] February 7, 2014 Response to Office Action at 1-4.

[19] Petitioner was formed as a nonprofit corporation in Texas on June 22, 2015. Heumann Tr. 3-4; 22 TTABVUE 16-19.

Ms. Heumann owns and operates a separate water safety instruction business called Infant Aquatics, LLC, Heumann Tr. 3:8-17, but incorporated Petitioner shortly after she and other water safety instructors received demand letters from ISR regarding their uses of "self-rescue." Heumann Tr. 12:17-20 (22 TTABVUE 12-13); 19:11-20:19 (22 TTABVUE 10-11, 14-15). Petitioner commenced this proceeding a little more than a month after Petitioner's formation.

Petitioner's Certificate of Formation states that Petitioner's purpose is "to promote an effective teaching method used to equip infants and preschool children with the necessary aquatic skills to survive in the case of an accidental water exposure," 22 TTABVUE 17, but its actual activities are unclear. Ms. Heumann, the only one of Petitioner's witnesses who identified herself as a current member of Petitioner, testified that the "members of Infant Aquatics Network, Inc." were "[i]nstructors that were certified in the Infant Aquatics Survival method," Heumann Tr. 18:12-15, and who were licensed to use "the Infant Aquatics logo." Heumann Tr. 31:24-32:2-8. There is no evidence, however, that Petitioner owns the "Infant Aquatics logo" or any marks pertaining to what Ms. Heumann described as "the Infant Aquatics Survival method," and there is no evidence reflecting Petitioner's certification or licensing of its members or showing that Petitioner itself provides or promotes instruction in water safety skills. The only specific activity on the part of Petitioner that is clear from the record is the prosecution of this proceeding.

III. Standing

A threshold issue in every *inter partes* case is the plaintiff's standing to challenge registration. *See Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111

USPQ2d 1058, 1062 (Fed. Cir. 2014), *cert. denied*, 135 S. Ct. 1401 (2015); *John W. Carson Found. v. Toilets.com Inc.*, 94 USPQ2d 1942, 1945 (TTAB 2010). Section 14 of the Trademark Act, 15 U.S.C. § 1064, provides that a "petition to cancel a registration of a mark . . . may . . . be filed . . . by any person who believes that he is or will be damaged . . . by the registration of a mark on the principal register . . . ." Petitioner must plead and prove its standing. *Apollo Med. Extrusion*, 123 USPQ2d at 1848.

There is "a liberal threshold for determining standing . . . ." *Azeka Bldg. Corp. v. Azeka*, 122 USPQ2d 1477, 1479 (TTAB 2017). Petitioner is required to show only that it possesses a real interest in the proceeding beyond that of a mere intermeddler, and that it has a reasonable basis for its belief that damage will result from the continued registration of Respondent's mark. *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999). "A 'real interest' is a 'direct and personal stake' in the outcome of the proceeding." *Azeka Bldg. Corp.*, 122 USPQ2d at 1479 (quoting *Ritchie*, 50 USPQ2d at 1026).

Petitioner argues that it has standing because its members are water safety instructors, some of whom received demand letters from ISR regarding their use of "self-rescue." 37 TTABVUE 14-15. Petitioner argues that it "acts as a 'trade association' for its members, even though it does not use that phrase in its name." 41 TTABVUE 7.

Respondent counters that Petitioner's members "operate separate, completely independent companies" that teach drowning prevention skills, and that Petitioner "provided no evidence that [Petitioner] itself is engaged in these services, that it must

use the term 'self rescue' to identify its own business, or that it is being harmed by [Respondent's] registration." 38 TTABVUE 10. Respondent acknowledges that "trade associations have been recognized as having standing to act on behalf of their members' interests," but argues that Petitioner "never claimed to be a trade association and furnished no evidence to that effect" and that Petitioner "does not offer any evidence that it received fees or performs an industry regulation, or indeed any evidence at all to show that an alleged harm to its 'members' constitutes a real interest or damage to" Petitioner itself. 38 TTABVUE 10-11. Respondent's witness Austin Barrett went so far as to posit that Ms. Heumann "registered this new entity, Infant Aquatics Network, for the sole purpose of bringing this challenge of [sic] our mark." A. Barnett Tr. 9:4-10.

"'The purpose in requiring standing is to prevent litigation where there is no real controversy between the parties, where a . . . petitioner . . . is no more than an intermeddler.'" *Jewelers Vigilance Comm. Inc. v. Ullenberg Corp.*, 823 F.2d 490, 2 USPQ2d 2021, 2023 (Fed. Cir. 1987) (quoting *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982)). That purpose is satisfied here. As noted above, the only activity of Petitioner that is clearly established by the record is the prosecution of this proceeding, and we could reasonably infer from the timing and circumstances of Petitioner's formation that it was incorporated for that purpose, but its raison d'etre is inconsequential to its standing. Mr. Barnett identified a number of water safety instructors whom he believed were affiliated with Petitioner, including Ms. Heumann herself, who had received demand letters from ISR, and he

agreed that Petitioner was a competitor of ISR. A. Barnett Tr. 5:16-23; 15:1-14; 19:22-20:3; 21:14-16; 23:23-24:14, 19-21; 25-25:1, 11-13; 26:5-11; 27:13-14, 19-24; 28:23-29:13, 18-30:14, 17-18; 31:19-20; 32:4-6, 17-22; 33:5-23; 34:3-5, 14-17; 35:3-16. Therefore, Petitioner is not an intermeddler, but rather has a "direct and personal stake' in the outcome of the proceeding," *Azeka Bldg. Corp.*, 122 USPQ2d at 1479, sufficient "to assure that concrete adverseness which sharpens the presentation of issues upon which the [Board] so largely depends for illumination of difficult . . . questions.'" *Jewelers Vigilance*, 2 USPQ2d at 2023 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)); *see also Apollo Med. Extrusion*, 123 USPQ2d at 1848 (opposer's receipt of cease and desist letter from applicant confirmed standing to oppose).

IV. Petitioner's Non-Ownership Claim

Section 1(a)(1) of the Trademark Act provides that "[t]he owner of a trademark used in commerce may request registration of its trademark on the principal register . . . " 15 U.S.C. § 1051(a)(1). "In a use-based application under Trademark Act Section 1(a), only the owner of the mark may file the application for registration of the mark. If the entity filing the application is not the owner of the mark as of the filing date, the application is void ab initio." *Great Seats Ltd. v. Great Seats Inc.*, 84 USPQ2d 1235, 1239 (TTAB 2007). To prevail on its claim that the involved application was void ab initio, Petitioner must show, by a preponderance of the evidence, that Dr. Barnett, the original applicant, was not the owner of the mark when he applied to register it. *Wonderbread 5 v. Gilles*, 115 USPQ2d 1296, 1302 (TTAB 2015).

Petitioner argues that "the owner of the mark establishes ownership of a mark by being the first to use the mark in commerce," 37 TTABVUE 15, and that Dr. Barnett

was not the first user of SELF RESCUE in commerce in light of the uses of "self-rescue" by Petitioner's instructor witnesses and others, which are discussed below. Petitioner also points out that when Dr. Barnett filed the application, he did not claim use of the SELF RESCUE mark himself, but rather alleged that the mark had been used "by group members" with his permission because he "control[led] the use of the mark by members as follows: all members must have written permission to use the term SelfRescue prior to their utilizing the term." Petitioner contends that there is no evidence supporting the "group members'" alleged use or their alleged authorization by Dr. Barnett. Petitioner further argues that Ms. Barnett's statements during prosecution, following the application's assignment to Respondent, belie Dr. Barnett's ownership claim, and that the credible evidence indicates that the entity using the SELF RESCUE mark at the time of filing was neither Dr. Barnett nor Respondent, but rather ISR. 37 TTABVUE 16-18; 41 TTABVUE 8-12.

Respondent counters that Dr. Barnett created the SELF RESCUE mark prior to the formation of any of his companies, that he controlled the use of the mark by his companies until its assignment to Respondent in 2012, and that the court in the Colorado state court litigation brought by Petitioner's founder Ms. Heumann had specifically found, in response to the plaintiffs' request to pierce the corporate veil of the Barnett Companies to allow recovery against Dr. Barnett personally, "that ISR is the 'alter ego' of Dr. Barnett," 38 TTABVUE 8, and that "Dr. Barnett and his companies were legally one and the same . . . ." 38 TTABVUE 19.

Petitioner relies upon *Estate of Coll-Monge v. Inner Peace Movement*, 524 F.3d 1341, 86 USPQ2d 1598 (D.C. Cir. 2008), 37 TTABVUE 15, but that case recognized that it was not necessary for the mark's owner to itself use the mark because "the Lanham Act permits an applicant to establish ownership under the 'related companies' doctrine by showing that it controlled the first user of the mark." 86 USPQ2d at 1601. "The Lanham Act defines a 'related company' as 'any person whose use of a mark is controlled by the owner of the mark with respect to the nature and quality of the goods or services on or in connection with which the mark is used." *Id.* at 1602 (citing 15 U.S.C. § 1055). Here, Respondent claims that Dr. Barnett "maintained control over the mark until its assignment in 2012" and that "[p]rior to 2012, the use of the mark by ISR was under license from Dr. Barnett and inured to the benefit of Dr. Barnett." 38 TTABVUE 18-19.

As noted above, when Dr. Barnett filed the application, he claimed ownership of the mark by virtue of its use "by members" through "written permission . . . prior to their utilizing the term," but he did not have any copies of any such written permissions and had not provided any to Respondent's counsel. H. Barnett Tr. 10:18-11:4. As discussed in detail below, the record reflects the use of "Self-Rescue" on the ISR website at infantswim.com between 2009 and March 2012, 28 TTABVUE 273, 282, 284-288, 290-292, 294-295, 297, 299-306, 308, 318, 336-337, 340, 343, 348, 350, but exactly how Dr. Barnett controlled ISR's use of "Self-Rescue" on the website or otherwise is not clear. He testified that "[a]ny dissemination of any information in any format, brochures, pamphlets, any written documentation, websites and so forth

. . . had to be cleared prior to its use by [ISR] employees or our agents," H. Barnett Tr. 19:13-21, but did not explain whether or how he was personally involved in that process.

Dr. Barnett also testified, however, that he owned the "Self-Rescue" mark and filed the application in his own name because he considered that he and ISR "were essentially the same," based upon the court's ruling in 2011 in the *Heumann* litigation, and that he was the founder and owner of ISR, H. Barnett Tr. 20:5-18,[20] and the sole member of ISR. H. Barnett Tr. 16:17-19. Dr. Barnett's ownership of ISR, in and of itself, would be an insufficient basis upon which to claim that ISR was a related company, or that its use of "Self-Rescue" was attributable to him personally. *Great Seats*, 84 USPQ2d at 1243 (citing *In re Hand*, 231 USPQ 487 (TTAB 1986); *Smith v. Coahoma Chem. Co.*, 264 F.2d 916, 121 USPQ 215 (CCPA 1959)). But as the Board noted in *In re Hand*, the CCPA in *Smith v. Coahoma Chem. Co.* had clearly

[20] Petitioner submitted, under its rebuttal notice of reliance, the transcript of Dr. Barnett's September 16, 2010 deposition taken during discovery in that case, in which he apparently testified at length about the Barnett Companies. 36 TTABVUE 5-141. Petitioner claims that his testimony is relevant to show that Dr. Barnett did not own the mark, and that it is admissible under notice of reliance "pursuant to TBMP § 704.08 and 37 C.F.R § 2.122(e)," 36 TTABVUE 2, apparently claiming that his deposition is an "official record" within the meaning of Trademark Rule 2.122(e)(1). Testimony from another proceeding may be admitted in an *inter partes* proceeding only pursuant to Trademark Rule 2.122(f), which provides that "[b]y order of the . . . Board, on motion, testimony taken in . . . a suit or action in a court, between the same parties or those in privity may be used in a proceeding, so far as relevant and material . . . . 37 C.F.R. § 2.122(f). The "Board has construed the term 'testimony,' as used in Rule 2.122(f) as meaning only trial testimony, or a discovery deposition which was used, by agreement of the parties, as trial testimony in the other proceeding." *Threshold.TV Inc. v. Metronome Enters. Inc.*, 96 USPQ2d 1031, 1035 n.8 (TTAB 2010). Dr. Barnett's prior deposition meets none of these requirements for admissibility. It was not offered by motion, the *Heumann* case did not involve "the same parties" or a party in privity with Petitioner, and there is no evidence that Dr. Barnett's deposition "was used, by agreement of the parties, as trial testimony in the other proceeding." *Id.* We have given it no consideration.

implied that "if facts were presented to show that an individual['s] ownership of a corporation was so complete that the two legal entities 'equitably constituted a single entity,' then sufficient control by the individual with use by the corporation inuring to the individual's benefit would be found." 231 USPQ at 488 (quoting *Smith*, 121 USPQ at 218).

The court in the *Heumann* litigation found in 2011, a little more than a year before Dr. Barnett filed the application, that the Barnetts' trial testimony about the various Barnett Companies "showed that the web of corporations that they formed were meaningless window dressing for what was in fact a kitchen table operation." 36 TTABVUE 146. The court observed that the Barnetts "often could not keep their own corporations straight" and that even though ISR had been formed in 2002, there were no corporate records for ISR as of 2011, "none whatsoever." 36 TTABVUE 146, 148. The court also found that an Infant Swimming Research business plan "described the ISR techniques as the intellectual property of Harvey Barnett, not the property of any of his corporations." 36 TTABVUE 147. The court concluded that Infant Swimming Research and ISR were alter egos and that Infant Swimming Research was "the alter ego of Dr. Barnett," and entered judgment against Dr. Barnett and ISR, enabling the Heumanns to collect the judgment that they had obtained against Infant Swimming Research against Dr. Barnett and ISR. 36 TTABVUE 149.

The court's judgment, which was made of record by Petitioner, and obtained by the prime mover behind Petitioner, who was represented in that case by the same attorney representing Petitioner in this one, permits us to infer that Dr. Barnett and

ISR "equitably constituted a single entity," *Smith*, 121 USPQ at 218, when the application was filed in 2012, such that any use of "Self-Rescue" by ISR at that time inured to Dr. Barnett's benefit and made him the owner of the mark. We therefore find that Petitioner failed to prove, by a preponderance of the evidence, that Dr. Barnett did not own the "Self-Rescue" mark when the application to register it was filed, and we dismiss Petitioner's non-ownership claim.

V. Petitioner's Genericness Claim

"A generic term 'is the common descriptive name of a class of goods or services.'" *Princeton Vanguard, LLC v. Frito-Lay N. Am., Inc.*, 786 F.3d 960, 114 USPQ2d 1827, 1830 (Fed. Cir. 2015) (quoting *H. Marvin Ginn Corp. v. Int'l Ass'n of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986)). The test for determining "a mark's genericness requires 'a two-step inquiry: First, what is the genus of goods or services at issue? Second, is the term sought to be registered or retained on the register understood by the relevant public primarily to refer to that genus of goods or services?'" *Id.* (quoting *Marvin Ginn*, 228 USPQ at 530). "It is [P]etitioner's burden to establish that [SELF RESCUE] is generic by a preponderance of the evidence." *Alcatraz Media Inc. v. Chesapeake Marine Tours Inc.*, 107 USPQ2d 1750, 1761 (TTAB 2013), *aff'd mem.*, 565 F. App'x 900 (Fed. Cir. 2014).

A. The Genus of Services

"Often, the genus is defined by the identified goods or services in the involved registration . . . ." *Alcatraz Media*, 107 USPQ2d at 1761. The parties agree,[21] and we

[21] 37 TTABVUE 20; 38 TTABVUE 12.

find, that the identification of services in the registration adequately defines the genus of services. We thus turn to the second inquiry under *Marvin Ginn*, whether SELF RESCUE is understood by the relevant public primarily to refer to "instructing infants and young children in aquatic survival skills" or to "classes and seminars in the field of water safety and drowning prevention for infants and young children."[22]

B. The Relevant Purchasing Public's Understanding of SELF RESCUE

1. Defining the Relevant Purchasing Public

"[O]ur next task is to define the relevant purchasing public," *Alcatraz Media*, 107 USPQ2d at 1761, which "means 'the relevant public which does or may purchase the goods or services in the marketplace.'" *Id*. at 1762 (quoting *Magic Wand Inc. v. RDB Inc*., 940 F.2d 638, 19 USPQ2d 1551, 1552-53 (Fed. Cir. 1991)). The parties disagree on this issue. Petitioner argues that the relevant purchasing public includes parents and others who purchase the identified services for children, as well as instructors and other water safety professionals seeking to learn techniques for instructing children in aquatic survival skills, 37 TTABVUE 20, while Respondent argues that "the only relevant consumers here are the parents and those purchasing aquatic survival skills classes and seminars for infants and children." 38 TTABVUE 12-13. We agree with Respondent. While water safety instructors may be a competent source of probative evidence regarding the perception of the term SELF RESCUE by the relevant purchasing public, they render, rather than consume, the identified services.

[22] The entire registration may be cancelled if the mark is found to be the generic name for either service. *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012).

We find that the relevant purchasing public comprises parents and other persons who purchase the services of "instructing infants and young children in aquatic survival skills" or "classes and seminars in the field of water safety and drowning prevention for infants and young children."

2. The Significance of the Term SELF RESCUE to the Relevant Purchasing Public

"Any competent source suffices to show the relevant purchasing public's understanding of a contested term, including purchaser testimony, consumer surveys, dictionary definitions, trade journals, newspapers and other publications." *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 57 USPQ2d 1807, 1801 (Fed. Cir. 2001). Petitioner relies primarily upon the testimony of water safety instructors; two American Red Cross manuals; third-party webpages and other materials used by water safety instructors; pages from the websites at americanwhitewater.org and southwestpaddler.com pertaining to whitewater canoeing; excerpts from the December 1988/January 1989 newsletter of the National Association of State Boating Law Administrators entitled "Small Craft Advisory" and from a document entitled "Oregon Recreational Boating Accident Statistics–1998;" and three patents regarding devices and systems that are claimed to enable "self-rescue" by persons separated from watercraft in open water, incapacitated divers, and kayakers. Petitioner also points to the ISR website, which Petitioner claims uses "self-rescue" as an adjective to modify nouns such as "instruction," "lessons," and "skills." 37 TTABVUE 21.[23]

[23] Petitioner and Respondent disagree regarding the nature of Respondent's use of SELF RESCUE as an adjective. Petitioner argues that such use makes SELF RESCUE generic, 37 TTABVUE 21, while Respondent argues that such use "identif[ies] its unique techniques with

Petitioner argues that these materials are "ample evidence that SELF RESCUE has a history of established use in the genus of water safety, drowning prevention, and aquatic survival skills." 37 TTABVUE 22.

Respondent counters that Petitioner "has not offered *any* evidence that [the relevant purchasing public] perceives the mark SELF RESCUE to be the common name for these services," 38 TTABVUE 13, and specifically that Petitioner "has not provided any survey evidence showing consumer perception, nor testimony from parents, nor any documentary evidence showing how the mark is understood." 38 TTABVUE 13-14.[24]

Several swimming and water safety instructors testified to their and others' use of "self-rescue" in connection with water safety and drowning prevention instruction and classes for infants and young children. Ms. Heumann, an instructor since about 1972, testified that she was certified by the Red Cross as a water safety instructor at that time, and heard and saw use of "self-rescue" in her lifesaving courses "to describe how you could rescue yourself in the event of an accident by taking off your clothes and making flotation devices out of your jeans, blowing air in them, and being able to

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regard to infant swimming and survival instruction." 38 TTABVUE 13 n.3. It is well-settled that generic adjectives, like generic nouns, are not protectable as marks. *See, e.g., In re Central Sprinkler Co.*, 49 USPQ2d 1194, 1199 (TTAB 1998). The question is whether SELF RESCUE is used generically.

[24] We agree with Respondent that some of Petitioner's evidence is not probative of whether the relevant purchasing public understands SELF RESCUE to refer primarily to water safety and drowning prevention instruction and classes for infants and young children. The use of "self-rescue" to refer to saving oneself from a boating, kayaking, or diving accident, from drowning in a submerged vehicle, or from drowning after falling through ice into cold water, 22 TTABVUE 55-147, 176-186, 202-212; 36 TTABVUE 150-155, does not necessarily assist us in determining whether the term primarily refers to the agreed-upon genus of services.

float and sustain yourself in the water." Heumann Tr. 3:24-4:9; 4:10-16, 21-24; 7:22-8:4.[25] She testified that she first used the term when she began teaching water safety in 1980, following the birth of her son, to mean that a baby was able to float on his or her back. Heumann Tr. 7:1-21.

She testified that she has used the term in conversations with parents and other instructors that she trained, and in letters to parents,[26] in YouTube videos, on websites, and in social media. Heumann Tr. 8:10-9:5; 10:23-12:16. She testified that she has produced three videos showing her instructing an infant in which the term "self-rescue" was used, and that she posted the videos on her YouTube channel, where she claimed they have been viewed over 300,000 times. Heumann Tr. 10:23-12:16. She also testified that she was aware of the use of the term "self-rescue" by other instructors that she trained, as well as by instructors named Rob and Cathy McKay in Florida, and that the McKays own a website at babyswimming.com on which they use "self-rescue" to describe water safety skills. Heumann Tr. 13:8-14:14.[27]

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[25] A discussion of this means of "self-rescue" is contained in the second of the two American Red Cross manuals in the record, which is discussed and depicted below.

[26] She identified Exhibit 1 to her testimony deposition as her "2000 Information Letter for prospective parents," which she created on February 23, 2000 and sent to parents who contacted her about water safety instruction. Heumann Tr. 9:6-10:3-14. Exhibit 1 was not attached to Ms. Heumann's deposition transcript when it was filed, 26 TTABVUE, but the letter appears as Exhibit 19 to Petitioner's Notice of Reliance. 22 TTABVUE 194-201. The letter's first page states that in her water safety classes, "[i]nfants and children are taught how to effectively engage the aquatic environment for self-rescue."

[27] Pages from the babyswimming.com website archived on November 27, 1999 by the Wayback Machine on archive.org are attached as Exhibit 18 to Petitioner's Notice of Reliance. 22 TTABVUE 189-193. One page states that the "first safety skill teaches a baby to jump in the water-turn around and swim back to the side," which "is the most practical method of self-rescue for infants and toddlers as the majority of accidents occur near the edge of pools or bodies of water." 22 TTABVUE 191. There is no evidence in the record regarding the

Ginny Ferguson, an instructor since 1973, testified that she understood the term "self-rescue" to mean generally "to get yourself out of trouble without having to put other people at risk to rescue you," Ferguson Tr. 4:15-19, and that she first used it when she became a certified water safety instructor with the Red Cross in 1973, after her instructor taught her how to teach babies to roll over on their backs and float to keep their heads out of the water. Ferguson Tr. 6:17-24; 7:4-20. She testified that she has used the term since she started teaching swimming in connection with teaching children the tools to self-rescue. Ferguson Tr. 8:13-25; 9:11-14; 24:3-9, 19-25:8. She was also aware of the use of the term on the McKay website and by other water safety instructors. Ferguson Tr. 9:15-11:9.

Joy McGinty testified that she began using the term "self-rescue" in water safety instruction beginning in 1996 because she "realized that that is exactly what I teach my students," and that she has continued to use it in talking to parents and describing her program to clients. McGinty Tr. 5:12-6:2, 18-7:2. She testified that she took Red Cross training in 2000 in which she was taught self-rescue skills, McGinty Tr. 4:2-4; 6:15-17, and that the term "self-rescue" was referred to in both of her Red Cross manuals. She also testified that she heard the term used by Mr. McKay and by water safety instructor Jenny Flahive at conferences of the National Swim School Association, that she had trained other instructors who have used the term, and that she was aware of other uses of it on websites and in advertising. McGinty Tr. 6:8-14;

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number of visits to this website or the extent of the exposure of the term "self-rescue" to the relevant purchasing public through the website.

7:8-8:8; 10:24-11:6. She testified that her clients refer to her program PediaSwim as "a self rescue program." McGinty Tr. 10:15-20.

Beverly Steinfink, an instructor since 1986, Steinfink Tr. 3:5-13; 5:15-20, testified that she heard the term "self-rescue" used in her Red Cross lifeguard training, and began using the term herself around 2004 after "looking for a better way to describe what we did." She testified that she has used it as "a descriptive term for how the lessons were different from regular swimming lessons taught at the Y or other rec. centers," Steinfink Tr. 3:16-4:19; 6:4-24, in her parent manual,[28] and in training other instructors. Steinfink Tr. 7:3-19. She testified that she was aware of the use of "self-rescue" by Mr. McKay, Ms. Flahive, and at least one instructor that she had trained. Steinfink Tr. 8:1-9:7. She stopped using "self-rescue" in 2015. Steinfink Tr. 7:8-12.

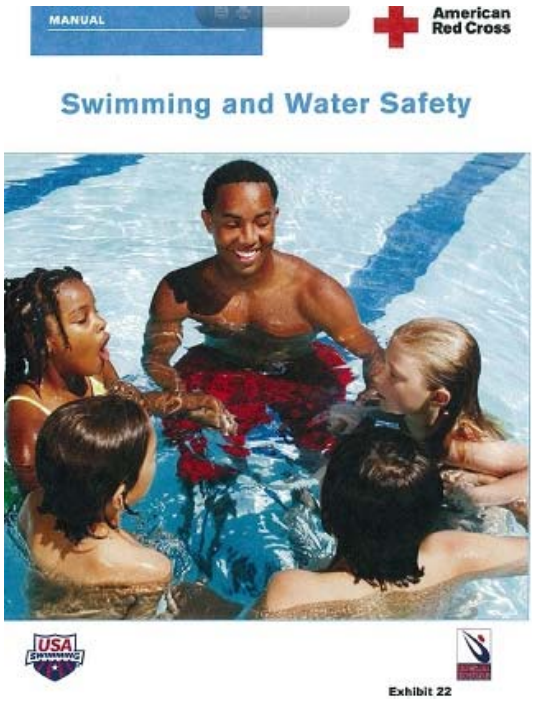
The only parent to testify at trial, Respondent's witness Nicole Cahill, the mother of two sons who went through the ISR program, explained that she chose ISR because "[t]hey were the only company with a proven method to teach infant children to SELF-RESCUE." Cahill Tr. 4:18-21.[29] She testified that "self-rescue" refers to the "method ISR teaches infants and children to surface and float or float and swim if they are old enough to save themselves from drowning," which "buys them time so an adult can interfere or they can SELF-RESCUE by getting to the edge of the water

[28] Ms. Steinfink's parent manual is not in the record.

[29] Ms. Cahill and several of Respondent's other witnesses, whose testimony is discussed below in connection with whether SELF RESCUE has acquired distinctiveness, used the words "self rescue" in their testimony depositions in the manner of a reflexive verb, but the court reporters transcribed the words in capital letters, usually joined by a hyphen, as a trademark might be depicted. We have considered the manner in which the term "self-rescue" was used by these witnesses, not the manner of its transcription, in evaluating their testimony.

and out of the water into safety." Cahill Tr. 4:22-5:7. She recounted that her own son had fallen into a hot tub and that she "never would have known he was in there if he hadn't been trained to pop up into his float to SELF-RESCUE." Cahill Tr. 10:2-5. She testified that her personal "goal is to have every child have the ability to SELF-RESCUE, and ISR is the only way that that can happen." Cahill Tr. 10:6-8.[30]

We reproduce below pertinent pages from the second of the two Red Cross manuals made of record by Petitioner:



[30] Respondent also cites testimony by Ms. Barnett that Respondent claims shows "that parents and customers recognize that the mark SELF RESCUE refers to the particular methods and services originating in Dr. Barnett and JBH's licensee, ISR." 38 TTABVUE 14. This testimony consisted of Ms. Barnett's answer "Yes, I am" to the question "Are you aware that third parties, particularly parents who are 'customers' of your company's infant swimming survival services, recognize the term self rescue as referring to a particular method of your company?," and her statement that she did not know of the appearance of the term "self rescue" in any dictionaries. J. Barnett Tr. 13:23-14:7. We give this testimony no weight on the issue of the relevant purchasing public's recognition of SELF RESCUE as a mark. Ms. Barnett's conclusory three-word answer "Yes, I am" does not qualify as permissible lay opinion testimony under Rule 701 of the Federal Rules of Evidence.

American Red Cross

StayWell

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American Red Cross certificates may be issued upon successful completion of a training program, which uses this manual as an integral part of a course. By itself, the material in this manual does not constitute comprehensive Red Cross training. In order to issue Red Cross certificates, your instructor must be authorized by the American Red Cross, and must follow prescribed policies and procedures. Make certain that you have attended a course authorized by the Red Cross. Contact your local American Red Cross chapter *(www.redcross.org)* for more information.

The emergency care procedures outlined in this manual reflect the standard of knowledge and accepted emergency practices in the United States at the time this manual was published. It is the reader's responsibility to stay informed of changes in the emergency care procedures.

Printed in the United States of America.

a substitution for boating safety education and experience (**Fig. 1-8**).

Drownproofing and Young Children: A Dangerous Myth

Participation in any swim lesson program cannot "drownproof" your child. Despite claims to the contrary, no young child is drownproof or water safe. Young children are, by nature, wildly curious, unpredictable and vary greatly in their size, physical abilities and motor skills and may be clumsy at times. An infant or a toddler who falls into the water can become disoriented and scared and may not correctly remember techniques for self-rescue. Although some young children are quite skilled at swimming, due to

CHAPTER 3

Water Safety—Recognition and Response

Anyone who participates in aquatic activities should know how to recognize and respond to an aquatic emergency. Learning basic skills for self-rescue and for helping someone who is in trouble in the water is important for everybody, because most people live, work or play near water. In fact, knowing how to respond to an aquatic emergency is just as important as knowing how to prevent one.

By focusing on the steps necessary for recognizing and responding to an aquatic emergency as well as tips and procedures for self-rescue, this chapter outlines the information necessary to handle most aquatic emergencies.

Responding in an Emergency

The most important thing you can do in an aquatic emergency situation is to keep yourself safe. In most cases, only trained professionals should enter the water to perform a rescue, such as a rescue in deep water or when the victim is far from shore.

Self-Rescue

Muscle Cramps

Muscle cramps can occur when muscles become tired or cold from swimming or other activity. A cramp is an involuntary muscle contraction, usually in the arm, foot or calf. A person with a muscle cramp in shallow water should–

- Try to relax the muscle by stopping the activity and begin floating or changing the swimming stroke.

***Self-Rescue* with Clothes**

A person may be able to swim toward safety by inflating the pants or by trapping air in the shoulders of a shirt or jacket. Once filled with air, the shirt or pants can be used as a flotation aid.

To inflate a shirt or jacket by blowing air into it–

1. Tuck the shirt in or tie the shirttail ends together around the waist.
2. Unbutton the collar button, take a deep breath, bend your head forward into the water, pull the

Moving Water Self-Rescue

If you fall into moving water–

1. Float downstream on your back with your feet in front to fend off obstacles and avoid entrapping the feet or legs.

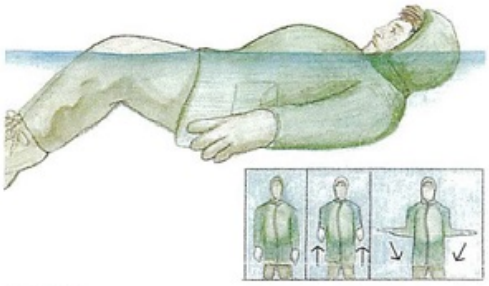

Fig. 3-14

22 TTABVUE 221-224 (all highlighting supplied by Petitioner).

Respondent's own documentary evidence reveals uses of "self-rescue" to describe or refer to the ability of an infant or young child to save himself or herself from drowning in a water emergency. A page from the ISR website reproduced below states that ISR teaches children "skills to potentially save themselves if they find themselves in the water alone:"

Infant Swim Self Rescue™ Survival Swimming Lessons - Our Story... http://www.infantswim.com/about-isr/about-isr.html

ISR Home Contact Us ENROLL YOUR CHILD

Lessons About Us Splash Zone Blog Water Safety Careers CrossFit Kids Join Our Mission

ABOUT ISR

Our Story & Mission

Find an Instructor

Enter your Zip Code

Radius (miles) e.g. 20

GO

Share Your ISR Story

If your child has previously gone through ISR Self-Rescue™ lessons, we invite you to share your story with us

SHARE

Our Store

About Us

Today, our mission, "Not One More Child Drowns," is the foundation of everything we do and is the driving force behind ISR's employees, our independent ISR instructors, and our major corporate partnerships. We believe the successful prevention of the leading cause of accidental death for children under the age of 4 in the U.S. will require a large group of caring and capable professionals whose sole focus is to save lives. To date, we have delivered more than 7,750,000 ISR Self-Rescue™ lessons and saved more than 800 lives.

ISR believes pool fences, supervision, and pool alarms are important parts of a necessary multi-layered approach to drowning prevention. However, traditional lines of defense break down, and the over 4,000 drowning deaths per year bear a grim testament to the fact that traditional approaches are missing a key component: the child. ISR's core conviction is that the child is the most important part of a drowning prevention strategy and our over 250,000 ISR graduates and 800 documented survival stories are proof that children can save themselves. Children are curious, capable, and have an uncanny ability to overcome obstacles like pool fences; at ISR we take that ability and teach them skills to potentially save themselves if they find themselves in the water alone.

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Press Room Medical Community Privacy/Non-Discrimination Policy

28 TTABVUE 67 (January 17, 2013 Response to Office Action at 7).[31] Other ISR webpages in the record display various uses of "Self-Rescue" or "self-rescue" to describe or refer to water survival skills. An archived ISR webpage reproduced below states, among other things, that "ISR provides researched instruction techniques and a drowning prevention strategy for parents to ensure that young children are learning self rescue skills and the confidence required to safely enjoy the water:"

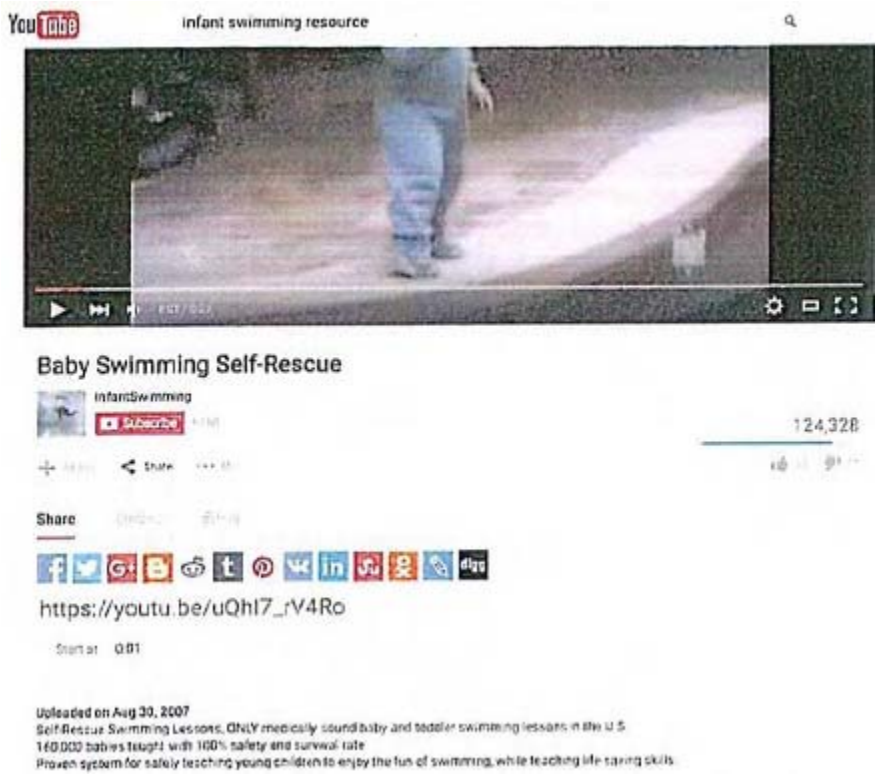
[31] This page and virtually all of the other webpages submitted by Respondent are barely legible. Filers in Board cases "are responsible for ensuring that all submissions are legible." *In re Loggerhead Tools, LLC*, 119 USPQ2d 1429, 1433 n.5 (TTAB 2016). We "can only review evidence that is clear so we have considered this evidence to the extent that it is legible and we are able to read the entire context of the evidence." *Alcatraz Media*, 107 USPQ2d at 1758.

28 TTABVUE 273. Other pages from the ISR website use "self-rescue" in the phrases "self rescue skills" (28 TTABVUE 273); "the ISR Self-Rescue™ Survival Sequence" or "Self-Rescue™ sequence" (28 TTABVUE 274, 312);[32] "ISR's Self-Rescue™ program" (28 TTABVUE 275, 306-307); "ISR Self-Rescue™ survival swimming skills" (28 TTABVUE 276); "ISR Self-Rescue™ survival swimming lessons" (28 TTABVUE 277, 292, 317); "ISR Self-Rescue™ lessons" (28 TTABVUE 279, 313, 319); "ISR Self-

[32] The record reflects consistent use of the "™" symbol next to the words "Self-Rescue" on ISR's website, and an undated page in the record entitled "Instructor Websites" advises ISR's instructors that "[t]he first time Self-Rescue is used on your site it must have the TM symbol: Self-Rescue(tm)." 32 TTABVUE 48. "The mere '[u]se of the letters '™' on a product does not make unregistrable matter into a trademark.'" *In re Empire Tech. Dev. LLC*, 123 USPQ2d 1544, 1556 n. 23 (TTAB 2017) (quoting *In re Remington Prods. Inc.*, 3 USPQ2d 1714, 1715 (TTAB 1987)). The use of the symbol "is significant only if it contributed to educating the public to understand that ['self-rescue'] is something other than a generic term." *Id.*

Rescue™ skills" (28 TTABVUE 280, 290, 291, 295-296, 319, 337-338, 340-341);[33] "ISR's Self Rescue techniques" (28 TTABVUE 301, 308); "the Self Rescue method used by ISR today" and the "ISR Self-Rescue™ Method" (28 TTABVUE 304, 339); the "ISR Self Rescue technique and system" (28 TTABVUE 305); ISR's "proven Self-Rescue™ survival swimming method" (28 TTABVUE 310); and "ISR's Self-Rescue™ training" (28 TTABVUE 315).

Respondent also made of record pages from what appears to be the ISR YouTube channel that use "Self-Rescue" to describe or refer to water survival skills:



28 TTABVUE 358.

[33] Two of these pages are entitled "Cameron had ISR Self-Rescue™ Skills When He Needed Them Most," 28 TTABVUE 295, and "ISR Self-Rescue™ Skills Made the Difference." 28 TTABVUE 296.

28 TTABVUE 359. In addition, Respondent made of record what appear to be visitor posts on the ISR Facebook page, which Ms. Bullivant testified has over 60,000 followers. Bullivant Tr. 37:15-17. One post seeks an instructor to teach "the ISR Infant Self Rescue swim technique," 28 TTABVUE 324, while the other states that the ISR "Self-Rescue Survival Swim program saves so many lives." 28 TTABVUE 325.

Non-ISR website pages and social media pages made of record by Respondent also use "Self-Rescue" to describe or refer to water survival skills. A page from the website at click2houston.com is entitled "Infant Self Rescue teaches babies, toddlers, kids skills to save themselves." 28 TTABVUE 323. A page from momparadigm.com captioned "Infant Swimming Self-Rescue" links to a video and states "I'm not sure why we don't teach our babies how to self-rescue should they fall in the water." 28

TTABVUE 328. A page from reddit.com states that "ISR or Infant Self Rescue is an aquatic survival technique meant to be an added layer of protection for babies/toddlers in the event of a water related accident," which "teaches crawling babies and toddlers how to handle themselves in the water in the event of a pool/hottub/bathtub accident." 28 TTABVUE 329.[34] Another page shows pictures taken while "an infant self-rescue training exercise was in progress." 28 TTABVUE 330.

A *New York Times Magazine* article reproduced below discusses Dr. Barnett, mentions a baby who was "introduced to 'self-rescue'," and refers to "[b]abies who have been taught 'self-rescue' technique through Barnett's infant-swimming program":

Magazine

Before Learning to Crawl, You Must Learn to Swim

Look

Rachel Ubiera, a 29-year-old in Kissimmee, Fla., considers herself "one of the relaxed mams." But the first time she saw her 5-month-old daughter, Zoe, carefully dropped underwater in a pool for infant survival swim training, it was nerve-racking. "She looked surprised," Ubiera says. "Like, 'What are you doing to me?'" Zoe was being introduced to "self-rescue," in which babies are taught to hold their breath underwater, kick their feet, turn over to float on their backs and rest until help arrives. The technique, photographed here by Seth Casteel, who is working on a related book that will come out next spring, was pioneered in the late '60s by Harvey Barnett, who at 18 became determined to teach infants to swim after the drowning of a neighbor's child. His methods have spread around the world — taught in clinics and imitated widely. "It gives the baby the best possible chance," he says. Julie Bosman

SLIDE SHOW | 15 Photos
Little Nemos

Residential swimming pools in the U.S.: 10.4 million

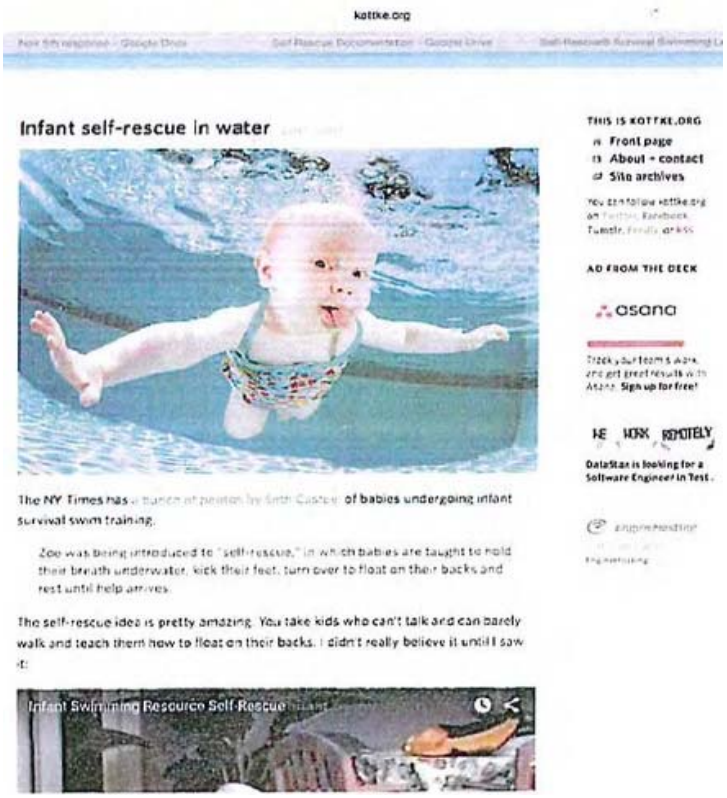
Accidental, nonboating drownings of children 14 or younger in the U.S. every day: 2

Babies who have been taught 'self-rescue' technique through Barnett's infant-swimming program: Almost [illegible] *

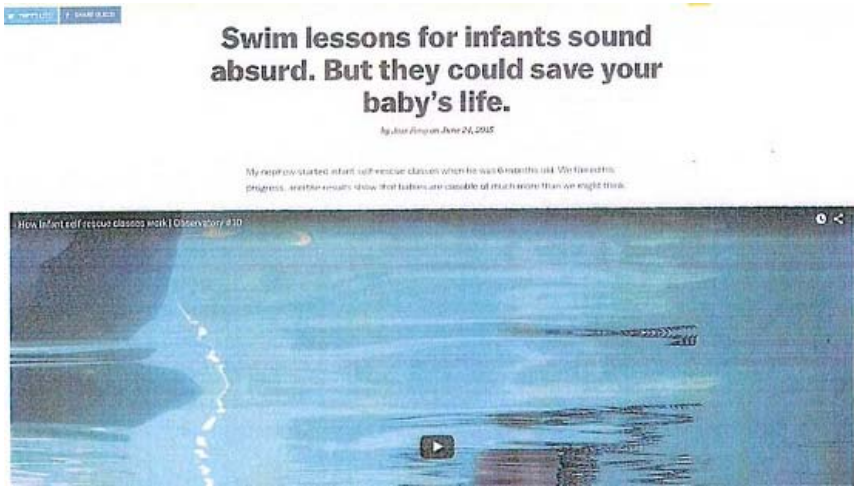
RELATED COVERAGE

[34] The record reflects a few uses of the acronym "ISR" to refer to "Infant Self Rescue" rather than "Infant Swimming Research" or "Infant Swimming Resource."

28 TTABVUE 331. Another webpage appears to refer to the *Times* article and states that the "self-rescue idea is pretty amazing":



28 TTABVUE 327. A page from vox.com links to a video of "How infant self-rescue classes work" and states that the poster's "nephew started infant self-rescue classes when he was 6 months old" and that "we filmed his progress":



28 TTABVUE 332.

"As we have often stated, '[g]enericness is a fact-intensive determination and the Board's conclusion must be governed by the record which is presented to it.'" *Alcatraz Media*, 107 USPQ2d at 1763 (quoting *In re Country Music Ass'n Inc.*, 100 USPQ2d 1824, 1832 (TTAB 2011)). The record reflects both generic and trademark uses of "self-rescue" for water safety and drowning prevention instruction and classes for infants and young children.

We credit the testimony of Petitioner's instructor witnesses that they have used "self-rescue" to refer to what is taught in their water safety and drowning prevention classes, and we can infer from their testimony that some members of the relevant purchasing public have been exposed to such generic uses of "self-rescue" by these instructors. There are gaps in their testimony, however, regarding the duration, extent, and manner of their use of the term,[35] and a dearth of documentary evidence of it, and their testimony is thus limited in probative value on the issue of the relevant purchasing public's perception of the term "self-rescue."

A page from the 2009 American Red Cross Swimming and Water Safety manual reproduced above states that it is "an integral part of a course" in a training program leading to the issuance of a Red Cross certificate, and the testimony of the instructors that they used various Red Cross manuals in their own training suggests that the 2009 manual was exposed to instructors who went on to train infants and young

[35] The same is true with respect to their testimony regarding the use of "self-rescue" by other instructors, including on the website at babyswimming.com. This testimony is anecdotal in nature.

children in water safety and drowning prevention. The manual refers to situations in which infants and toddlers "may not correctly remember techniques for self-rescue," as well as the need for "[a]nyone who participates in aquatic activities" to learn "basic skills for self-rescue." This use of "self-rescue" in lower case letters "is a classic example of the use of a putative mark as a generic term," *Empire Tech.*, 123 USPQ2d at 1556, and suggests to users that "techniques for self-rescue" and "basic skills for self-rescue" are not taught only by ISR instructors in ISR classes. We can infer from the testimony of Petitioner's instructor witnesses who said that they used Red Cross manuals during their training in water safety that other water safety instructors have been exposed to the 2009 manual's generic use of "self-rescue," but there is no information in the record regarding the extent of such exposure, or the extent, if any, to which the manual reached the relevant purchasing public. The 2009 Red Cross manual thus also has limited probative value in establishing the genericness of "self-rescue."

Some of the non-ISR web and social media pages in the record display "self-rescue" as a generic term, sometimes in lower case letters. Some associate the term with ISR or Dr. Barnett, 28 TTABVUE 327-329, while others do not. 28 TTABVUE 323, 330, 332. The *New York Times Magazine* article uses "self-rescue" generically, but attributes the "technique" to Dr. Barnett.[36] Other webpages use "Self-Rescue" with

[36] The *Times* article is the only newspaper or magazine article in the record. The absence of others undercuts Petitioner's claim that "self-rescue" is generic. *Cf. Empire Tech.*, 123 USPQ2d at 1560 (citing *Plyboo America Inc. v. Smith & Fong Co.*, 51 USPQ2d 1633, 1640 (TTAB 1999)).

initial capital letters as an adjective together with a reference to ISR, 28 TTABVUE 320, 324-325,[37] or use the hashtag "#SelfRescue" together with references to ISR. 28 TTABVUE 334-335.

As discussed above, the ISR website uses "self-rescue" to describe the goal, objective, or desired end result of ISR's services.[38] These uses are all directly associated with ISR, however, and the only parent witness, Ms. Cahill, testified that "self-rescue" refers to the "method ISR teaches infants and children to surface and float or float and swim if they are old enough to save themselves from drowning," and that her personal "goal is to have every child have the ability to SELF-RESCUE, and ISR is the only way that that can happen." Cahill Tr. 4:22-5:4; 10:6-8. An applicant's or registrant's own use of a term in websites, specimens, and other public-facing materials can be powerful, even dispositive, evidence of the term's genericness. *See In re Gould Paper Corp.*, 834 F.2d 1017, 5 USPQ2d 1110, 1112 (Fed. Cir. 1987) (applicant's specimen of use of the mark SCREENWIPE for wipes that clean computer and television screens stated that its product was "a wipe for screens" and "provided the most damaging evidence that its alleged mark is generic and would be perceived by the purchasing public as merely a common name for its goods rather than a mark identifying the good's source."); *Empire Tech.*, 123 USPQ2d at 1556 (applicant's generic uses of "coffee flour" on its website identified "a product, not a

[37] Some are simply too difficult to read to determine the manner of use of "self-rescue." 28 TTABVUE 321-322, 326.

[38] As discussed above, ISR has also used "self-rescue" generically in non-public facing materials, including in its LCA, which purports to prohibit current or former instructors from "teaching water survival, self-rescue or related aquatic skills to infants or young children."

particular producer of that product . . . ."). ISR's own materials here, however, are insufficient to show that the relevant purchasing public understands SELF RESCUE to refer primarily to Respondent's services.

All of the various uses of "self-rescue" discussed above result in "a mixed record of use of the phrase both generically and as part of what appear to be trademarks . . . ." *Alcatraz Media*, 107 USPQ2d at 1763; *see also In re Merrill Lynch, Pierce, Fenner, and Smith Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1143-44 (Fed. Cir. 1987) ("mixture of uses" of CASH MANAGEMENT ACCOUNT for various financial services, including uses associating term with applicant, did "not clearly place appellant's mark in the category of a generic or common descriptive term."); *In re Am. Online Inc.*, 77 USPQ2d 1618, 1623 (TTAB 2006) (mixed record of generic and trademark uses of INSTANT MESSENGER for various telecommunications services insufficient to establish genericness of term). After considering the record as a whole, we conclude that Petitioner failed to show, by a preponderance of the evidence, that the registered SELF RESCUE mark is the generic name for Respondent's services. The genericness claim is accordingly dismissed.

VI. Petitioner's Claim That the Registered Mark Has Not Acquired Distinctiveness

Petitioner's failure to prove that SELF RESCUE is generic for Respondent's services does not preclude it from showing that the mark has not acquired distinctiveness. *Alcatraz Media*, 107 USPQ2d at 1761-67 (finding that respondent's mark was not generic for respondent's services, but granting petition for cancellation

on alternative ground that it had not acquired distinctiveness). We turn now to Petitioner's claim that SELF RESCUE has not acquired distinctiveness.

A. Respondent's Section 2(f) Registration and the Parties' Respective Evidentiary Burdens

Respondent's registration issued under Section 2(f) of the Trademark Act, which provides that "nothing . . . shall prevent the registration of a mark used by the applicant that has become distinctive of the applicant's goods [or services] in commerce." 15 U.S.C. § 1052(f). A Section 2(f) registration is presumed to be valid, *Cold War Museum Inc. v. Cold War Air Museum Inc.*, 586 F.3d 1352, 92 USPQ2d 1626, 1628 (Fed. Cir. 2009), and that presumption "includes a presumption that the registered mark has acquired distinctiveness." *Id.* "To rebut this presumption, a party seeking to cancel a Section 2(f) registration must produce sufficient evidence for the Board to conclude, in view of the entire record in the cancellation proceeding, that the party has rebutted the mark's presumption of acquired distinctiveness by a preponderance of the evidence." *Id.*[39] Petitioner may show either that the mark had not acquired distinctiveness when the registration issued in 2014, or that it lacked acquired distinctiveness at the time of trial in 2017. *Alcatraz Media*, 107 USPQ2d at 1764.

[39] Respondent argues that SELF RESCUE is not merely descriptive, 38 TTABVUE 14-15, but "[w]here an applicant seeks registration on the basis of Section 2(f), the mark's descriptiveness is a non-issue; an applicant's reliance on Section 2(f) during prosecution presumes that the mark is descriptive." *Cold War Museum*, 92 UPSQ2d at 1629 (citing *Yamaha Int'l Corp. v. Hoshino Gakki Co. Ltd.*, 840 F.2d 1572, 6 USPQ2d 1001, 1005 (Fed. Cir. 1988)). Thus, Respondent's "contention that its mark is not merely descriptive . . . is untenable." *Apollo Med. Extrusion*, 123 USPQ2d at 1849.

In *Cold War Museum*, the Federal Circuit described the respective evidentiary burdens in a cancellation proceeding involving a Section 2(f) registration as follows:

> 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 of the evidence. . . . In a Section 2(f) case, the party seeking cancellation bears the initial burden to establish a prima facie case of no acquired distinctiveness. To satisfy this initial burden, the party seeking cancellation must present sufficient evidence or argument on which the board could reasonably conclude that the party has overcome the record evidence of acquired distinctiveness—which includes everything submitted by the applicant during prosecution. The burden of producing additional evidence or argument in defense of registration only shifts to the registrant if and when the party seeking cancellation establishes a prima facie showing of invalidity. The Board must then decide whether the party seeking cancellation has satisfied its ultimate burden of persuasion, based on all the evidence made of record during prosecution and any additional evidence introduced in the cancellation proceeding.

92 USPQ2d at 1630 (citations and quotations omitted).

As discussed above, Ms. Barnett's declaration of five years of substantially exclusive and continuous use of SELF RESCUE was "everything submitted by the applicant during prosecution." *Id*. "The fact that respondent's mark was registered pursuant to Section 2(f) based solely on a declaration of use does not preclude petitioner from introducing evidence that the mark is so highly descriptive as to require actual evidence of acquired distinctiveness in order to satisfy its initial burden of proof." *Alcatraz Media*, 107 USPQ2d at 1765. Petitioner may "carry its burden of showing prima facie invalidity by introducing evidence at trial that the mark is so highly descriptive that a mere declaration of five years continuous and

substantially exclusive use is insufficient to establish acquired distinctiveness, so that actual evidence of acquired distinctiveness in the form of sales and advertising figures and the like is necessary." *Id.*[40] *See also In re La. Fish Fry Prods., Ltd.*, 797 F.3d 1332, 116 USPQ2d 1262, 1265 (Fed. Cir. 2015) (the Board has discretion to not accept a Section 2(f) declaration where a mark is highly descriptive); *Apollo Med. Extrusion*, 123 USPQ2d at 1849 ("the higher the degree of descriptiveness of the designation in question, the higher the burden Applicant faces in proving acquired distinctiveness.").

B. The Degree of Descriptiveness of Respondent's Mark

"The initial question before us in our analysis of whether [SELF RESCUE] has acquired distinctiveness is the degree of descriptiveness of that phrase as used in connection with [Respondent's services]." *Id*. Petitioner argues that SELF RESCUE "is so highly descriptive that a mere declaration of five years continuous and substantially exclusive use is insufficient to establish acquired distinctiveness." 41 TTABVUE 16. We agree.

"A designation is considered to be merely descriptive under Section 2(e)(1) if it immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used." *Id.* (citing *Chamber of Commerce*, 102 USPQ2d at 1219). The word "self" is a pronoun that means, it in combining form,

[40] As the Board explained in *Alcatraz Media*, "'[h]ighly descriptive terms . . . are less likely to be perceived as trademarks and more likely to be useful to competing sellers than are less descriptive terms. More substantial evidence of acquired distinctiveness thus will ordinarily be required to establish that such terms truly function as source-indicators.'" *Id.* at 1767 (quoting *In re Greenliant Sys. Ltd.*, 97 USPQ2d 1078, 1085 (TTAB 2010)).

"oneself or itself [e.g.] self-supporting" (*Merriam-Webster Dictionary*, merriam-webster.com, accessed on November 30, 2017).[41] During prosecution, the Examining Attorney made of record a dictionary definition of "rescue" as "to bring (someone or something) out of danger, attack, harm, etc., deliver or save." July 17, 2012 Office Action at 2 (*Collins Dictionary*, collinsdictionary.com). When "rescue" follows "self," the resulting combination means to bring oneself out of danger, or to save oneself. Respondent's brief itself concedes that "the mark is used to identify what is being taught, *e.g.*, Self Rescue™ lessons," 38 TTABVUE 18, and the record shows that "what is being taught" is the skill of bringing oneself out of danger in the water and saving oneself from drowning.

When he filed his application, Dr. Barnett described his services as follows:

> Self Rescue is a term utilized in the education of the public concerning a comprehensive drowning prevention strategy for infants and young children. Self Rescue denotes the physical skills and the responsibility of the infant or young child in the water who has escaped supervision and defeated the gate or pool fence.

JoAnn Barnett testified that "self rescue" "refers to *the end result of what the children learn in the ISR program*." J. Barnett Tr. 11:2-9 (emphasis added). Austin Barnett testified that ISR's enforcement efforts were directed at instructors who tried to mislead parents "to believe that their children are being provided with self-rescue skills." A. Barnett Tr. 5:18-23.

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[41] The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed form or regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

Respondent's instructor witnesses testified similarly about the meaning of "self-rescue." Lisa Beers testified that her responsibility was to "teach children to SELF-RESCUE should they ever reach the water alone," and that the term "means *to teach an independent survival skill*." Beers Tr. 4:21-23; 6:4-8 (emphasis added). Kristy Wexler testified that "self rescue" refers to "[t]he child's ability to *learn how to independently save themselves* [sic] if ever in any aquatic emergency." Wexler Tr. 7:7-12 (emphasis added). Kathleen Smith testified that "self-rescue" "refers to ISR's SELF RESCUE technique where infants and young children *learn to save their own life if they were to reach the water alone*." Smith Tr. 6:23-7:4 (emphasis added). Nadya Davis testified that the term refers to the "ISR Self-Rescue technique." Davis Tr. 10:1-5. Respondent's parent witness Ms. Cahill testified that "self-rescue" refers to the "*method ISR teaches infants and children* to surface and float or float and swim if they are old enough *to save themselves from drowning*," which "buys them time so an adult can interfere or they can SELF-RESCUE by getting to the edge of the water and out of the water into safety." Cahill Tr. 4:22-5:7 (emphasis added).

As discussed and shown above in our analysis of genericness, the record is replete with uses of "self-rescue" to describe what the ISR website, the 2009 Red Cross manual, the *New York Times Magazine* article, and other sources variously call the "skills," "methods," and "techniques" of self-rescue that are taught to infants and young children by ISR and others.

A mark is merely descriptive when it describes the desired end result or purpose of services, *In re Meridian Rack & Pinion*, 114 USPQ2d 1462, 1464 (TTAB 2015); *In*

re Capital Formation Counselors, Inc., 219 USPQ 916, 919 (TTAB 1983), and the evidence discussed above amply demonstrates that SELF RESCUE, while not proved to be generic, is highly descriptive. *See Alcatraz Media*, 107 USPQ2d at 1765. We find that no thought or imagination whatsoever is required to immediately understand that "self-rescue" describes a desired end result or purpose of, and thus a quality, feature, function, or characteristic of, the services of "instructing infants and young children in aquatic survival skills" and providing "classes and seminars in the field of water safety and drowning prevention for infants and young children," namely, that those services teach infants and young children to save themselves from drowning. *See Apollo Med. Extrusion*, 123 USPQ2d at 1851. "Accordingly, [Respondent's] burden of proving acquired distinctiveness is likewise very high." *Id.* at 1856. *See also La. Fish Fry*, 116 USPQ2d at 1265; *In re Boston Beer Co. L.P.*, 198 F.3d 1370, 53 USPQ2d 1056, 1058 (Fed. Cir. 1999).

"Given the highly descriptive nature of the mark and the fact that the only evidence that respondent offered at the time of registration was the five year period of use we find that petitioner has satisfied its initial burden of making a prima facie showing of lack of acquired distinctiveness." *Alcatraz Media*, 107 USPQ2d at 1765. "[T]he burden shifts to respondent to now prove acquired distinctiveness based on any 'additional evidence or argument' produced in this cancellation proceeding, keeping in mind that petitioner bears the ultimate burden of proof by a preponderance of the evidence." *Id.*

C. Respondent's Evidence of Acquired Distinctiveness

"'To show that a mark has acquired distinctiveness, an applicant must demonstrate that the relevant public understands the primary significance of the mark as identifying the source of a product or service rather than the product or service itself.'" *Apollo Med. Extrusion*, 123 USPQ2d at 1851 (quoting *In re Steelbuilding.com*, 415 F.3d 1293, 75 USPQ2d 1420, 1424 (Fed. Cir. 2005)). We must "examine the evidence of record, including any evidence of advertising expenditures, sales success, length and exclusivity of use, unsolicited media coverage, and consumer studies . . . ." *Id.*

Respondent argues that it "has presented substantial evidence to show that the consuming public has come to recognize the mark SELF RESCUE as identifying [Respondent] (through its licensee ISR) as the company offering the infant and youth aquatic survival instructions and training." 38 TTABVUE 17. Respondent relies upon claimed use of the mark by Dr. Barnett since 1968, claimed use on the ISR website since 2009, claimed use by instructors, claimed consumer association of the SELF RESCUE mark with ISR's services, as reflected in social media pages and in other materials, 38 TTABVUE 17-18, media coverage, 38 TTABVUE 9, and enforcement of the registered mark. 38 TTABVUE 16.

1. Length, Exclusivity, and Extent of Use of "Self-Rescue"

When Dr. Barnett filed his application in 2012, he claimed specific dates of first use of the SELF RESCUE mark "at least as early as March 4, 2008" and first use in commerce "at least as early as November 26, 2008." At trial, however, he claimed that "the term was used actually much earlier than that" and that he could not remember

why he had used those dates. H. Barnett Tr. 10:5-15. He claimed to have made up the term "self-rescue" in 1968, and to have used it since the late 1960s. H. Barnett Tr. 8:11-20; 10:15. Three of Petitioner's witnesses who had a business relationship with Dr. Barnett in the 1980s and 1990s, or otherwise knew him, testified that they had never heard him use the term. Steinfink Tr. 10:20-11:10; McGinty Tr. 9:6-11, 17-20; Heumann Tr. 15:16-21, 16:3-6.

Ms. Barnett stated under oath in her Section 2(f) declaration during prosecution that "Self-Rescue" had been "used in commerce since at least as early as November 26, 2008." February 7, 2014 Response to Office Action at 3. She testified at trial that she met Dr. Barnett in 1982 and has "spent the past 35 years teaching ISR programs to thousands of children and training instructors," J. Barnett Tr. 4:25-5:9, but did not provide any specifics regarding the use of "Self-Rescue" during that period, or the length of use, vaguely claiming that "Self-Rescue" was used in various materials "prior to March 2008." J. Barnett Tr. 18:16-19:12. Ms. Bullivant testified that she was an ISR instructor between August 2000 and December 2010, when she accepted a full-time position with ISR, Bullivant Tr. 4:11-20; 11:15-24, but did not testify to any use of "Self-Rescue" during that 10-year period.

With respect to the existence of documentary evidence establishing the length of use of "Self-Rescue," Dr. Barnett testified that the mark had been used "[i]n the materials that I wrote" and by ISR instructors, H. Barnett Tr. 8:11-9:3; 10:10-17, while Ms. Barnett testified that prior to 2008, "it was part of ISR literature. It was part of media coverage on the program. It was part of conversations that Harvey and

I had. It was on a lot of our collateral as well." J. Barnett Tr. 18:16-19:1. Respondent's instructors each acknowledged that "Self-Rescue" was ISR's mark, but did not specify how long they had used it, or the manner in which they had used it beyond use on their own websites and in emails to their clients, none of which are in the record. Davis Tr. 10:1-11:6; Beers Tr. 6:4-7:1; Wexler Tr. 7:7-8:17; Smith Tr. 6:23-7:11.[42]

The only ISR literature or "collateral" in the record is Dr. Barnett's 2012 specimen of use, which he described as "the brochure holder for the Self Rescue brochures and other educational materials available at this place of business." The other documentary evidence showing use of "self-rescue" by, or with reference to, Dr. Barnett or the Barnett Companies, consists of pages from ISR's website, pages from other websites, and social media pages made of record by Respondent under notice of reliance, a number of which are discussed and shown above. These Internet materials are "probative only for what they show on their face." *Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1467 n.30 (TTAB 2014) (citing *Safer, Inc. v. OMS Invs., Inc.*, 94 USPQ2d 1031, 1040 (TTAB 2010)). Any statements contained in them regarding the history of the use of "Self-Rescue" are incompetent to show how long the term has been used by Dr. Barnett or the Barnett Companies.

[42] Kathleen Smith was the only ISR instructor whose testimony appeared to touch on the length of use of "Self-Rescue." She has been an ISR instructor since about 2010, Smith Tr. 4:18-24, but testified that she "recognized ISR's SELF RESCUE when I taught water safety classes from 1998 until 2004" and that "ISR's SELF RESCUE method is why I switched training and chose ISR SELF RESCUE method." Smith Tr. 15:15-18. Given her reference in this answer to a "method," not a mark, and her explanation elsewhere in her testimony that "self-rescue" "refers to ISR's SELF RESCUE technique where infants and young children learn to save their own life if they were to reach the water alone," Smith Tr. 6:23-7:4, we do not find that her testimony establishes use of "Self-Rescue" as a mark "from 1998 until 2004."

Ayoub, Inc. v. ACS Ayoub Carpet Serv., 118 USPQ2d 1392, 1399 n.62 (TTAB 2016) (statement on third-party website claiming use of subject mark "since 1929" did not establish such use).

The earliest documents in the record that associate "self-rescue" with Dr. Barnett or ISR on their faces are pages from the infantswim.com website that were archived by the "Wayback Machine" of archive.org on April 13, 2009. 28 TTABVUE 273, 301-302.[43] One of them is reproduced below (highlighting of "self" supplied by Respondent):

[43] Trademark Rule 2.122(e), 37 C.F.R. § 2.122(e), provides that "Internet materials may be admitted into evidence under a notice of reliance . . . so long as the date of the internet materials were accessed and their source (e.g., URL) are provided." A number of the pages submitted by Respondent do not comply with these requirements, but Petitioner did not object on this ground, and we have considered them for what they show on their faces. Respondent also did not offer any explanatory testimony or other evidence regarding the reliability of the "Wayback Machine," but Petitioner did not object on this ground either, and we have assumed, for purposes of our analysis in this opinion only, that the "Wayback Machine" accurately reproduced pages from the ISR website as the site existed on the dates on which the pages were archived. *Cf. Paris Glove of Canada Ltd. v. SBC/Sporto Corp.*, 84 USPQ2d 1856, 1858-59 (TTAB 2007) (discussing reliability issues regarding archived webpages).

These pages appear to reproduce news stories about ISR, including one that bears a November 2, 2007 date and that discusses "Infant Swimming Resource Self Rescue lessons."

Taking into account what is in the record—and what is not—we do not find credible Respondent's claim that "Dr. Barnett began using the phrase SELF RESCUE in 1968," 38 TTABVUE 17, or Dr. Barnett's testimony that he used the term "self-rescue" since 1968 in connection with the services identified in the registration. On the basis of the record as Respondent made it, we find that there was no use of the SELF RESCUE mark by Dr. Barnett or the Barnett Companies prior to 2007. Given the highly descriptive nature of Respondent's mark, use for 10 years is insufficient, in and of itself, to establish acquired distinctiveness. *Alcatraz Media*, 107 USPQ2d at

1766 (finding that 20 years of use of highly-descriptive mark ANNAPOLIS TOURS was insufficient to show acquired distinctiveness).[44]

The record is also extremely thin regarding the extent of use of SELF RESCUE. Given the claimed use of the mark through licenses to instructors, the instructors' use, advertising, and promotion of the mark appear to be key means by which it is exposed to the relevant purchasing public, but there is little or no probative evidence of those activities. JoAnn Barnett and Austin Barnett testified that ISR reviews instructor advertising, J. Barnett Tr. 10:7-11:1; A. Barnett Tr. 6:14-18, but no such advertising is in the record, and none of the Barnett family witnesses testified that ISR itself does any advertising under the SELF RESCUE mark. None of the ISR instructor witnesses testified about the extent of their own advertising and promotion using the SELF RESCUE mark. The record is also devoid of evidence of the amount of revenue that has been paid to ISR by the alleged licensees of the SELF RESCUE mark, or even the amount of revenue realized by instructors for giving lessons under the SELF RESCUE mark. The complete absence of such sales and advertising evidence puts us "at a disadvantage to accurately gauge the degree of exposure and the achievement of distinctiveness among the relevant classes of purchasers." *Id.*

Respondent argues that ISR instructors have provided over 7 million lessons to 200,000 infants and toddlers, and that there have been nearly 800 "documented cases

[44] Given the highly descriptive nature of SELF RESCUE, even if use since the late 1960s had been proven, "[it] is well settled that an applicant's use of wording for a long time does not necessarily establish that the wording has acquired distinctiveness as a mark." *Apollo Med. Extrusion*, 123 USPQ2d at 1855; *see also La. Fish Fry*, 116 USPQ2d at 1262.

of children using ISR techniques, including those taught under the mark SELF RESCUE, to save themselves from drowning," 38 TTABVUE 17, but the cited evidence, an archived page from the infantswim.com website, 28 TTABVUE 305, and the ISR "Instructor Website Key Messaging" page, 30 TTABVUE 285, is "admissible only to show what has been printed, not the truth of what has been printed." *Couch/Braunsdorf Affinity*, 110 USPQ2d at 1467 n.30. Mr. Barnett testified that during 2017 ISR would "serve more than 40,000 clients and we still maintain a waiting list of more than that," A. Barnett Tr. 36:11-13, while Ms. Bullivant referred in her testimony to "the hundreds of thousands of children who have learned SELF-RESCUE since 1966, thanks to ISR" and to "the thousands of people who apply to our instructor training program every year," Bullivant Tr. 35:9-12, but we do not find this testimony sufficient to establish the extent of the exposure of the relevant purchasing public to the *term* "self-rescue" as an indicator of source in Respondent.[45] The question is not how many people have been taught, but how many have been exposed to the term.

There is virtually no evidence regarding how, and to what extent, the SELF RESCUE mark is actually used by the instructors in rendering Respondent's services. As discussed above, neither the 2012 version of ISR's LCA, nor its 2017 counterpart,

[45] Mr. Barnett's testimony is limited to the current year, and it is not clear that Ms. Bullivant has the personal knowledge of that matter that is required by Rule 602 of the Federal Rules of Evidence. She was born in 1979 and has worked full time for ISR only since 2010, with responsibility for instructor development. Bullivant Tr. 4:14-5:5; 8:13; 11:15-12:14. She did not testify regarding the source of her knowledge regarding the number of children that have been trained "since 1966." Her testimony on this point lacks credibility in any event because she claimed that instruction in "self-rescue" began two years before her father claims to have made up the term. H. Barnett Tr. 8:19-20.

licenses the SELF RESCUE mark to ISR's instructors, the ISR Branding Guide provides no guidance regarding its use, and ISR's instructor witnesses did not provide documentary evidence reflecting whether or how they use SELF RESCUE in communications with parents and students. The record simply does not establish how and how extensively the SELF RESCUE mark is used by instructors.

There is some evidence of regular use of the term "self-rescue" on the ISR website, as multiple webpages bearing dates from 2009-2013 and containing stories in which the term appears are in the record. 28 TTABVUE 273-319, 336-357, 360. As discussed above in connection with our analysis of genericness, the term is frequently used on these pages to modify terms such as "skills," "lessons," and "techniques," and it is almost invariably preceded by the "ISR" mark, which is what ISR's LCA actually licenses and what ISR's Branding Guide actually purports to protect. 28 TTABVUE 274-283, 285-303, 305-319, 337-339, 341-357, 360. This evidence is thus of little probative value in showing that the SELF RESCUE mark per se has acquired distinctiveness. *Alcatraz Media*, 107 USPQ2d at 1766; *Apollo Med. Extrusion*, 123 USPQ2d at 1855 (where applicant's claimed mark appeared almost without exception together with prominently displayed acronym MET, Board was "not convinced that relevant purchasers associate[d] the designation MEDICAL EXTRUSION TECHNOLOGIES, without the accompanying MET, solely with Applicant.").

Finally, with respect to exclusivity of use, Dr. Barnett claimed that "self-rescue" has "only been used by me," H. Barnett Tr. 8:19-20, and that he was unaware of any use by anyone else "until the United States Patent and Trademark Office agent

referenced that it had been used as it relates to kayaking experiences." H. Barnett Tr. 8:20-23. Some of Respondent's other witnesses also testified that they were unaware of, or did not recall, any third-party uses of "self-rescue" in connection with water safety instruction, other than uses that were claimed by them to be infringements of the registered mark. Davis Tr. 11:9-12:7; J. Barnett Tr. 18:16-19:12; Bullivant Tr. 9:12-10:3; Cahill Tr. 5:12-15, 21-6:11; 7:2-16; Smith Tr. 8:18-9:19. Even assuming the truth of their claims of ignorance, however, the "fact that [they] never heard of other uses does not establish that there are none." *Apollo Med. Extrusion*, 123 USPQ2d at 1853 n.10.

As discussed above, Petitioner provided credible testimony from several water safety instructors regarding their use of the term "self-rescue" prior to or during the period in which Respondent claims substantially exclusive use, and documentary evidence showing use of the term by the American Red Cross in connection with water safety instruction around 2009. As discussed immediately below, Austin Barnett and other witnesses for Respondent identified multiple water safety instructors whom they claimed improperly used "self-rescue" in connection with water safety instruction for infants and young children. J. Barnett Tr. 12:16-13:7, 14:16-15:5; A. Barnett Tr. 4:2-9:3, 10:12-19, 12:18-16:19, 19:21-20:3, 20:24-33:23, 35:3-23, 38:17-39:5, 42:7-45:15; Bullivant Tr. 5:13-7:6, 14:17-18:5, 20:24-33:5, 39:16-41:5; Beers Tr. 7:2-12, 16:3-23, Wexler Tr. 16:5-11, 18-17:2; 30 TTABVUE 270-283, 287-299. These third-party non-trademark uses of "self-rescue" in connection with water safety instruction for infants and young children may be insufficient to establish the

genericness of SELF RESCUE, but they clearly indicate that use of SELF RESCUE by Respondent "has not been 'substantially exclusive' as is required for a showing of acquired distinctiveness under Section 2(f)." *Apollo Med. Extrusion*, 123 USPQ2d at 1853. This "[n]on-exclusive use presents a serious problem for [Respondent] in obtaining trademark rights in a designation that is not inherently distinctive, because it interferes with the relevant public's perception of the designation as an indicator of a single source." *Id.*; *see also Levi Strauss & Co. v. Genesco, Inc.*, 742 F.2d 1401, 222 USPQ 939, 940-41 (Fed. Cir. 1984) ("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 purchaser may rely is lacking under such circumstances."); *Ayoub*, 118 USPQ2d at 1404; *cf. Racine Indus. Inc. v. Bane-Clene Corp.*, 35 USPQ2d 1830, 1840 (TTAB 1994) (where applicant had not challenged opposer's use of subject term, applicant's use "cannot be said to have been substantially exclusive."); *Nextel Commc'ns Inc. v. Motorola Inc.*, 91 USPQ2d 1393, 1408 (TTAB 2009) (opposer's use of claimed mark undercut applicant's case for acquired distinctiveness). Given the highly descriptive nature of SELF RESCUE as applied to Respondent's services, the third-party uses significantly undercut Respondent's claim that SELF RESCUE points uniquely to Respondent in the context of the relevant services.

2. Media Coverage and Consumer Recognition of the SELF RESCUE Mark

Respondent argues that "[o]ver the years, Dr. Barnett's pioneering infant aquatic survival techniques have received significant media coverage," 38 TTABVUE 9, and a number of Respondent's witnesses testified on that topic. In response to the questions "Has ISR and/or its methods and techniques ever received any positive unsolicited publicity?" and "Can you describe any?," Ms. Barnett testified that "the media comes to us," that in 2013 ISR "had over 385 media pieces including The Today Show, Good Morning America, CNN," that ISR had previously been on Dateline and 20/20, and that "yearly hundreds of local media pieces" refer to ISR. J. Barnett Tr. 24:9-17. In response to the questions "Is Infant Swimming Resource recognized as the leading provider of aquatic survival methods for infants and young children?" and "If yes, what makes you say that?," Mr. Barnett gave a lengthy narrative answer in which he stated, among other things, that "in the last five years we've been featured by nearly every major international news outlet and every major news outlet in the U.S., like Fox News, CNN, the Today Show, and more," that "ISR was featured or participated in over 400 news pieces and our picture are used with permission as a visual in even unrelated articles about drowning prevention by the likes of Fox News and others," that ISR maintains partnerships with doctors and hospitals, including the American Academy of Pediatrics, which "alluded to what is widely known as ISR's most successful viral video," and that by doing "a simple Google search using any relevant term for survival swimming lessons" one can see ISR's prominence over its competitors. A. Barnett Tr. 35:24-37:6. In response to the same form questions, Ms.

Bullivant echoed her mother and brother in testifying that "we are routinely approached by national media outlets like The Today Show, Good Morning America and Fox & Friends to speak about our program," that she had twice personally appeared on Fox & Friends "working live with ISR students . . . demonstrating ISR's SELF-RESCUE," and that these media opportunities "come about as a result of videos of ISR students demonstrating their skills going viral." Bullivant Tr. 35:5-20.

The record is devoid of videos or transcripts of the referenced articles, programs, and reports, the "viral videos" mentioned by several witnesses, the "hundreds of local media pieces" referred to by Ms. Barnett, and the results of the Google search hypothesized by Mr. Barnett. We therefore cannot determine from the testimony of these witnesses, or that of the ISR instructors,[46] the extent (if any) to which the referenced media coverage displayed or discussed the SELF RESCUE mark, or, if it did, how the mark was displayed or used. The complete absence of any documentary evidence showing the nature or extent of the use of the SELF RESCUE mark severely undercuts the unsupported testimony of Respondent's witnesses on the issue of whether SELF RESCUE per se has acquired distinctiveness.[47]

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[46] The instructors were asked the form questions "Have you seen publicity or news or feature articles as opposed to paid advertising for [ISR] and/or its methods and techniques including the SELF-RESCUE methods; if 'yes," can you recall what?" They responded with mentions of various national and local news programs, some of which were unspecified. Beers Tr. 25:1-9; Wexler Tr. 24:9-17; Smith Tr. 23:13-21; Davis Tr. 25:23-26:6.

[47] References to media coverage on the ISR website, such as the ones shown at 28 TTABVUE 301-302, are not evidence of unsolicited media coverage. *Alcatraz Media*, 107 USPQ2d at 1765-66.

The cited evidence of consumer recognition of SELF RESCUE as Respondent's mark through "numerous Facebook and Instagram posts, news articles, page comments, and other publications," 38 TTABVUE 18, consists mostly of the ISR webpages discussed above. The portion of this evidence that does not comprise ISR webpages, 28 TTABVUE 320-335, uses "self-rescue" generically or to describe the desired result of the ISR program, as shown in several examples above.

We find that the claimed media coverage and consumer recognition evidence do not show that SELF RESCUE has acquired distinctiveness as Respondent's mark for "instructing infants and young children in aquatic survival skills; educational services, namely, classes and seminars in the field of water safety and drowning prevention for infants and young children."

3. Enforcement of the SELF RESCUE Mark

Respondent argues that it "has worked diligently to prevent others from misusing the mark for services that are not Dr. Barnett's original techniques," 38 TTABVUE 16, and Respondent's witnesses testified at length about efforts to enforce the registered SELF RESCUE mark and the confusion and damage that they claimed resulted from unauthorized use of the mark. Respondent also made of record several demand letters sent to instructors, including former ISR-certified instructors, who were using the term "self-rescue" in their businesses, and some responses to those letters. J. Barnett Tr. 12:16-13:7, 14:16-15:5; A. Barnett Tr. 4:9-9:3, 10:12-19, 12:18-16:19, 19:21-20:3, 20:24-33:23, 35:3-23, 38:17-39:5, 42:7-45:15; Bullivant Tr. 5:13-7:6, 14:17-18:5, 20:24-33:5, 39:16-41:5; Beers Tr. 7:2-12, 16:3-23, Wexler Tr. 16:5-11, 18-

17:2; 30 TTABVUE 270-283, 287-299.[48] The demand letters in the record challenged uses of the term "self-rescue" such as "Teach your baby or toddler how to survive using our self-rescue techniques" and "What Self-Rescue skills Can Children Learn?," 30 TTABVUE 276; "What is self rescue/survivial swimming?," 22 TTABVUE 14; 30 TTABVUE 280; "Infant Aquatics teaches baby self-rescue swimming lessons to toddlers and children," 22 TTABVUE 12; and "instructors also provide a strong transition of the children's self-rescue skills use [sic] in many different situations." 22 TTABVUE 14. Tellingly, one letter challenged an instructor's use of "self-rescue" to "describe the method that you teach." 30 TTABVUE 292.

The record establishes that ISR has convinced a number of recipients of its demand letters, including some of Petitioner's trial witnesses, to cease their use of "self-rescue" in their materials and on their websites. 30 TTABVUE 297-299; Heumann Tr. 20:23-21:3, 27:8-15. Ms. Heumann's testimony suggests, however, that she suspended her use of "self-rescue" pending the outcome of this proceeding, and would resume such use if Petitioner prevails, Heumann Tr. 20:23-22:9, and it is reasonable to infer from the record as a whole that some of the other recipients of the demand letters would do so as well, or that they ceased their use of "self-rescue" simply because they could not afford to defend against the threatened legal action,

[48] Respondent designated the demand letters and the responses as "Confidential Attorney's Eyes Only." Petitioner made of record in the public files additional demand letters. 22 TTABVUE 10-15. One of the confidential demand letters primarily alleged a breach of the "Covenant Not to Compete" provision of the LCA through the teaching of "self-rescue . . . skills." 30 TTABVUE 271-274.

and not because they recognized Respondent's rights in the term. Steinfink Tr. 13:16-14:7; 16:24-17:5; 23:17-23; McGinty Tr. 8:2-5.

In any event, "'[c]opying is only evidence of secondary meaning if the defendant's intent in copying is to confuse consumers and pass off his product as the plaintiff's.'" *Alcatraz Media*, 107 USPQ2d at 1766-67 (quoting *Stuart Spector Designs Ltd. v. Fender Musical Instruments Corp.*, 94 USPQ2d 1549, 1575 (TTAB 2009)). The record is devoid of evidence of the actual manner of use of "self-rescue" by the recipients of ISR's demand letters, but the discussions of the challenged uses contained in the letters in the record suggest that most recipients used "self-rescue" to merely describe the water safety and survival skills that they teach to infants and young children.

We cannot find, on the basis of the record as Respondent made it, that the intention of the recipients of the demand letters was to pass themselves off as ISR through their use of the term "self-rescue." In this regard, Respondent's witnesses testified that alleged infringers of the SELF RESCUE mark also used ISR videos and wording taken directly from the ISR website (J. Barnett Tr. 15:1-5; A. Barnett Tr. 5:23-6:1; 15:7-12); posted on the ISR Facebook page (A. Barnett Tr. 19:23; 23:23-24:4; 29:3-10; 31:8-13; 38:17-25; Bullivant Tr. 24:21-25:4; 29:15-18; 31:11-20); verbally held themselves out as offering ISR lessons or as being ISR instructors (A. Barnett Tr. 22:19-21; 23:11-15; Bullivant Tr. 22:22-23:4; 24:2-6; 30:5-15); used the ISR mark and logo (A. Barnett Tr. 26:24-27:4; 45:9-15; Bullivant Tr. 28:7-12); or made other efforts to associate themselves with the ISR brand (A. Barnett Tr. 15:20-24; 31:14-18; 38:17-25). Because documentary evidence of the challenged activities is not in the record,

we cannot determine the significance, if any, of these alleged unauthorized uses of the ISR mark. We do not find the evidence of Respondent's enforcement efforts to be probative of the acquired distinctiveness of the SELF RESCUE mark per se.

4. Summary

Respondent's "evidence of acquired distinctiveness must be weighed against the highly descriptive nature of the wording comprising" Respondent's mark. *Apollo Med. Extrusion*, 123 UPSQ2d at 1856. Given that SELF RESCUE is highly descriptive of the services identified in Respondent's registration, "much more evidence, especially in the quantity of direct evidence from the relevant purchasing public, than what [Respondent] submitted would be required to show that" SELF RESCUE has become distinctive for Respondent's services. *Id*. The continued registration of SELF RESCUE would be inconsistent with the competitive need of water safety and survival instructors to use the term "self-rescue" to "describe the method that [they] teach." 30 TTABVUE 292. *See id*. at 1855. We find, on the basis of the record as a whole, that Respondent has failed to rebut Petitioner's prima facie case and to establish that SELF RESCUE has acquired distinctiveness for instructing infants and young children in aquatic survival skills, or providing classes and seminars in the field of water safety and drowning prevention for infants and young children.

Decision: The Petition for Cancellation is granted on the ground that the SELF RESCUE mark is merely descriptive of the services identified in Respondent's registration, and has not acquired distinctiveness, and Registration No. 4562130 will be cancelled in due course.