

This Opinion is Not a  
Precedent of the TTAB

Mailed: June 25, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

*Schiebel Industries AG*  
*v.*  
*Camera Copters, Inc.*

Cancellation No. 92071596

Peter J. Phillips of Lucas & Mercanti LLP,  
for Schiebel Industries AG.

Lillian Taylor Štajnbaher of Trademarks Domestic International Inc.,  
for Camera Copters, Inc.

Before Goodman, Myles, and Stanley,  
Administrative Trademark Judges.

Opinion by Stanley, Administrative Trademark Judge:

On June 24, 2019, Schiebel Industries AG (“Petitioner”) filed a petition to cancel  
Camera Copters, Inc.’s (“Respondent”) registration on the Principal Register for the

composite mark  for the following goods and  
services:

- “Cameras and camera mounts for aerial photography and filming,” in  
International Class 9; and

- “Drones and structural parts therefor, Unmanned aerial vehicles (UAVs),” in International Class 12.<sup>1</sup>

Petitioner seeks to cancel Respondent’s registration in Class 12 on the ground that Respondent’s mark as used in connection with the identified goods so resembles Petitioner’s previously used CAMCOPTER mark that it is likely to cause confusion, mistake, or deception of prospective consumers under Section 2(d) of the Trademark

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<sup>1</sup> Registration No. 5440864 registered on April 10, 2018. The registration also covered services in Class 41, but Petitioner did not petition to cancel the mark for the Class 41 services. The registration alleged June 15, 1997 as the date of first use anywhere and in commerce for the Class 9 goods and Class 41 services, and August 4, 2016 as the date of first use anywhere and in commerce for the Class 12 goods. The underlying application which matured into Registration No. 5440864 was filed on September 30, 2015, pursuant to Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a) for the Class 9 goods and Class 41 services and Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b) for the Class 12 goods. The registration included the following description of the mark: “The mark consists of the words ‘CAMERA COPTERS’ in a white italicized bold font. There is a design of a film strip in white above and below the word ‘CAMERA’ on a black background. The wording ‘COPTERS’ is inside a red rectangle. The entire mark is on a black background.” The colors red, black, and white were claimed as a feature of the mark, and “CAMERA COPTERS” was disclaimed in Class 12.

On October 23, 2024, during the course of this proceeding and after final briefing, Registration No. 5440864 was cancelled by the Office pursuant to Trademark Act Section 8, 15 U.S.C. § 1058, after Respondent failed to file the required Section 8 affidavit of continued use. On October 31, 2024, the Board issued an order requiring Respondent to show cause why judgment should not be entered against Respondent pursuant to Trademark Rule 2.134(a), 37 C.F.R. § 2.134(a). 74 TTABVUE. On November 10, 2024, Respondent responded to the Board’s order explaining its failure to file the Section 8 affidavit. 75 TTABVUE. On March 27, 2025, the Board issued an order finding that “Respondent’s failure to timely renew its registration was the result of an ‘inadvertent and unintentional error’ in its counsel’s maintenance and review of her docket rather than an effort to moot this proceeding,” and as a result, the Board discharged the show cause order. 79 TTABVUE. 4. In accordance with Board practice, the Board’s March 27, 2025 order allowed Petitioner time to indicate whether it wished to proceed to a decision on the merits of the claims, or to have the petition to cancel dismissed without prejudice as moot (in light of the fact that Respondent’s involved registration had already been cancelled under Section 8). *Id.* at 5. On April 21, 2025, Petitioner notified the Board that “it wishes to proceed with the cancellation proceeding.” 80 TTABVUE 2.

Citations in this opinion refer to TTABVUE, the Board’s online docketing system. Specifically, the number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear.

Act, 15 U.S.C. § 1052(d).<sup>2</sup> Petitioner relies on alleged prior common law rights in the mark CAMCOPTER in connection with “helicopters,” including “unmanned helicopters.”<sup>3</sup> Petitioner also pleads ownership of Application Serial No. 87820467 for the standard-character mark CAMCOPTER for “apparatus for motion by air, namely, helicopters; apparatus for motion by air, namely, unmanned helicopters; apparatus for motion by air, namely, unmanned helicopters selling for between 4.5 and 7 million dollars, sold mainly to the military authorities,” in International Class 12 and alleges that said application was refused registration on the ground that it was likely to be confused with Respondent’s involved registration.<sup>4</sup>

Respondent, in its answer, admits that Petitioner owns Application Serial No. 87820467 and that said application was refused registration on the ground that it was likely to be confused with Respondent’s involved registration.<sup>5</sup> Respondent

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<sup>2</sup> Petition to Cancel, 1 TTABVUE. Petitioner also included in its Petition to Cancel a claim of abandonment as to both the Class 9 and Class 12 goods in Respondent’s registration. *Id.* at 5, ¶¶ 10-11. However, Petitioner did not pursue its abandonment claim in its brief and accordingly, it is deemed impliedly waived or forfeited. *See Monster Energy Co. v. Lo*, Opp. No. 91225050, 2023 TTAB LEXIS 14, at \*3-4 (TTAB 2023) (opposer waived claims that it did not argue in its brief).

<sup>3</sup> Petition to Cancel at ¶ 4, 1 TTABVUE 6.

<sup>4</sup> Petition to Cancel at ¶¶ 1-2, *id.* at 4. Application Serial No. 7773017 was filed on March 5, 2018, under Section 1(b) of the Trademark Act. On February 21, 2019, Petitioner filed an amendment to allege use, and alleged first use and first use in commerce as of October 12, 2009. It has come to the Board’s attention that after Respondent’s involved registration was canceled for failure to file a Section 8 affidavit (i.e., after briefing in this case was completed), Petitioner’s pleaded application issued as a registration. Our precedent, however, is clear that the Board will not consider a registration that issues after the plaintiff’s testimony period closes. *See* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 704.03(b)(1)(A) (2024); *UMG Recordings Inc. v. O’Rourke*, Opp. No. 91178937, 2009 TTAB LEXIS 533, at \*15 (TTAB 2009).

<sup>5</sup> Answer at ¶¶ 1-2, 4 TTABVUE 4.

otherwise denies the salient allegations in the Petition to Cancel.<sup>6</sup> Respondent did not plead any affirmative defenses.

The case is fully briefed. For the reasons discussed herein, we deny the petition to cancel.

## **I. The Record**

The record includes the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of the challenged registration. During its trial period, Petitioner also submitted:

- Petitioner's Notice of Reliance: the prosecution file for Respondent's unrelated Registration No. 5066702 for the standard-character mark CAMERA COPTERS for services in Class 41, the prosecution file for Petitioner's pleaded application, and Respondent's responses to certain document requests and interrogatories;<sup>7</sup> and
- Testimony Declarations with exhibits of Michael Schiller (Head of Programs Management within the Schiebel Group of companies comprising Petitioner and its wholly owned subsidiaries, Schiebel Elektronische Geraete GmbH and Schiebel Aircraft GmbH) ("Schiller Declaration"), Hans Georg Schiebel (Director of Petitioner and Chairman of the Schiebel Group) ("Schiebel Declaration"), and Angelo Scardullo (a former employee of the Boeing Company and current employee of Schiebel Elektronische Geraete GmbH) ("Scardullo Declaration").<sup>8</sup>

Respondent submitted:

- Respondent's Amended Notice of Reliance: Internet materials, materials showing use of Respondent's mark (e.g., invoices, catalogs, bids for work, photographs, advertisements), official records, news articles, survey

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<sup>6</sup> Answer at ¶¶ 3-12, *id.* at 2-3.

<sup>7</sup> Petitioner's Notice of Reliance ("NOR"), 27 TTABVUE. Petitioner also submitted the file history for Respondent's involved registration. *Id.* at 7-100. This is superfluous inasmuch as the file of the involved registration is automatically part of the record, without any action by either party. *See* Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b).

<sup>8</sup> 28 TTABVUE through 32 TTABVUE.

results, Federal Aviation Regulations, a cease and desist letter, and search engine results).<sup>9</sup>

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<sup>9</sup> Respondent's Amended NOR, 34 TTABVUE 8-139; Ex. H to Amended NOR, 41 TTABVUE 6-35. Respondent filed its original Notice of Reliance on November 9, 2021. 33 TTABVUE. The next day, Respondent sought leave to file an amended Notice of Reliance due to file corruption issues. 34 TTABVUE. While that motion was pending, Respondent sought leave to also file Ex. H to its Amended Notice of Reliance, which contained additional documents related to Respondent's expert's survey results. 41 TTABVUE. On May 13, 2022, the Board issued an order, among other things, granting both requests. 43 TTABVUE 3. The face of Respondent's Amended Notice of Reliance explains that Respondent intended to submit the testimony declarations of Paul Barth (Respondent's sole shareholder), Paul Morris (an expert in the "aerial photography industry"), and Laverne Dalley (an "international branding" expert) and that they would authenticate many of the documents attached to the Amended Notice of Reliance. 34 TTABVUE 11-14. Respondent, however, did not submit any testimony declarations.

After Petitioner filed its main brief and the day before Respondent filed its brief, Respondent filed a motion to reopen its testimony period to submit the testimony declarations identified above. 45 TTABVUE (under seal). That motion was later superseded by one available for public viewing. 59 TTABVUE. On July 28, 2023, the Board issued an order denying Respondent's motion to reopen its testimony period. 66 TTABVUE. On August 18, 2023, Respondent filed a Petition to the Director to review the Board's July 28, 2023 order. 69 TTABVUE. On August 5, 2024, Respondent's Petition to the Director was denied. 72 TTABVUE. Accordingly, we have not considered Respondent's testimony declarations.

We note that neither party cited to TTABVUE page numbers in any of their briefs. As explained in *Turdin v. Trilobite, Ltd.*, Conc. Use No. 94002505, 2014 TTAB LEXIS 17, at \*6 n.6 (TTAB 2014):

Because the Board primarily uses TTABVUE in reviewing evidence, the Board prefers that citations to material or testimony in the record that has not been designated confidential include the TTABVUE docket entry number and the TTABVUE page number. For material or testimony that has been designated confidential and which does not appear on TTABVUE, the TTABVUE docket entry number where such material or testimony is located should be included in any citation.

*See also* TBMP § 801.03 ("When referring to the record in an inter partes proceeding, parties should reference evidence by citation to the Board's TTABVUE docket electronic database by the entry and page number (e.g., 1 TTABVUE 2) to allow the reader to easily locate the cited material."); *cf.* Trademark Rule 2.142(b)(3), 37 C.F.R. § 2.142(b)(3) ("Citation to evidence in briefs should be to the documents in the electronic application record by date, the name of the paper under which the evidence was submitted, and the page number in the electronic record.").

## II. Preliminary Matters

### A. Respondent's Request for Judicial Notice

In its brief, Respondent requests that we take judicial notice of several documents comprising Internet materials or official records.<sup>10</sup> The Board may take judicial notice of a fact that is “not subject to reasonable dispute because it: (1) is generally known within the trial court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b). *See* TBMP § 704.12(a). The documents subject to Respondent’s request do not constitute the type of evidence subject to judicial notice, as contemplated by Fed. R. Evid. 201. *See UMG Recordings, Inc. v. Mattel, Inc.*, Opp. No. 91176791, 2011 TTAB LEXIS 286, at \*30 n.12 (TTAB 2011) (rejecting request for judicial notice of web pages); *Motion Picture Ass’n of Am. Inc. v. Respect Sportswear Inc.*, Opp. No. 91153141, 2007 TTAB LEXIS 54, at \*8-9 (TTAB 2007) (rejecting request for judicial notice of results from Internet search engines and from eBay website); *Standard Knitting Ltd. v. Toyota Jidosha K.K.*, Opp. No. 91116242, 2006 TTAB LEXIS 9, at \*49 n.26 (TTAB 2006) (rejecting request for judicial notice of third-party websites: “These materials are clearly not proper subject matter for judicial notice”).

Accordingly, Respondent’s request for judicial notice is denied.<sup>11</sup>

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<sup>10</sup> Respondent’s Br., 46 TTABVUE 2-3.

<sup>11</sup> The Trademark Rules specifically provide a procedure for introducing official records and Internet materials into evidence by notice of reliance, *see* Trademark Rule 2.122(e), 37 C.F.R. § 2.122(e), and for the vast majority of the documents subject to Respondent’s request for judicial notice, it appears the documents are already in the record via their submission with Respondent’s Amended Notice of Reliance. *See* Respondent’s Amended NOR, 34 TTABVUE 8-139. To the extent the documents subject to Respondent’s request for judicial notice were

**B. Petitioner's Objections to Respondent's "Defenses"**

As noted above, Respondent did not plead any affirmative defenses in its Answer. In both its main brief and reply brief, Petitioner objects to Respondent's reliance on any defenses, including "a *Morehouse* defense, 'tacking,' abandonment, [and] lack of distinctiveness."<sup>12</sup> In an order dated August 2, 2021, the Board noted that Respondent did not plead a *Morehouse* defense and therefore such a defense would not be considered.<sup>13</sup> Likewise, in an order dated May 13, 2022, the Board found Petitioner's motion to strike and preclude evidence relating to unpleaded defenses moot with respect to "abandonment" and "*Morehouse*" because "Respondent represent[ed] that it is 'not seek[ing] to defend this matter based upon Petitioner's abandonment' and that it 'will not rely upon a Morehouse defense ....'"<sup>14</sup> In that same order, the Board deferred consideration of Petitioner's motion to strike "any other unpled defense."<sup>15</sup> To the extent that Respondent's arguments in its brief could be construed as presenting a *Morehouse* defense or an abandonment defense, those defenses have not been considered because they were not pleaded.

That leaves us with the "tacking" and "lack of distinctiveness" defenses, both of which the Board deferred whether to strike until final decision. We consider Petitioner's objections to each in turn.

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submitted with Respondent's Amended Notice of Reliance, they have been considered consistent with the Trademark Rules.

<sup>12</sup> Petitioner's Br., 44 TTABVUE 7; *see also* Petitioner's Reply Br., 67 TTABVUE 3-4, 10-11.

<sup>13</sup> August 2, 2021 Order, 26 TTABVUE 8-9.

<sup>14</sup> May 13, 2022 Order, 43 TTABVUE 3-4.

<sup>15</sup> *Id.* at 4.

“Tacking” allows a party to “clothe a new mark with the priority of an older mark” when “the original and revised marks are ‘legal equivalents’ in that they create the same continuing commercial impression.” *Hana Fin., Inc. v. Hana Bank*, 574 U.S. 418, 419-420 (2015). Petitioner is correct that “tacking” must be pleaded as a defense, *see H.D. Lee Co., Inc. v. Maidenform, Inc.*, Opp. No. 91168309, 2008 TTAB LEXIS 21, at \*11 (TTAB 2008), but Respondent, as it acknowledges, did not pursue a tacking defense.<sup>16</sup> As such, Petitioner’s objection to Respondent’s alleged “tacking” defense is moot.

What Petitioner labels as a “tacking” defense is an argument based on the zone of expansion doctrine. Respondent argues that it “was the first to use its composite film strip CAMERA COPTERS mark in the United States for aerial photography goods and services” (i.e., Class 41 services), and as the “senior user,” Respondent “has the right to enjoin ‘junior’ Petitioner from using its confusingly similar marks in the same industry and market, and certainly within Registrant’s natural zone of expansion.”<sup>17</sup> Based on the zone of expansion doctrine, Respondent contends that “Petitioner has NO right to registration of CAMCOPTER.”<sup>18</sup>

Respondent misunderstands the zone of expansion doctrine. As explained by the Board in *Mason Eng’g and Design Corp. v. Mateson Chem. Corp.*, Opp. No. 91066845, 1985 TTAB LEXIS 114 (TTAB 1985):

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<sup>16</sup> Respondent’s Br., 46 TTABVUE 14 (“Neither a Moorehouse [sic] defense or tacking are relied upon herein, in defense of the composite mark at issue.”).

<sup>17</sup> *Id.* at 19.

<sup>18</sup> *Id.* at 28.

Under the doctrine of natural expansion, the first user of a mark in connection with particular goods or services possesses superior rights in the mark not only as against subsequent users of the same or similar mark for the same or similar goods or services, but also as against subsequent users of the same or similar mark for any goods or services which purchasers might reasonably expect to emanate from it in the normal expansion of its business under the mark.

*Id.* at \*18-19. The doctrine is typically “used in the context of parties’ dueling claims of priority.” *Orange Bang, Inc. v. Olé Mexican Foods, Inc.*, Opp. No. 91189001, 2015 TTAB LEXIS 311, at \*62 (TTAB 2015). Although the parties here are disputing priority, Respondent cannot rely on the doctrine of natural expansion. As held by the Federal Circuit’s predecessor, the United States Court of Customs and Patent Appeals (CCPA), in *Jacks-Evans Mfg. Co. v. Jaybee Mfg. Corp.*, 481 F.2d 1342 (CCPA 1973), “the ‘expansion of business’ doctrine is purely a defensive doctrine,” one used only to prevent another’s registration or use of a mark, not to expand into an area where another party has established intervening rights. *Id.* at 1344. Thus,

[w]hile the doctrine of “natural expansion of business” can be considered in determining whether a senior user can prevent registration of the same or similar mark to a junior user for related goods, the doctrine does not represent the test to be applied when the senior user himself seeks to register a mark for certain goods by relying on his earlier use of the same mark for “related” (but not “substantially identical”) goods.

*Big Blue Prods. v. IBM*, Opp. No. 91081697, 1991 TTAB LEXIS 9, at \*10 n. 4 (TTAB 1991).

Although a zone of expansion defense could be presented in the context of whether Respondent’s prior rights in Respondent’s mark for Class 41 services precludes

Petitioner's registration for the CAMCOPTER mark for Class 12 goods, that is not the dispute before us. As Petitioner correctly puts it: "Petitioner's right to use its mark in Class 12, or register it, is not an issue here."<sup>19</sup> Respondent cannot rely on the zone of expansion doctrine to obtain (or keep) its registration for Class 12 goods based on alleged prior rights for its Class 41 services.

Lastly, we consider Petitioner's objection to Respondent's lack of distinctiveness arguments. Our primary reviewing court has stated that a petitioner cannot prevail on a Section 2(d) claim unless it shows that its unregistered common law mark is distinctive of its goods or services, whether inherently, through the acquisition of secondary meaning, or through "whatever other type of use may have developed a trade identity." *Towers v. Advent Software Inc.*, 913 F.2d 942, 945-46 (Fed. Cir. 1990); see *Otto Roth & Co. v. Universal Foods Corp.*, 640 F.2d 1317, 1320 (CCPA 1981) (opposer must establish proprietary rights in its pleaded common-law mark).

As the Federal Circuit clearly stated in *Hoover Co. v. Royal Appliance Mfg. Co.*, 238 F.3d 1357 (Fed. Cir. 2001), the burden to show distinctiveness of its own unregistered term is the plaintiff's:

Hoover, as the party opposing registration on the basis of likelihood of confusion with its own mark, must establish that 'Number One in Floorcare' is distinctive of its goods either inherently or through the acquisition of secondary meaning.

*Id.* at 1359; see also *RXD Media v. IP Application Dev. LLC*, *RxD Media, LLC v. IP Application Dev. LLC*, Opp. No. 91207333, 2018 TTAB LEXIS 37, at \*32 (TTAB 2017)

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<sup>19</sup> Petitioner's Reply Br., 67 TTABVUE 5.

(“Opposer has the burden of proving the distinctiveness of its pleaded unregistered mark”), *aff’d*, 377 F. Supp. 3d 588 (E.D. Va. 2019), *aff’d*, 986 F.3d 361 (4th Cir. 2021).

In other words, the question of distinctiveness is raised by Petitioner pleading a common law mark.

Accordingly, we find that the issue of the distinctiveness of Petitioner’s alleged common law rights in its CAMCOPTER mark is properly before us. Petitioner’s objection to Respondent’s arguments concerning the distinctiveness of Petitioner’s pleaded mark is overruled.<sup>20</sup>

### III. Entitlement to a Statutory Cause of Action

Entitlement to a statutory cause of action is a requirement in every inter partes case. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 1303-05 (Fed. Cir. 2020);

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<sup>20</sup> We further note that the circumstances of this case plainly put Petitioner on notice that the distinctiveness of the CAMCOPTER mark is at issue. Petitioner did not plead that its mark should be presumed to be inherently distinctive; nor did it argue as such in its brief. *See RxD Media*, 2018 TTAB LEXIS 37, at \*32 (“Opposer has not asserted or shown that its pleaded mark should be presumed to be inherently distinctive. While Opposer has the burden of proving the distinctiveness of its pleaded unregistered mark, we will first consider whether the asserted mark is merely descriptive and lacks acquired distinctiveness.”). The record – i.e., Petitioner’s own testimony and evidence – makes clear that the question of the distinctiveness of Petitioner’s alleged common law mark is not resolved. Indeed, Petitioner’s pleaded application is for the same mark and same goods for which it claims common law rights (i.e., helicopters, including unmanned helicopters), and in that application, the Examining Attorney issued a descriptiveness refusal, to which Petitioner responded with a claim of acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f). *See* Petitioner’s NOR, 27 TTABVUE 170 (“The following refusal made final in the Office action is withdrawn: final Section 2(e)(1) refusal for mere descriptiveness (as applicant has submitted an acceptable amendment to allege use, as well as an acceptable Section 2(f) claim).”). In view of this evidence, it is not surprising that Petitioner argues in its main brief not that its mark is inherently distinctive but rather that its pleaded mark has acquired distinctiveness. *See* Petitioner’s Br., 44 TTABVUE 20 (listing as one of the “issues” to be decided: “Whether [Petitioner] has demonstrated that its CAMCOPTER mark is distinctive, based on extensive sales on unmanned helicopters and use of CAMCOPTER from 2009-2019”); *id.* at 36-37 (“The evidence [Petitioner] submitted amply demonstrated that the CAMCOPTER mark had acquired distinctiveness.”).

*Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 1373 (Fed. Cir. 2020) (citing *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 n.4 (2014)). A party in the position of plaintiff may petition to cancel the registration of a mark where such cancellation is within the zone of interests protected by the statute, 15 U.S.C. § 1064, and the party’s reasonable belief in damage is proximately caused by continued registration of the mark. *See Meenaxi Enter., Inc. v. Coca-Cola Co.*, 38 F.4th 1067, 1070-71 (Fed. Cir. 2022); *Corcamore*, 978 F.3d at 1304.

Petitioner introduced into the record under notice of reliance a copy of its pleaded application file showing the Office refused registration of the CAMCOPTER mark under Section 2(d) of the Trademark Act, citing Respondent’s involved registration.<sup>21</sup> This is sufficient to establish Petitioner’s entitlement to bring this cancellation. *See Australian Therapeutic Supplies*, 965 F.3d at 1375 (“A petitioner may demonstrate a real interest and reasonable belief of damage where the petitioner has filed a trademark application that is refused registration based on a likelihood of confusion with the mark subject to cancellation.”). Petitioner also claims common law rights in the mark CAMCOPTER, a mark it contends is confusingly similar to Respondent’s mark, and provided testimony and evidence in support, which also establishes Petitioner’s entitlement to bring this cancellation. *See Monster Energy*, 2023 TTAB

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<sup>21</sup> Petitioner’s NOR, 27 TTABVUE 167-610. In its Answer, Respondent admitted Petitioner’s ownership of Petitioner’s pleaded application and the Examining Attorney’s refusal of the application. *See Answer at ¶¶ 1-2, 4 TTABVUE 2.*

LEXIS 14, at \*16 (finding entitlement based on common law use of mark alleged to be confusingly similar).

Accordingly, we find that Petitioner has established its entitlement to assert the Section 2(d) claim in this proceeding.

#### **IV. Section 2(d): Priority and Likelihood of Confusion**

##### **A. Priority**

Section 2(d) of the Trademark Act prohibits the registration of a mark that “[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive[.]” 15 U.S.C. § 1052(d). For purposes of priority, “proprietary rights may arise from a prior registration, prior trademark or service mark use, prior use as a trade name, prior use analogous to trademark or service mark use, or any other use sufficient to establish proprietary rights.” *Herbko Int’l Inc. v. Kappa Books Inc.*, 308 F.3d 1156, 1162 (Fed. Cir. 2002).

Petitioner’s likelihood of confusion claim is based on alleged prior common law rights in the mark CAMCOPTER for “helicopters,” including “unmanned helicopters.” To establish prior common law rights, Petitioner, who did not plead analogous use, must prove by a preponderance of the evidence that it used the CAMCOPTER mark in commerce in connection with its pleaded goods, and that the designation was distinctive, inherently or otherwise, for Petitioner’s goods before the earliest priority date upon which Respondent may rely. *See Metro Traffic Control*,

*Inc. v. Shadow Network Inc.*, 104 F.3d 336, 339 (Fed. Cir. 1997) (“A petitioner seeking cancellation on [the ground of likelihood of confusion] bears the burden of proving the alleged prior use by a preponderance of the evidence.”); *see also Towers*, 913 F.2d at 945-46 (discussing *Otto Roth*); *DeVivo v. Ortiz*, Opp. No. 91242863, 2020 TTAB LEXIS 15, at \*7 (TTAB 2020).

Petitioner’s relies on purported common law rights in the same mark for the same goods as are subject to its pleaded application (i.e., the mark CAMCOPTER for helicopters, including unmanned helicopters), and as noted above, Petitioner amended its pleaded application to seek registration based on acquired distinctiveness under Section 2(f) of the Trademark Act.<sup>22</sup> By seeking registration of its pleaded mark based on a claim of acquired distinctiveness, Petitioner has conceded that its mark is not inherently distinctive. *See Cold War Museum, Inc. v. Cold War Air Museum, Inc.*, 586 F.3d 1352, 1358 (Fed. Cir. 2009) (“[A]n applicant’s reliance on Section 2(f) during prosecution presumes that the mark is descriptive.”); *Yamaha Int’l Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 1577 (Fed. Cir. 1988) (An application under Section 2(f) is an admission that the mark is merely descriptive). Petitioner argues, however, that CAMCOPTER has acquired distinctiveness when used in connection with its goods.<sup>23</sup>

Acquired distinctiveness, or “secondary meaning,” “occurs when, in the minds of the public, the primary significance of a mark is to identify the source of the product

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<sup>22</sup> *See supra* at note 20.

<sup>23</sup> *Petitioner’s Br.*, 44 TTABVUE 36-37.

rather than the product itself.” *Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 972 (Fed. Cir. 2018) (citing *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 211 (2000)). While the Board “may accept as prima facie evidence ... proof of substantially exclusive use for a period of five years before the date on which the claim of distinctiveness is made,” see 15 U.S.C. § 1052(f), “the language of the statute is permissive, and the weight to be accorded this kind of evidence depends on the facts and circumstances of the particular case.” *In re Ennco Display Sys., Inc.*, Serial No. 74439206, 2000 TTAB LEXIS 235, at \*23 (TTAB 2000).

A determination of the degree of descriptiveness is an integral part of a claim of acquired descriptiveness because the burden of demonstrating acquired distinctiveness increases with the level of descriptiveness; more descriptive terms require stronger evidence of acquired distinctiveness. *Real Foods*, 906 F.3d at 972 (citing *In re Steelbuilding.com*, 415 F.3d 1293, 1300 (Fed. Cir. 2005)). Therefore, we first “must make an express finding regarding the degree of the mark’s descriptiveness on the scale ranging from generic to merely descriptive, and [we] must explain how its assessment of the evidentiary record reflects that finding.” *Royal Crown Co. v. Coca-Cola Co.*, 892 F.3d 1358, 1369 (Fed. Cir. 2018).

“A term is merely descriptive of goods or services if it immediately conveys information concerning a quality, characteristic, feature, function, purpose or use of the goods or services with which it is used.” *In re Bayer AG*, 488 F.3d 960, 963 (Fed. Cir. 2007) (citing *In re Gyulay*, 820 F.2d 1216, 1217 (Fed. Cir. 1987)).

Here, the compound term CAMCOPTER combines a term that is “short for camera”<sup>24</sup> with “another term for helicopter.”<sup>25</sup> We have no doubt that CAMCOPTER is perceived as the compound form of “Cam Copter,” which has the understood meaning of “Camera Helicopter.” *See Minn. Mining & Mfg. Co. v. Addressograph-Multigraph Corp.*, 1967 TTAB LEXIS 152, at \*5 (TTAB 1967) (“[i]t is almost too well established to cite cases for the proposition that an otherwise merely descriptive term is not made any less so by merely omitting spaces between the words”). *See also In re Gould Paper Corp.*, 834 F2d 1017, 1018 (Fed. Cir. 1987) (“[B]ecause Gould’s wipes are used on television and computer screens, and the combination of ‘SCREEN’ and ‘WIPE’ does not render Gould’s [SCREENWIPE] mark unique or incongruous, the common descriptive aspect of applicant’s mark is not lost in the combined form.”); *In re Thomas Nelson, Inc.*, Ser. No. 76681269, 2011 TTAB LEXIS 9, at \*14-15 (TTAB 2011) (holding NKJV “substantially synonymous” with merely descriptive term “New King James Version” and thus merely descriptive of bibles).

Petitioner’s goods are helicopters (including unmanned helicopters), and the evidence of record demonstrates that Petitioner’s helicopters use cameras to gather images or provide video to the end-user.<sup>26</sup> Given the common meaning of the terms

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<sup>24</sup> Petitioner’s NOR, 27 TTABVUE 567 (oxforddictionaries.com page for “cam”).

<sup>25</sup> *Id.* at 605 (oxforddictionaries.com page for “copter”).

<sup>26</sup> *See, e.g.*, Petitioner’s NOR, 27 TTABVUE 509 (Petitioner’s website: “The CAMCOPTER S-100 UAB can carry a variety of cameras suitable and capable of providing the highest definition video”); 28 TTABVUE 386 (brochure for CAMCOPTER S-100: “High-definition aerial imagery digital camera technology provides for the acquisition of high spatial resolution digital aerial imagery”); *id.* at 391 (brochure for CAMCOPTER S-100: “Superior HD imaging resolution from an EO camera”); 29 TTABVUE 54, 107 (Pilot Handbook for

“cam” and “copter,” the unambiguous meaning of the term “CamCopter” used in connection with Petitioner’s goods, and the evidence of record describing Petitioner’s goods as being unmanned helicopters that feature camera technology, we find that Petitioner’s mark CAMCOPTER is highly descriptive of its goods. Given the highly descriptive nature of the term “CamCopter,” Petitioner may not rely on a statutory presumption of acquired distinctiveness based on substantially exclusive use for five years; nor may Petitioner rely on the Examining Attorney’s acceptance of the claim for acquired distinctiveness in Petitioner’s application. *See In re La. Fish Fry Prods., Ltd.*, 797 F.3d 1332, 1336-37 (Fed. Cir. 2015) (Board was within its discretion not to accept applicant’s allegation of five years’ use given the highly descriptive nature of the mark). It is Petitioner’s burden to establish acquired distinctiveness, *see Yamaha Int’l*, 840 F.2d at 1578-79, and as a highly descriptive mark, Petitioner’s burden of establishing acquired distinctiveness for its CAMCOPTER mark is commensurately high. *See Steelbuilding.com*, 415 F.3d at 1301 (“The proposed mark is highly descriptive. Therefore, applicant had the burden to show a concomitantly high level of secondary meaning.”).

Acquired distinctiveness may be proven through both direct and circumstantial evidence. *Schlafly v. Saint Louis Brewery, LLC*, 909 F.3d 420, 424 (Fed. Cir. 2018). “Direct evidence includes actual testimony, declarations or surveys of consumers as to their state of mind.” *Kohler Co. v. Honda Giken Kogyo K.K.*, Opp. No. 91200146,

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CAMCOPTER S-100 includes sections on “Pilot Camera Module” and “Reconnaissance Camera System”).

2017 TTAB LEXIS 450, at \*122 (TTAB 2017). “Circumstantial evidence is evidence from which consumer association may be inferred, such as years of use, extensive amount of sales and advertising, and any similar evidence showing wide exposure of the mark to consumers.” *Id.*

“Evidence of the public’s understanding of [a] term may be obtained from any competent source.” *Real Foods*, 906 F.3d at 977 (quoting *Royal Crown*, 892 F.3d at 1366). Specifically, we consider: (1) association of the mark with a particular source by actual purchasers (typically measured by customer surveys); (2) the length, degree, and exclusivity of use; (3) amount and manner of advertising; (4) amount of sales and number of customers; (5) intentional copying; and (6) unsolicited media coverage. *Converse, Inc. v. Int’l Trade Comm’n*, 909 F.3d 1110, 1120 (Fed. Cir. 2018); *In re SnoWizard, Inc.*, Serial No. 87134847, 2018 TTAB LEXIS 435, at \*16 & n.8 (TTAB 2018) (holding *Converse* applicable to Board proceedings); *see also Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1379 (Fed. Cir. 2012) (citing *Steelbuilding.com*, 415 F.3d at 1300). No single factor is determinative, and each factor need not be considered. *Steelbuilding.com*, 415 F.3d at 1300. “Rather, the determination examines all of the circumstances involving the use of the mark.” *Id.* (citing *Thompson Med. Co., Inc. v. Pfizer Inc.*, 753 F.2d 208, 217 (Fed. Cir. 1985)).

In support of its claim of acquired distinctiveness, Petitioner relies on the testimony of Mr. Schiller (Head of Programs Management within the Schiebel Group), Mr. Schiebel (Director of Petitioner and Chairman of the Schiebel Group), and Mr. Scardullo (a former employee of the Boeing Company and current employee

of Schiebel Elektronische Geraete GmbH, a wholly owned subsidiary of Petitioner). Both Mr. Schiller and Mr. Schiebel testify that Petitioner, through its wholly-owned subsidiary Schiebel Aircraft, has been using the mark CAMCOPTER in connection with its helicopters since at least October 12, 2009 and that the “aircraft industry in the United States has come to associate the CAMCOPTER mark with Schiebel Industries.”<sup>27</sup> Mr. Schiller also testifies that “[d]uring the years 2009 through 2019 Schiebel Aircraft promoted the sale of Schiebel Industries’ CAMCOPTER unmanned helicopters in the United States through Boeing, in that Schiebel Aircraft maintained trade fair booths in the United States for the CAMCOPTER unmanned helicopters, including trade fair booths at the AUVSI and SOFIC Trade Fairs at which customers and potential customers who may purchase unmanned helicopters attend”<sup>28</sup> and that “promotional materials” for the CAMCOPTER unmanned helicopters were distributed at the trade shows.<sup>29</sup>

We find Mr. Schiller’s and Mr. Scheibel’s testimony only marginally probative as to the alleged acquired distinctiveness of the CAMCOPTER mark, inasmuch as the declarations lack important details. For example, Petitioner does not contend that it serves a limited or niche market; it claims to serve “the aircraft industry.”<sup>30</sup> But the only customer that Petitioner identifies is Boeing, and the only end-user of

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<sup>27</sup> Schiller Decl. at ¶¶ 15-16, 28 TTABVUE 6-7; Schiebel Decl. at ¶¶ 21-22, *id.* at 18.

<sup>28</sup> Schiller Decl. at ¶ 25, 28 TTABVUE 9.

<sup>29</sup> Schiller Decl. at ¶ 28, *id.* at 10.

<sup>30</sup> Schiller Decl. at ¶¶ 15-16, *id.* at 6-7; Schiebel Decl. at ¶¶ 21-22, *id.* at 18.

Petitioner's helicopters identified is the United States Navy.<sup>31</sup> And for the lone customer identified, the only evidence of Boeing's perception of the CAMCOPTER mark is from a former employee of Boeing, who is also a current employee of Petitioner.<sup>32</sup>

Furthermore, Petitioner claims to attend industry trade shows, but, except for the dates and locations for trade shows in 2020,<sup>33</sup> Petitioner fails to give specific dates and places of any other trade shows, who attended any of the trade shows, and the number of people in attendance at those trade shows who witnessed or heard Petitioner's helicopters referred to as CAMCOPTER. Indeed, in its brief, Petitioner claims that Petitioner "promoted sales of its CAMCOPTER unmanned helicopters **at public trade shows and trade fairs**",<sup>34</sup> and in its reply brief, Petitioner claims that "Petitioner attended trade shows promoting its drones **to the industry**, and promoted UAVs [sic] its website and promotional materials, making **the public aware** of its CAMCOPTER trademark."<sup>35</sup> But again, Petitioner only identifies Boeing and the U.S. Navy as the universe of customers and end users aware of the CAMCOPTER mark. *See, e.g., Mana Prods., Inc. v. Columbia Cosms. Mfg., Inc.*, 65 F.3d 1063, 1071 (2d Cir. 1995) (affirming the district court's finding that the plaintiff had failed to raise a material issue of fact as to secondary meaning by submitting one

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<sup>31</sup> Schiller Decl. at ¶ 27, 28 TTABVUE 9-10.

<sup>32</sup> Scardullo Decl., 28 TTABVUE 21-24.

<sup>33</sup> 28 TTABVUE 327 (screen shot from Petitioner's website dated February 25, 2020).

<sup>34</sup> Petitioner's Br., 44 TTABVUE 39 (emphasis added).

<sup>35</sup> Petitioner's Reply Br., 67 TTABVUE 7 (emphasis added).

customer affidavit and claiming that it had spent over \$3 million in advertising); *Unleashed Doggie Day Care, LLC v. Petco Animal Supplies Stores, Inc.*, 828 F. Supp. 2d 384, 392 (D. Mass. 2010) (two customer affidavits “clearly insufficient” to show secondary meaning: “While proof that each and every member of the consuming public associates the mark with the plaintiff is not required, the plaintiff must prove that ‘a significant quantity of the consuming public understand a name as referring exclusively to the appropriate party.’”) (quoting *President & Trs. of Colby Coll. v. Colby Coll.-N.H.*, 508 F.2d 804, 807 (1st Cir. 1975)).

Petitioner also failed to submit any evidence of advertising expenditures, unsolicited media coverage, consumer studies or surveys about the CAMCOPTER mark, or evidence of intentional copying of the CAMCOPTER mark.<sup>36</sup> Rather, the evidence of record submitted by Petitioner, discussed below, pertains only to the length, manner, and degree of Petitioner’s use of CAMCOPTER.

Petitioner has produced evidence in the form of a variety of manuals (e.g., operating, flight, equipment, and maintenance manuals), pilot operator handbooks, flight logbooks, promotional materials, invoices, and packing slips reflecting consistent use of the term CAMCOPTER since at least October 2009.<sup>37</sup> Although Petitioner produced several invoices for the sale of its CAMCOPTER helicopters to Boeing, Petitioner did not identify the total amount of sales of its goods to Boeing (or

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<sup>36</sup> Mr. Schiebel testifies that on December 29, 2008, Petitioner’s attorneys sent a cease and desist email to the “Mundus Group, Las Vegas, NV asking them to stop using the mark CamCopter on their website” and that they thereafter ceased using the term. Schiebel Decl. at ¶ 26, 28 TTABVUE 19. There is insufficient information for us to consider the alleged use by Mundus Group as “intentional copying.”

<sup>37</sup> Schiller at ¶¶20-33, 28 TTABVUE 7-11; *see also id.* at 26-372 and 29 through 31 TTABVUE.

any other customer) or the amount of advertising spent promoting the CAMCOPTER helicopters.<sup>38</sup> It is clear from the face of the invoices, however, that Petitioner's revenue from the sale of the CAMCOPTER helicopters totals many millions of dollars, with each helicopter costing at least hundreds of thousands of dollars, and sometimes millions of dollars.<sup>39</sup> Petitioner's long use and revenues suggest that Petitioner has enjoyed a degree of business success. However, we cannot accurately gauge the level of Petitioner's success without additional evidence as to Petitioner's market share, or, alternatively put, how Petitioner's goods sold under the CAMCOPTER mark rank in terms of sales in its industry.

"Our precedents have long alerted practitioners to the fact that the absence of evidence of competitive contextual information may limit the probative value that we might otherwise accord advertising and sales numbers in the acquired distinctiveness inquiry." *In re GJ & AM, LLC*, Serial No. 86858003, 2021 TTAB LEXIS 203, at \*50 (TTAB 2018) (citing *Mini Melts, Inc. v. Reckitt Benckiser LLC*, Opp. No. 91173963, 2016 TTAB LEXIS 151, at \*58 (TTAB 2016); *AS Holdings, Inc. v. H & C Milcor, Inc.*, Opp. No. 91182064, 2013 TTAB LEXIS 388, at \*32 (TTAB 2013); *Target Brands v. Hughes*, Opp. No. 91163556, 2007 TTAB LEXIS 94, at \*14 (TTAB 2007); *In re Gibson Guitar Corp.*, Serial No. 75513342, 2001 TTAB LEXIS 835, at \*9-10 (TTAB 2001)). See also THOMAS J. MCCARTHY, 2 MCCARTHY ON TRADEMARKS AND UNFAIR

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<sup>38</sup> Although Mr. Schiller testified that "Schiebel Aircraft promoted the sale of [Petitioner's] CAMCOPTER unmanned helicopters in the United States **through Boeing**" (Schiller Decl. at ¶ 25, 28 TTABVUE 9) (emphasis added), the record is unclear how Boeing participated in the promotion of Petitioner's goods or how much Boeing spent doing so.

<sup>39</sup> 28 TTABVUE 26-227, 318-20.

COMPETITION § 15:49 (5th ed. May 2025 Update) (“Raw sales figures need to be put into context to have any meaning. That is, if a company says that its sales of goods or services under the mark are \$x, that number cannot be said to be ‘impressive’ or ‘persuasive’ evidence of secondary meaning without knowing how \$x compares with the norms of that industry.”). Petitioner’s evidence regarding its sales without any context and without further supplementation or explanation, fails to help Petitioner establish that the CAMCOPTER mark has acquired distinctiveness.<sup>40</sup>

Considering the record as a whole, we find that Petitioner has failed to prove by a preponderance of the evidence that its alleged mark CAMCOPTER acquired distinctiveness prior to either Respondent’s March 18, 2015 claimed date of first use in connection with its Class 12 goods<sup>41</sup> or September 30, 2015, the filing date of Respondent’s underlying application for the involved registration. We do not ignore Petitioner’s use of the CAMCOPTER mark since 2009, but it is well settled that long use alone is insufficient to establish acquired distinctiveness as a mark. *See Alcatraz Media, Inc. v. Chesapeake Marine Tours Inc.*, Can. No. 92050879, 2013 TTAB LEXIS 347, at \*55 (TTAB 2013), *aff’d mem.*, 565 F. App’x. 900 (Fed. Cir. 2014) (19 years use insufficient to prove acquired distinctiveness); *In re Packaging Specialists, Inc.*,

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<sup>40</sup> Respondent argues that Petitioner’s sales to Boeing were “in the nature of [a] collaborative investment” (i.e., not an arms-length transaction but rather akin to an “intracompany” transaction). Respondent’s Br., 46 TTABVUE 16. Petitioner disagrees with this characterization, asserting that Petitioner’s sales to Boeing were “bona fide sales.” Petitioner’s Reply Br., 67 TTABVUE 6. We need not decide whether Petitioner’s sales to Boeing were akin to an intracompany transaction. We have treated Petitioner’s sales to Boeing as bona fide sales.

<sup>41</sup> Petitioner’s NOR, 27 TTABVUE 613 (Respondent’s Response to Petitioner’s Interrogatory No. 5).

Serial No. 250697, 1984 TTAB LEXIS 159, at \*7 (TTAB 1984) (16 years “is a substantial period but not necessarily conclusive or persuasive” on acquired distinctiveness); *In re Interstate Folding Box Co.*, 1970 TTAB LEXIS 226, at \*10 (TTAB 1970) (30 years use insufficient to prove acquired distinctiveness).

**B. Likelihood Of Confusion**

Because Petitioner has not established priority, its claim under Section 2(d) of the Trademark Act must fail, and we need not reach the issue of likelihood of confusion. *See Hornby v. TJX Cos.*, Can. No. 92044369, 2008 TTAB LEXIS 19, at \*36 (TTAB 2008) (“Because petitioner cannot prove priority of use of the mark TWIGGY, her likelihood of confusion claim must fail.”).

**Decision:** The petition to cancel is denied.<sup>42</sup>

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<sup>42</sup> Although we have denied Petitioner’s petition to cancel, the involved registration, Registration No. 5440864, remains canceled due to Respondent’s failure to file an acceptable Section 8 affidavit of continued use.