

This Opinion is not a
Precedent of the TTAB

Mailed: February 13, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re SMP Logic Systems, LLC

Serial No. 97622112

Shane M. Popp, Esq. *pro se*
for SMP Logic Systems, LLC.

Brandi Brenner, Trademark Examining Attorney, Law Office 128,¹
Colleen Cassidy, Managing Attorney.

Before Heasley, Lynch, and Brock,
Administrative Trademark Judges.

Opinion by Heasley, Administrative Trademark Judge:

Applicant, SMP Logic Systems, LLC, owns a Supplemental Register registration, issued on March 27, 2018, for INDUSTRIAL CLOUD (in standard characters, with “CLOUD” disclaimed) for “Cloud computing featuring software for use in the design and design consultation of pharmaceutical manufacturing systems; Providing on-line,

¹ Megan Aurand was the Examining Attorney during prosecution of the Application.

non-downloadable, Internet-based software applications for operating pharmaceutical manufacturing enterprises” in International Class 42.²

On October 6, 2022, Applicant applied to register the same mark, INDUSTRIAL CLOUD (again in standard characters) on the **Principal** Register for the same services in International Class 42.³ In response to the Examining Attorney’s first Office Action, refusing registration on the ground of mere descriptiveness,⁴ Applicant claimed that its applied-for mark is distinctive, added a claim of acquired distinctiveness, and again disclaimed “CLOUD.”⁵ The Examining Attorney finally refused registration on the ground that the applied-for mark is merely descriptive under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), and has not acquired distinctiveness under Section 2(f), 15 U.S.C. § 1052(f). For the reasons discussed below, we affirm the refusal to register.

I. Preliminary Matter

During the course of prosecution, Applicant submitted a February 21, 2024 Response to Office Action referring to “Attachments” A through C, consisting of “A copy of US Patent No.: 11,754,911 which is the product embodiment of the INDUSTRIAL CLOUD platform,” as well as a press release and a certificate listing Applicant among ten companies “at the forefront of providing shop floor management

² Supplemental Register Registration No. 5435217, claiming first use and first use in commerce since September 26, 2017. 15 U.S.C. § 1051(a). A declaration of use under Section 8 has been accepted.

³ App. Ser. No. 97622112, again claiming first use and first use in commerce since September 26, 2017. 15 U.S.C. § 1051(a).

⁴ July 21, 2023 Office Action.

⁵ Oct. 24, 2023 Response to Office Action.

solutions and *impacting the marketplace*.⁶ The “Attachments” were not attached.⁷ Applicant later appended these “Attachments” to its main brief on appeal as exhibits B, C, and D.⁸

The Examining Attorney objects and requests that the Board disregard this new evidence because it was untimely submitted during the appeal.⁹ We sustain the objection. The record in an application should be complete before the applicant files its appeal. Trademark Rule 2.142(d); 37 C.F.R. § 2.142(d). Any request to supplement the record thereafter must be addressed through a separately filed and captioned written request to the Board for a remand to introduce additional evidence based on good cause. TBMP § 1209.04. Therefore, we decline to consider these materials, which are not part of the prosecution record. *In re Taverna Izakaya LLC*, 2021 WL 5411210, *1 (TTAB 2021).¹⁰

Applicant also attached to its main brief exhibit A, a print copy of its Supplemental

⁶ February 21, 2024 Response to Office Action at 6.

⁷ The Examining Attorney notified Applicant of this issue in the March 27, 2024 Final Office Action at 3 (“In applicant's February 21, 2024, response, applicant argues that they have attached a U.S. Patent as Attachment A, a copy of a press release as Attachment B, and a recognition certificate as Attachment C. However, this evidence was not attached. As such, none of the corresponding arguments have been considered.”)

⁸ Applicant’s main brief, 7 TTABVUE 20-83.

⁹ Examining Attorney’s brief, 8 TTABVUE 12.

¹⁰ This opinion is issued as part of an internal Board pilot citation program on broadening acceptable forms of legal citation in Board cases. Westlaw (WL) citations are used for decisions of the Board, and only precedential Board decisions are cited. Decisions of the U.S. Court of Appeals for the Federal Circuit and its predecessor, the U.S. Court of Customs and Patent Appeals, are cited only to the Federal Reporter (e.g., F.2d, F.3d, or F.4th). This opinion thus conforms to the practice set forth in TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (“TBMP”) § 101.03 (2024).

Register registration for INDUSTRIAL CLOUD, and exhibit E, Merriam-Webster.com dictionary definitions of “cloud.”¹¹ We exercise our discretion to consider these exhibits, as the Examining Attorney has already acknowledged the existence of Applicant’s Supplemental Register registration,¹² and we take judicial notice of dictionary definitions.¹³

II. Mere Descriptiveness

Section 2(e)(1) of the Trademark Act presumptively prohibits registration on the Principal Register of a term that “when used on or in connection with the goods [or services] of the applicant is merely descriptive ... of them....” 15 U.S.C. § 1052(e)(1). “A term is merely descriptive if it immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used.” *State Permits, Inc. v. Fieldvine, Inc.*, 2024 WL 3825297, *11 (TTAB 2024) (quoting *In re Chamber of Com. of the U.S.*, 675 F.3d 1297, 1300 (Fed. Cir. 2012)).

We disagree with Applicant’s assertion that INDUSTRIAL CLOUD is suggestive. Applicant, referring to its Merriam-Webster dictionary definitions, points out that “cloud”:

can be used as a noun or a verb. The most common primary definition (used as a noun) is “a visible mass of particles of condensed vapor (such as water or ice) suspended in the atmosphere of a planet (such as the earth) or moon.” Clearly, even a cursory view of the Applicant’s goods and services in IC042 bear no resemblance to the common definition of the literal element CLOUD. Applicant asserts this conclusion is inescapable. Accordingly, asserts [sic] that, in totality, the words INDUSTRIAL

¹¹ *Id.* 7 TTABVUE 17-19, 84-86.

¹² March 27, 2024 Office Action at 5.

¹³ See *In re Jimmy Moore LLC*, 2016 WL 6819242, *3 (TTAB 2016) (taking judicial notice of Merriam-Webster online definitions).

CLOUD “require imagination, thought, or perception to reach a conclusion as to the nature of those goods or services.” *In re N.C. Lottery*, 866 F.3d 1363 (Fed. Cir. 2017).¹⁴

As the Examining Attorney points out, “INDUSTRIAL” means “of or relating to industry.”¹⁵ Applicant agrees with this definition.¹⁶ “CLOUD” is defined as “the computers and connections that support cloud computing.”¹⁷ “[S]o long as any one of the meanings of a term is descriptive, the term may be considered to be merely descriptive.” *In re Mueller Sports Med., Inc.*, 2018 WL 2277503, *6 (TTAB 2018) (quoting *In re Chopper Indus.*, 1984 WL 63033, *2 (TTAB 1984)). The fact that the term may have other meanings in other contexts is not controlling. *In re Canine Caviar Pet Foods, Inc.*, 2018 WL 2277123, *7 (TTAB 2018).

“Whether a term is merely descriptive is evaluated in relation to the particular goods [or services] for which registration is sought, the context in which it is being used, and the possible significance that the term would have to the average purchaser of the goods [or services] because of the manner of its use or intended use.” *In re Bayer AG*, 488 F.3d 960, 964 (Fed. Cir. 2007), *quoted in In re Chamber of Com. of the U.S.*, 675 F.3d at 1300 and *In re Fallon*, 2020 WL 6255423, *8 (TTAB 2020). In this case, Applicant offers “**Cloud computing** featuring software for use in the design and design consultation of pharmaceutical manufacturing systems; Providing on-line,

¹⁴ Applicant’s brief, 7 TTABVUE 15.

¹⁵ Examining Attorney’s brief, 8 TTABVUE 4, citing Merriam-Webster.com, July 31, 2023 Office Action at 8-12.

¹⁶ Applicant’s main brief, 7 TTABVUE 15.

¹⁷ *Id.* 7 TTABVUE 86.

non-downloadable, Internet-based software applications for operating pharmaceutical manufacturing enterprises.” (Emphasis added.)

Furthermore, Applicant has disclaimed “CLOUD,” not only in its current application but in its Supplemental Register registration, thereby conceding that the term is generic as applied to its cloud computing services. *In re Consumer Prot. Firm PLLC*, 2021 WL 825503, *12 (TTAB 2021) (“Applicant disclaimed FIRM.COM on the Supplemental Register and therefore has conceded it is generic.”); *In re Haden*, 2019 WL 6650556, *6 (TTAB 2019) (“Generic matter must be disclaimed to permit registration on the Supplemental Register.”). “The generic name of a thing is in fact the ultimate in descriptiveness.” *H. Marvin Ginn Corp. v. Int’l. Ass’n of Fire Chiefs, Inc.*, 782 F.2d 987, 989 (Fed. Cir. 1986).

Combined, the individual words INDUSTRIAL CLOUD retain their descriptive or generic meaning in relation to Applicant’s identified services, particularly “Cloud computing featuring software for use in the design and design consultation of pharmaceutical manufacturing systems.” *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 1255 (Fed. Cir. 2012) *cited in In re Nursecom, LLC*, 2024 WL 5265079, *7 (TTAB 2024). As Applicant’s specimen states, “SMP’s INDUSTRIAL CLOUD services(s) allow pharmaceutical manufacturers and [their] manufacturing providers to seamlessly transition into the cloud.”¹⁸ The applied-for mark, considered as a whole, thus immediately conveys knowledge of a feature or function of Applicant’s services: providing cloud-based software used in industrial production.

¹⁸ Specimen, Oct. 6, 2022 TEAS Plus Application at 2.

See In re Korn Ferry, 2024 WL 3219482, *2 (TTAB 2024).

Furthermore, Applicant's registration on the Supplemental Register is an admission that the applied-for mark was not then inherently distinctive. *See, e.g., Quaker State Oil Refining Corp., v. Quaker Oil Corp.*, 453 F.2d 1296, 1299 (1972); *In re Future Ads LLC*, 2012 WL 3263733, *4 (TTAB 2012) ("it is well-settled as a legal matter that a mark owner's acceptance of registration on the Supplemental Register constitutes an admission that the mark is descriptive at the time of registration..."), *cited in State Permits, Inc. v. Fieldvine, Inc.*, 2024 WL 3825297, at *15; *In re Highlights For Children, Inc.*, 2016 WL 1380729, *4 (TTAB 2016); *In re Morinaga Nyugyo Kabushiki Kaisha*, 2016 WL 5219811, *6 n. 5 (TTAB 2016); *Otter Prods. LLC v. BaseOneLabs LLC*, 2012 WL 6798845, *3 (TTAB 2012); *Perma Ceram Enters. Inc. v. Preco Indus. Ltd.*, 1992 WL 156544, *3 n. 11 (TTAB 1992); *In re Hester Indus., Inc.*, 1986 WL 83614, *1 (TTAB 1986).

"Eligibility for registration on the Supplemental Register, 15 U.S.C. § 1091, requires that the term does not meet the requirements of registration on the Principal Register but is deemed capable of achieving an association with the source of the product." *In re Bush Bros. & Co.*, 884 F.2d 569, 570 (Fed. Cir. 1989), *quoted in Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 972 (Fed. Cir. 2018). *See generally* 2 McCarthy on Trademarks and Unfair Competition § 19:43 (5th ed. Sept. 2024).

The record as a whole amply demonstrates that INDUSTRIAL CLOUD immediately describes features of Applicant's services.

III. Acquired Distinctiveness

“Under Section 2(f) of the Trademark Act, matter that is merely descriptive under Section 2(e)(1) may nonetheless be registered on the Principal Register if it ‘has become distinctive of the applicant’s goods [or services] in commerce.’” *In re Virtual Indep. Paralegals, LLC*, 2019 WL 1453034, *11 (TTAB 2019) (quoting 15 U.S.C. § 1052(f)). Section 2(f) is not a ground for refusal, but a means by which merely descriptive terms may, over time, become registrable. *Yamaha Intern. Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 1580 (Fed. Cir. 1988), *quoted in In re Koninklijke Philips Elecs. N.V.*, 2014 WL 5035509, *3 (TTAB 2014).

“An applicant seeking registration of a mark under Section 2(f) bears the ultimate burden of establishing acquired distinctiveness.” *Virtual Indep. Paralegals*, 2019 WL 1453034, at *11 (citing *In re La. Fish Fry Prods., Ltd.*, 797 F.3d 1332, 1335 (Fed. Cir. 2015)). Applicant’s burden is to prove acquired distinctiveness by a preponderance of the evidence. *In re GJ & AM, LLC*, 2021 WL 2374670, *17 (TTAB 2021). Applicant acknowledges this burden of proof.¹⁹

The Federal Circuit has “long held that ‘the applicant’s burden of showing acquired distinctiveness increases with the level of descriptiveness; a more descriptive term requires more evidence of secondary meaning.’” *Royal Crown Cola Co. v. Coca-Cola Co.*, 892 F.3d 1358, 1368 (Fed. Cir. 2018) (quoting *In re Steelbuilding.com*, 415 F.3d 1293, 1300 (Fed. Cir. 2005)). In this case, based on the evidence of record, we find the applied-for mark INDUSTRIAL CLOUD highly

¹⁹ Applicant’s main brief, 7 TTABVUE 5.

descriptive. The repeatedly disclaimed word “CLOUD” is generic for Applicant’s identified cloud computing services, and the broadly-defined adjective “INDUSTRIAL” merely indicates that its cloud computing services are for use in industrial production. *See Remington Prods., Inc. v. N. Am. Philips Corp.*, 892 F.2d 1576, 1580 (Fed. Cir. 1990) (degree of descriptiveness of an applied-for mark can be determined in the context of its identified services). Applicant’s own promotional materials emphasize this function and purpose.²⁰ Moreover, third parties such as PWC,²¹ Aveva,²² Siemens,²³ and Waterfall Security²⁴ make similar use of “INDUSTRIAL CLOUD” or a variation thereof in connection with cloud computing services. In sum, the dictionary definitions, disclaimers, promotional materials, and third-party uses all indicate that the applied-for mark is highly descriptive. *See, e.g., In re Yarnell Ice Cream, LLC*, 2019 WL 3183842, *12 (TTAB 2019).

Consequently, while it is not impossible for Applicant to establish secondary meaning—after all, registration on the Supplemental register presupposes that a mark is “capable of distinguishing applicant’s goods or services,” 15 U.S.C.

²⁰ *See* specimen, Oct. 6, 2022 TEAS Plus Application at 2 (“Furthering the Industrial Internet of Things (IIoT), SMP’s INDUSTRIAL CLOUD services assist pharmaceutical manufacturers in designing appropriate scale systems to bring pharmaceutical production into the cloud while keeping costs contained and quality high.” ... “The result is a pharmaceutical production capability working globally in the INDUSTRIAL CLOUD.”).

See also Applicant’s print advertisement in Manufacturing Technology Insights magazine, May 2019 (“SMP’s Industrial Cloud™ services allow pharmaceutical manufacturers to seamlessly transition into the cloud....”). Oct. 24, 2023 Response to Office Action at 12.

²¹ March 27, 2024 Office Action at 7-19, 25-29 (“Industry Cloud”).

²² *Id.* at 20-24, 30-35 (“Industrial Cloud”).

²³ *Id.* at 36-46 (“Industrial Cloud Computing”).

²⁴ *Id.* at 47-58 (“industrial cloud services”).

§ 1091(a)—it bears a heavier burden of proving acquired distinctiveness. *Real Foods v. Frito-Lay*, 906 F.3d at 979; *In re La. Fish Fry.*, 797 F.3d at 1336 (highly descriptive term bears heavier burden).

“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.” *Virtual Indep. Paralegals*, 2019 WL 1453034, at *11 (quoting *In re Steelbuilding.com*, 415 F.3d at 1297). In other words, the applicant must demonstrate that “consumers have come to associate the mark with a single source.” *In re MK Diamond Prods., Inc.*, 2020 WL 4346886, *23 (TTAB 2020).

An applicant may not base a claim of acquired distinctiveness under Section 2(f) on ownership of a registration issued on the Supplemental Register. Trademark Rule 2.41(a)(1), 37 C.F.R. § 2.41(a)(1) (prior registration on Principal Register), *cited in In re Snowizard, Inc.*, 2018 WL 6923620, *5 n. 10 (TTAB 2018).

The Federal Circuit sets forth the relevant factors for proving acquired distinctiveness:

[T]he considerations to be assessed in determining whether a mark has acquired secondary meaning can be described by the following six factors: (1) association of the [mark] with a particular source by actual purchasers (typically measured by customer surveys); (2) 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 of the product [or service] embodying the mark.

Converse, Inc. v. Int’l Trade Comm’n, 909 F.3d 1110, 1121 (Fed. Cir. 2018). No single factor is determinative and all six factors are to be weighed together in determining

the existence of secondary meaning. *In re Post Foods, LLC*, 2024 WL 64681, *7 (TTAB 2024).

Under the first factor, Applicant admits that has not conducted any customer surveys to determine purchasers' association of INDUSTRIAL CLOUD with a particular source.²⁵ Nor has it adduced declarations from any members of the consuming public or the pharmaceutical industry attesting that they associate the applied-for mark with a single source.

Under the second factor, Applicant asserts that it has used INDUSTRIAL CLOUD since its claimed date of first use, September 26, 2017, amounting to at least seven years' use.²⁶ Section 2(f) states that “[t]he Director **may** accept as prima facie evidence that the mark has become distinctive, as used on or in connection with the applicant’s goods [or services] in commerce, proof of substantially exclusive and continuous use thereof as a mark by the applicant in commerce for the five years before the date on which the claim of distinctiveness is made.” 15 U.S.C. § 1052(f) (emphasis added); *see also* Trademark Rule 2.41(a)(2), *cited in Schlafly v. Saint Louis Brewery, LLC*, 909 F.3d 420, 423-24 (Fed. Cir. 2018).

But this statutory language is permissive, not mandatory, and the passage of time alone may not suffice to bestow on the applied-for mark the mantle of distinctiveness. *See, e.g., In re Ennco Display Sys., Inc.*, 2000 WL 1160458, *6 (TTAB 2000) (“Applicant’s length of use ranging from approximately seven to seventeen years is simply insufficient, in itself, to bestow acquired distinctiveness.”). In light of its highly

²⁵ Applicant’s main brief, 7 TTABVUE 9.

²⁶ *Id.* Oct. 24, 2024 Response to Office Action at 8.

descriptive nature, a much longer length of use may still not suffice. *See Alcatraz Media, Inc. v. Chesapeake Marine Tours Inc.*, 2013 WL 5407315, *19 (TTAB 2013) (“Given the highly descriptive nature of registrant’s mark continuous use alone since 1992 would not be sufficient to establish acquired distinctiveness.”); *In re Packaging Specialists, Inc.*, 1984 WL 63099, *3 (TTAB 1984) (deeming use of highly descriptive mark for sixteen years “a substantial period but not necessarily conclusive or persuasive on the Section 2(f) showing”) (collecting decisions).

Beyond that, Applicant offers no insight into the **degree** of use of the applied-for mark—no indication of market penetration or geographic extent.

As for exclusivity, the evidence of third-party use noted above shows that Applicant’s use of “INDUSTRIAL CLOUD” or variations thereof²⁷ has been anything but “substantially exclusive.” *Racine Industries Inc. v. Bane-Clene Corp.*, 1994 WL 847348, *10 (TTAB 1994). Indeed, given the highly descriptive nature of the term, it is unsurprising that others in the industry would find it desirable to make use of the same terminology to describe their own goods and services. This third-party use impedes Applicant’s acquisition of distinctiveness because it hinders the relevant public’s perception of the applied-for mark as an indicator of a single source. “When the record shows that purchasers are confronted with more than one (let alone numerous) independent users of a term or device, an application for registration under Section 2(f) cannot be successful, for distinctiveness on which purchasers may

²⁷ “In order to be relevant to the question of whether applicant’s mark has acquired distinctiveness, the third-party uses do not have to be identical to applicant’s mark.” *Saint-Gobain Corp. v. 3M Co.*, 2007 WL 2509515, *20 (TTAB 2007).

rely is lacking under such circumstances.” *Levi Strauss & Co. v. Genesco, Inc.*, 742 F.2d 1401, 1403 (Fed. Cir. 1984).

Under the third factor, the amount and manner of advertising, Applicant asserts that it “has done a substantial amount of targeted advertising to specific customer groups extensively over its period of exclusive use.”²⁸ But as the Examining Attorney correctly notes, Applicant did not substantiate this vague assertion with evidence identifying those consumer groups or quantifying the extent of its advertising.²⁹

Applicant offers two print advertisements: one in the April 2018 Pharma Tech Outlook magazine, and the other in the May 2019 Manufacturing Technology Insights magazine.³⁰ This evidence falls short for several reasons. First, it fails to show any advertising in the other years since Applicant’s claimed date of first use in 2017. Second, it fails to identify or quantify the readership for these magazines. “The advertisements of record do not support an inference of distinctiveness inasmuch as the evidence fails to disclose information from which the number of people exposed to the [applied-for mark] could be estimated—such as circulation of the publications in which the advertisements appear, advertising expenditures, number of advertisements published, ... and the like.” *In re Soccer Sport Supply Co.*, 507 F.2d 1400, 1403 (CCPA 1975), *quoted in Grote Indus., Inc. v. Truck-Lite Co., LLC*, 2018 WL 1557301, *16 (TTAB 2018).

And third, Applicant’s evidence fails to show that the relevant consumers, even if

²⁸ Applicant’s main brief, 7 TTABVUE 9.

²⁹ Examining Attorney’s brief, 8 TTABVUE 14-15.

³⁰ Oct.24, 2023 Response to Office Action at 12-13.

exposed to the two advertisements, would by virtue of that exposure come to regard INDUSTRIAL CLOUD as a mark, indicative of a single source. Applicant prominently displays its logo (which the Examining Attorney characterizes as its “house mark”)³¹ at the top of each ad. For example:



And Applicant uses INDUSTRIAL CLOUD, buried in text that depicts its features and function. For example:

Enhancing the Pharmaceutical Cloud.

...

SMP Logic Systems newest product offerings allow pharmaceutical manufacturers to fully automate pharmaceutical manufacturing operations to attain Industrial Internet of Things (“IIoT”) capability. SMP’s Industrial **Cloud**TM services allow pharmaceutical manufacturers to seamlessly transition into the cloud by designing appropriately scaled systems to efficiently close the technology gap between legacy systems and cloud-based systems in a cost-effective manner.

³²

Given the prominent display of Applicant’s logo/house mark together with its applied-for mark, “it is impossible to gauge from this advertising whether and, if so, to what extent, these advertisements inured to the benefit of the ... words used therein or to the other marks that appeared together with them.” *In re LC*

³¹ Examining Attorney’s brief, 8 TTABVUE 14-15.

³² Oct.24, 2023 Response to Office Action at 11-12.

Trademarks, Inc., 2016 WL 7655545, *12 (TTAB 2016). See, e.g., *In re La. Fish Fry*, 797 F.3d at 1337 (advertising LOUISIANA FISH FRY PRODUCTS unpersuasive to show acquired distinctiveness of the words FISH FRY PRODUCTS alone). “It is well-settled that, where, as here, a party’s advertising and sales data is based on materials and packaging in which the mark at issue is almost always displayed with another mark, such data does not prove that the mark at issue possesses the requisite degree of consumer recognition.” *ProMark Brands Inc. v. GFA Brands, Inc.*, 2015 WL 1646447, *12 (TTAB 2015) (citing *In re Bongrain Int’l*, 894 F.2d 1316, 1318 (Fed. Cir. 1990) (sales and advertising figures alone may not suffice where other marks were featured with the mark at issue)).

Under the fourth factor, Applicant declines to furnish its amount of sales and number of customers for its services offered in connection with INDUSTRIAL CLOUD. Applicant rationalizes this refusal, protesting that, “Given the type of customers for the Applicant’s products, sales are not determined by a unit price. In addition, customers generally seek confidentiality provisions in the sales / license contracts with the Applicants to maintain a competitive advantage. Thus, the Applicant does not keep traditional figures such as the number of sales and a specific number of customers.”³³

As noted, proof of acquired distinctiveness is Applicant’s burden, and a heavy one at that. “When a party is asserting the existence of secondary meaning, he is claiming that the expression in issue points uniquely and consistently to him as the source of

³³ Applicant’s main brief, 7 TTABVUE 11.

the goods [or services] bearing the expression. Therefore he cannot leave unanswered the questions which the evidence here has raised.” *In re Consol. Foods Corp.*, 1978 WL 21557, *4 (TTAB 1978). Applicant’s failure to adduce this evidence—even in the form of summaries, without identifying its customers—warrants the inference that it cannot prove sales under the applied-for mark (as opposed to other marks or designations) to support secondary meaning. “We further note that, when it is within a party’s power to produce a certain kind of persuasive testimony or documentary evidence on an urged factual finding, and it fails to do so, a tribunal is at least permitted—perhaps even compelled—to draw the inference that that fact is unsupported and/or untrue.” *In re USA Warriors Ice Hockey Program, Inc.*, 2017 WL 2572815, *5 (TTAB 2017).

Under the fifth factor, intentional copying, Applicant states that “[t]o the best of the Applicant’s knowledge, there is no evidence on the record of any intentional copying by Third Parties. Thus, the Applicant asserts this factor is neutral to evaluate evidence in a §2(f) claim.” Putting the best spin on the matter, Applicant contends that “[a]rguably, this tilts the scales in favor of the Applicant since the relevant market understands that the Mark is the source of Applicant’s products.”³⁴

Actually, “[t]he copying of a U.S. mark has been held to support a finding of secondary meaning,” *Meenaxi Enter., Inc. v. Coca-Cola Co.*, 38 F.4th 1067, 1079 (Fed. Cir. 2022), and the absence of such evidence in this case weighs against Applicant’s efforts to demonstrate secondary meaning. It does not tilt in Applicant’s favor, as the

³⁴ Applicant’s main brief, 7 TTABVUE 11.

record evidence shows third parties freely using variations of “industrial cloud” to describe their own services. This is not copying, but use of terms that are in the public domain. *See Hoover Co. v. Royal Appliance Mfg. Co.*, 238 F.3d 1357, 1360 (Fed. Cir. 2001) (“descriptive terms are in the public domain and should be free for use by all who can truthfully employ them to describe their goods.”).

Under the sixth and last factor, unsolicited media coverage, Applicant alludes to an August 2018 article in Manufacturing Technology Insights magazine and a July 2019 article in the CIO Bulletin.³⁵ Assuming that these articles are truly “unsolicited,” we note that they suffer from the same shortcomings as Applicant’s advertising. Each article is headed with Applicant’s trade name or logo:



And each article uses “SMP Logic Systems” together with “Industrial Cloud.” For example:

Meanwhile, SMP Logic Systems’ Industrial Cloud service caters to pharmaceutical manufacturers’ and their manufacturing providers’ needs to transition into the smart factory paradigm efficiently. With a focus on cost control and keeping the quality high, the Industrial Cloud service assists manufacturers in designing appropriate scale systems for bringing production aspects into the cloud. The objective is to close the technology

Applicant did not provide circulation figures for the two publications in which the

³⁵ Oct. 24, 2023 Response to Office Action at 13-15.

³⁶ Oct. 24, 2023 Response to Office Action at 13-14.

³⁷ Oct. 24, 2023 Response to Office Action at 13.

articles appeared, rendering it difficult to gauge the extent of their exposure to the relevant classes of purchasers. And even if Applicant had done so, the articles, like the advertisements, treat the applied-for mark as an adjunct, subordinate to Applicant's trade name or house mark.

“The ultimate test in determining whether a designation has acquired distinctiveness is Applicant's success, rather than its efforts, in educating the public to associate the proposed mark with a single source.’ *Mini Melts, [Inc. v. Reckit Benckiser LLC, 2016 WL 3915987, *19 (TTAB 2016)]*. More persuasive evidence than what Applicant has submitted would be necessary to show that its proposed mark has become distinctive” *LC Trademarks, 2016 WL 7655545, at *13*.

IV. Conclusion

On careful consideration of all the evidence, arguments, and applicable law, we find: that the applied-for mark, INDUSTRIAL CLOUD, is highly descriptive of Applicant's recited services; that Applicant bears a commensurately heavy burden of proving that it has acquired distinctiveness; and that on this evidentiary record, notable for its paucity, Applicant has not established that the term has become distinctive of Applicant's services in commerce. 15 U.S.C. § 1052(f).

Decision: The refusal to register Applicant's mark is affirmed on the ground of mere descriptiveness. 15 U.S.C. § 1052(e)(1).