

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: March 16, 2011

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re SRC, LLC

Serial No. 77282935

Gary M. Anderson of Fulwider Patton LLP for SRC, LLC.

Michael Webster, Trademark Examining Attorney, Law Office
102 (Karen M. Strzyz, Managing Attorney).

Before Holtzman, Kuhlke and Mermelstein, Administrative
Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

SRC, LLC has filed an application to register in
standard characters FREEDEMOGRAPHICS.COM for services
ultimately identified as "business and marketing services,
namely, providing customizable demographic data, reports,
and analysis" in International Class 35.¹

Registration was originally refused under Section
2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1), on the
basis that FREEDEMOGRAPHICS.COM is merely descriptive of

¹ Application Serial No. 77282935, filed September 18, 2007.

Serial No. 77282935

applicant's services and it has not acquired distinctiveness. Applicant subsequently amended the application to seek registration on the Supplemental Register. In response, the examining attorney refused registration on the Supplemental Register under Section 23 of the Trademark Act, 15 U.S.C. §1091, on the ground that FREEDEMOGRAPHICS.COM is incapable of identifying applicant's services.

In view of applicant's amendment, the sole issue in the appeal is whether FREEDEMOGRAPHICS.COM is generic for applicant's services and, thus, unregistrable on the Supplemental Register.

When a proposed mark is refused registration as generic, the examining attorney has the burden of proving genericness by "clear evidence." In re Merrill Lynch, Pierce, Fenner & Smith, Inc., 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987); see also In re Gould Paper Corp., 834 F.2d 1017, 5 USPQ2d 1110, 1111 (Fed. Cir. 1987). The critical issue is to determine whether the record shows that members of the relevant public primarily use or understand the term sought to be registered to refer to the category or class of goods or services in question. H. Marvin Ginn Corp. v. International Ass'n of Fire Chiefs, Inc., 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986); In

re Women's Publishing Co. Inc., 23 USPQ2d 1876, 1877 (TTAB 1992). Making this determination "involves a two-step inquiry: First, what is the genus of goods or services at issue? Second, is the term sought to be registered ... understood by the relevant public primarily to refer to that genus of goods or services?" Ginn, 228 USPQ at 530. Evidence of the public's understanding of a term may be obtained from any competent source, including testimony, surveys, dictionaries, trade journals, newspapers and other publications. Merrill Lynch, 4 USPQ2d at 1143, and In re Northland Aluminum Products, Inc., 777 F.2d 1556, 227 USPQ 961, 963 (Fed. Cir. 1985).

We find that the genus of services at issue in this case is adequately defined by applicant's identification of services, specifically, "business and marketing services, namely, providing customizable demographic data, reports, and analysis." The printout from applicant's website submitted as a specimen of use provides further clarification that its services include the provision of free access to demographic data. Thus, the genus includes providing free demographic data.

Turning to the second inquiry, applicant contends that the relevant public using FREEDEMOGRAPHICS.COM includes "novice and expert users who seek comprehensive data access

and analysis that is customizable by the user." The examining attorney does not dispute this description and the record does not point to a different conclusion; therefore, we accept applicant's description of the relevant user.

The examining attorney argues that "the term 'demographics' is clearly generic for the services of providing demographic data and reports whether customizable or in other form [and t]he relevant definition of 'FREE' is 'not costing or charging anything'. Merriam-Webster Online Dictionary."² Br. p. 3. Further, he argues that the "top-level domain (TLD) '.com' merely indicates an Internet address for use by commercial, for-profit organizations and, in general, adds no source identifying significance." Br. p. 3. In support of his argument that the public understands FREE DEMOGRAPHICS to identify free demographic data via the Internet, he submitted printouts from several third-party websites using the terms "free" and "demographic" or "free demographic" to identify services that provide free demographic data over the Internet. In addition, he submitted several articles downloaded from the

² We take judicial notice of the dictionary definition of the term "free." In re CyberFinancial.Net Inc., 65 USPQ2d 1789, 1791 n.3 (TTAB 2002); In re Total Quality Group Inc., 51 UPQ2d 1474, 1476 (TTAB 1999).

Serial No. 77282935

LEXISNEXIS database showing use of the "free demographic" or "free demographics" in discussing online sources for such data. A representative sample of excerpts from the third-party websites and downloaded articles is set forth below.

Get 100% Unlimited, Total Access To All the FREE Demographic Data That You'll Ever Need!! ... Guaranteed FREE Demographics Data To Explode Your Business, will be yours soon! ...Just follow my guide like the yellow brick road to create and download your customized FREE demographics report! <http://freedemodata.com>;

Free Census 2000 Reports ... Demographics you can Trust at a price you can Afford! ... Simple to use software ... The Right Site is designed for critical analytic tasks such as ring studies, trend analysis, standard reports, mapping, and demographic analysis. www.easidemographicx.com;

Free Demographics Report ... To determine the best target cluster and size of your mailing, it's good to get current counts and/or demographics of each carrier route ... Simply provide your information below and depending on volume we can normally email your Zip Count or Demographics Report within 24 hours. www.breakthroughchurch.com;

WebZoom Tools You Need Now! Tools For: Internet Marketing ... QUANTCAST: FREE DEMOGRAPHICS www.webzoom.biz;

CDYNE Corporation Web Services ... Demographic Data (Free Limited Version) FREE block level demographic data from any U.S. Postal Address. Segment your consumer data by address to effectively target specific profiles. This website version of the CDYNE Demographics Web Service is provided for limited demo use. Ask your IT department if they can add demographic

data to your marketing application.
www.cdyne.com;

This search engine can go the distance ... For industry executives and advertisers, the tool is a windfall of free demographics research. For the rest of us, the statistics offer fresh perspectives on familiar subjects. "The Boston Globe" (January 1, 2009);

A to Z Guide to American Consumers Provides Quick Links to Free Demographics. "Lab Business Week" (October 5, 2008);

WEB WATCH ... To the stats-minded, the only thing better than demographics is, well, free demographics. Fortunately, that's what you'll find here. This site will let you access all sorts of census-related data, perform quick market... "Florida Times-Union" (August 23, 2004);

How new business owners can teach themselves marketing ... marketing, Internet marketing and more. Sign up for free guides and Web casts by marketing experts. AMA's free demographics service (registration required) provides unlimited access to U.S. Census data on such things as home values and population trends. "Daily Breeze" (Torrance, California) (August 22, 2003); and

The Right Site is a pay Web site but there is one portion of it that offers free demographic analysis for business or personal use. You can do as many "ring" studies as you like. "The Tampa Tribune" (June 2, 1997).

Thus, the examining concludes that whether viewed as a compound term or a phrase the "significant evidence of third-party use of 'free demographics' is sufficient and clear evidence" that the public understands applicant's

marks to primarily refer to "providing customizable demographic data, reports, and analysis." Br. p. 4.

In traversing the refusal, applicant "acknowledges that individuals may use its website without charge, i.e. for free" but clarifies that it "does not simply provide raw demographic data [but rather] provides a means for users to create their own customized reports using U.S. Census data." Br. p. 2.

Applicant argues that "[a]s defined in the American Heritage Dictionary of the English Language, the term 'demographics' refers to 'the statistical data of a population, esp. those showing average age, income, education, etc.' [and t]he mark FREEDEMOGRAPHICS.COM is used in conjunction with an array of services extending far beyond the provision of statistical data that is available without monetary payment. ... [t]hus, as it refers to a source of services far beyond the provision of free statistics, FREEDEMOGRAPHICS.COM cannot be deemed an unprotectable generic name for use with services whereby through interactive participation, consumers have the ability to view and act upon consumer and market insights, using interactive maps, detailed summary and comparison reports, and fast access to data sorted by geographic data and demographic data characteristics." Br. p. 4.

In support of its position, applicant submitted printouts from two third-party websites referencing applicant's services when using the term FREEDEMOGRAPHICS.COM. The first printout is an online article titled "Free.Demographics.com: A strong site leading to stronger, un-free demographics." The second printout is from "a website dedicated to offering business owners the information and strategic tools they need to create a distinct competitive advantage." Br. p. 7. The printout includes the following excerpt, "FreeDemographics provides exceptional reporting capabilities, including a summary report containing multiple user-defined variables for a single geography."

We find FREEDEMOGRAPHICS.COM to be a compound term and properly analyzed under the Gould analysis. In re Gould Paper Corp., 834 F.2d 1017, 5 USPQ2d 1110, 1111-1112 (Fed. Cir. 1987); In re Wm. B. Coleman Co., Inc., 93 USPQ2d 2019 (TTAB 2010); In re DNI Holdings Ltd., 77 USPQ2d 1435 (TTAB 2005); In re Eddie Z's Blinds and Drapery, Inc., 74 USPQ2d 1037 (TTAB 2005). The record establishes that the individual components of applicant's mark are generic for the offered services, specifically providing access to free demographics over the Internet, and their combination lends "no additional meaning to the term." In re Dial-A-Mattress

Serial No. 77282935

Operating Corp., 240 F.3d 1341, 57 USPQ2d 1807, 1810 (Fed. Cir. 2001).

While it could be argued that unlike MATTRESS.COM, the proposed mark here includes three components "free" "demographics" and ".com" and, therefore, "bears closer conceptual resemblance to a phrase than a compound word," the evidence of record includes examples of use of the composite FREE DEMOGRAPHICS as a whole. In re American Fertility Society, 188 F.3d 1341, 51 USPQ2d 1832, 1837 (Fed. Cir. 1999). Further, the TLD .com in this case does not present an "exceptional circumstance" and, as such, is wholly without source-identifying significance. Eddie Z's, 74 USPQ2d 1037 at 1042. In view thereof, we find that under both the Gould and the American Fertility standards FREEDEMOGRAPHICS.COM is generic for applicant's services which include the offering of free demographics over the Internet.

Applicant's argument that its services encompass a broader category of business and marketing services that provide consumers with customizable data, reports and analysis does not persuade us of a different result. As the examining attorney explained, as long as the term is generic of an aspect of the services, it must be refused registration. Eddie Z's, 74 USPQ2d 1037 at 1042. Here,

Serial No. 77282935

the evidence shows that the provision of free demographics is a class of service and the term is used to refer to such services provided by other websites.

Finally, the two printouts from applicant do not present a mixed record sufficient to rebut the examining attorney's prima facie showing that the term FREEDEMOGRAPHICS.COM is generic for applicant's services. Merrill Lynch, 4 USPQ2d at 1141.

Decision: The refusal to register on the Supplemental Register based on genericness under Section 23 in application is affirmed.