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Subject: U.S. TRADEMARK APPLICATION NO. 77732462 - CRAWLSPACE - N/A - EXAMINER BRIEF

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UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

APPLICATION SERIAL NO. 77732462

MARK: CRAWLSPACE

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GENERAL TRADEMARK INFORMATION:
http://www.uspto.gov/main/trademarks.htm

TTAB INFORMATION:
http://www.uspto.gov/web/offices/dcom/ttab/index.html

EXAMINING ATTORNEY'S APPEAL BRIEF

Applicant has appealed the trademark examining attorney's final refusal to register the mark CRAWLSPACE in standard character form for "building maintenance and repair of crawlspaces under houses, namely, encapsulating crawlspaces for waterproofing, installation of building insulation, and removal of surface water and groundwater to facilitate the repair of structures, structural drying, and dehumidification" in Class 37 and "mold and mildew remediation in crawlspaces under houses, odor neutralization services for crawlspaces under houses" in Class 42. Registration was refused under Trademark Act Section 2(e)(1), 15 U.S.C. §1052(e)(1), because the proposed mark merely describes a characteristic and feature of applicant's services.

FACTS

On May 8, 2009, applicant, Frederick K. Norris, filed Application Serial No. 77732462 to register the above mark, alleging a bona fide intention to use the mark in commerce. On August 11, 2009, the examining attorney refused registration of the mark on the ground that it is merely descriptive of applicant's services under Section 2(e)(1) of the Trademark Act.[1] On February 16, 2010, applicant submitted a response arguing against the descriptiveness refusal. The examining attorney issued a Final Refusal as to the descriptiveness issue on April 12, 2010. Applicant filed this appeal on October 18, 2010 and, after numerous requests for extensions of time, filed an appeal brief on April

[1] The examining attorney also required an amendment to the identification and classification of services. In response, applicant adopted the current acceptable identifications in Classes 37 and 40. The identification and classification requirements are not at issue in this appeal.

16, 2012, merely stating conclusively "[t]here is no reason to reject the registration of the above mark."

ARGUMENT

THE MARK IS MERELY DESCRIPTIVE BECAUSE IT IMMEDIATELY CONVEYS KNOWLEDGE OF A CHARACTERISTIC AND FEATURE OF APPLICANT'S SERVICES.

A mark is merely descriptive if it describes an ingredient, quality, characteristic, function, feature, purpose, or use of an applicant's goods and/or services. TMEP §1209.01(b); *see In re Steelbuilding.com*, 415 F.3d 1293, 1297, 75 USPQ2d 1420, 1421 (Fed. Cir. 2005); *In re Gyulay*, 820 F.2d 1216, 1217-18, 3 USPQ2d 1009, 1009-10 (Fed. Cir. 1987). In short, it is merely descriptive if it immediately conveys knowledge of a quality, feature, function, or characteristic of an applicant's goods and/or services. *E.g.*, *In re The Chamber of Commerce of the U.S.*, ___ F.3d ___, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012); *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 963-64, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007).

Determining the descriptiveness of a mark is done in relation to an applicant's goods and/or services, the context in which the mark is being used, and the possible significance the mark would have to the average purchaser because of the manner of its use or intended use. *See In re The Chamber of Commerce of the U.S.*, ___ F.3d ___, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (citing *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 963-64, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)); TMEP §1209.01(b). Descriptiveness of a mark is not considered in the abstract. *In re Bayer Aktiengesellschaft*, 488 F.3d at 963-64, 82 USPQ2d at 1831.

"Whether consumers could guess what the product [or service] is from consideration of the mark alone is not the test." *In re Am. Greetings Corp.*, 226 USPQ 365, 366 (TTAB 1985). The question is not whether someone presented only with the mark could guess what the goods and/or services are, but whether someone who knows what the goods and/or services are will understand the mark to convey information about them. *In re Tower Tech, Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002); *In re Patent & Trademark Servs. Inc.*, 49 USPQ2d 1537, 1539 (TTAB 1998).

"A mark may be merely descriptive even if it does not describe the 'full scope and extent' of the applicant's goods or services." *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 1173, 71 USPQ2d 1370, 1371 (Fed. Cir. 2004) (citing *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 1346, 57 USPQ2d 1807, 1812 (Fed. Cir. 2001)); TMEP §1209.01(b). It is enough if a mark describes only one significant function, attribute, or property. *In re The Chamber of Commerce of the U.S.*, ___ F.3d ___, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012); TMEP §1209.01(b); *see In re Oppedahl & Larson LLP*, 373 F.3d at 1173, 71 USPQ2d at 1371.

In this case, as based on the definition and evidence described below, the mark is merely descriptive because it immediately conveys knowledge of a characteristic and feature of applicant's services.

Applicant's mark is the term CRAWLSPACE, which is defined as "(in a building) an area accessible by crawling, having a clearance less than human height, for access to plumbing or wiring, storage, etc." *See* Random House Dictionary definition at www.Dictionary.com, attached to the First Office Action dated August 11, 2009, at pages 2-3.

Applicant's services are performed on the ***crawlspaces*** of buildings. Applicant's identification of services reads as follows (emphasis added):

Class 37: Building maintenance and repair of **crawlspaces** under houses, namely, encapsulating **crawlspaces** for waterproofing, installation of building insulation, and removal of surface water and groundwater to facilitate the repair of structures, structural drying, and dehumidification

Class 42: Mold and mildew remediation in **crawlspaces** under houses, odor neutralization services for **crawlspaces** under houses

Based on this identification, the mark CRAWLSPACE merely describes a characteristic and feature of applicant's services, which involve maintenance, repair, and remediation of the shallow areas under buildings, namely, crawlspaces.

Moreover, as shown by the following evidence, the Office treats the term CRAWLSPACE as descriptive of maintenance, repair, and related services that may involve such shallow basement areas. Third-party registrations featuring the same or similar services as applicant's services are probative evidence on the issue of descriptiveness where the relevant word or term is disclaimed, registered under Trademark Act Section 2(f) based on a showing of acquired distinctiveness, or registered on the Supplemental Register. *See Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 1564-65, 4 USPQ2d 1793, 1797 (Fed. Cir. 1987); *In re Box Solutions Corp.*, 79 USPQ2d 1953, 1955 (TTAB 2006); *In re Finisar Corp.*, 78 USPQ2d 1618, 1621 (TTAB 2006).

Each of the following third-party registrations is attached to the First Office Action, dated August 11, 2009:

- Pages 4-6: Registration No. 3115836: ABC A BETTER CRAWLSPACE, INC. (stylized) for "Construction services, namely, installation of concrete flooring, foundation repairs, waterproofing of basements and flooring" and

"Inspection of homes and inspection of homes for the existence of mold." **CRAWLSPACE, INC. is disclaimed** in this registration.

- Pages 7-8: Registration No. 2928985: CRAWLSPACE DOCTOR (standard character mark) for "Building construction and repair, specifically concerning the crawlspace area of houses." This registration contains a **disclaimer of CRAWLSPACE**.

- Pages 9-10: Registration No. 3251074: CRAWLSPACE CARE (standard character mark) for "Installation of systems to protect the microenvironment in building crawl spaces by the reduction of moisture and relative humidity levels." This registration also contains a **disclaimer of CRAWLSPACE**.

The disclaimers in each of these registrations show that CRAWLSPACE is considered descriptive of services performed on the ***crawlspaces*** of buildings.

In addition, the term CRAWLSPACE is widely-used and accepted to denote the area of buildings on which maintenance, repair, and remediation services are performed, as demonstrated by the following evidence attached to the Final Office Action, dated April 12, 2010:[2]

- Pages 2-3: Indoor Environment Notebook [website excerpt from http://web.bsu.edu, dated November 14, 2003]: Question stating "My house **crawlspace** is wet and black mold is obvious…," and answer explaining "**Crawlspace** remediation can be done by a homeowner with possibly some help from a contractor…A wet **crawlspace** is mostly commonly due to poor site drainage…a wet **crawlspace** is a much greater risk for mold infestation and thus should be the major focus of **crawlspace** remediation…"

- Pages 4-6: Allergy Consumer Review [website excerpt from www.allergyconsumerreview.com, dated 2010, entitled ***Crawlspace*** *Mold Removal*]: Question stating "We have a **crawlspace** problem…once we treat the mold, how dry does it need to be once the mold in the **crawlspace** has been removed/treated?" and answer explaining "If one does have a moisture problem in a **crawlspace**, it will typically require some combination of improved drainage and ventilation to resolve. Remediation will also require the treatment of the **crawlspace** timbers

[2] Because many of the articles and web pages utilized as evidence are quite lengthy, only the most relevant sections have been included in this brief. The web pages are attached in their entirety to the April 12, 2010 Final Office Action.

with a polyborate-containing paint to both inhibit mold growth and to 'lock' mold spores in…If your house is near a coastal area, the **crawlspace** problem may be even more complicated. In coastal areas, high **crawlspace** humidity may actually occur as a consequence of outdoor air moving into your **crawlspace** and then condensing…In such cases closing **crawlspace** vents is recommended."

- Pages 7-11: The Dollar Stretcher [website excerpt from www.stretcher.com, dated 2010, entitled *Help! There's Water in our **Crawlspace***]: Question explaining "Our house has a **crawl space** that tends to collect water" and numerous suggestions from readers including installing sump pumps, improving ventilation, adding drains, and fixing gutters. These suggestions note "We were also taken in by so-called basement and **crawlspace** waterproof experts," "Standing water in a **crawlspace** will eventually rot your floor joists…I paid $4000 for a reputable contractor to install a perimeter drain inside my **crawlspace**," and "Take a look around your **crawlspace**, there should be several blocks with holes leading outside…These are for drainage."

- Pages 12-13: U.S. Inspect [website excerpt from www.usinspect.com, dated 2010, entitled ***Crawlspace** Inspections*]: Contractor website explaining "A **crawlspace** is a shallow and uninhabitable area, usually between the soil and the first floor of the home. **Crawlspace**s usually provide access to the electrical, plumbing and heating, ventilation and air conditioning (HVAC) systems…Water control and management in the **crawlspace** is essential for maintaining a house. The most common problem with wet **crawlspace**s is that moist conditions can lead to wood destroying fungus…water penetration into a **crawlspace** can lead to the undermining of the foundation."

- Pages 14-15: **Crawlspace** Doctor [website excerpt from www.crawlspacedoctor.com, dated 2010, entitled *Conditioned **Crawlspaces***]: Contractor website stating "A conditioned **crawlspace** is a healthy and energy efficient **crawlspace**…Conditioning the **crawlspace** is the practice of removing all compenents that cause moisture…properly sealing and conditioning a **crawlspace** is one of the main components of an energy efficient home."

- Page 20: Americrawl, Inc. [website excerpt from www.americrawlsouth.com, dated 2010]: Contractor website listing its services as "Waterproofing **Crawl Spaces** & Basements in Indiana, Kentucky, Illinois, & Ohio!!" and "Basement Waterproofing, **Crawl Space** Repair, and Foundation Repair."

- Pages 21-24: AmeriBrite **Crawl Space** Encapsulation System [website excerpt also from www.americrawlsouth.com, dated 2010, entitled *Dirt*

> *Crawl Space America's Housing Epidemic*]: Contractor website stating "The only factor we can control is the **crawl space** moisture levels. Any wet or damp **crawl space** can lead to the propagation of mold spores in your home…odors also occur when a wet **crawlspace** has standing stagnant water…Our AmeriBrite Encapsulation system prevents all sources of **crawlspace** odors…After [water] seeps in, it just lays there in puddles or floods the **crawlspace**…Properly sealing the **crawlspace** with AmeriBrite Encapsulation System and removing the moisture from the ground and air is part of the solution…**crawlspace** repairs aren't easy."

These website excerpts show the term CRAWLSPACE being used in a descriptive sense to refer to the shallow spaces underneath buildings where services such as applicant's maintenance, repair, encapsulation, insulation, water removal, mold remediation, and odor neutralization are performed.

To the extent that certain of the website excerpts spell CRAWLSPACE as two words, CRAWL SPACE, a novel spelling or an intentional misspelling that is the phonetic equivalent of a merely descriptive word or term is also merely descriptive if purchasers would perceive the different spelling as the equivalent of the descriptive word or term. *See In re Hercules Fasteners, Inc.*, 203 F.2d 753, 97 USPQ 355 (C.C.P.A. 1953) (holding "FASTIE," phonetic spelling of "fast tie," merely descriptive of tube sealing machines); *Andrew J. McPartland, Inc. v. Montgomery Ward & Co.*, 164 F.2d 603, 76 USPQ 97 (C.C.P.A. 1947) (holding "KWIXTART," phonetic spelling of "quick start," merely descriptive of electric storage batteries); *In re Carlson*, 91 USPQ2d 1198 (TTAB 2009) (holding "URBANHOUZING" phonetic spelling of "urban" and "housing," merely descriptive of real estate services); *In re State Chem. Mfg. Co.*, 225 USPQ 687 (TTAB 1985) (holding "FOM," phonetic spelling of "foam," merely descriptive of foam rug shampoo); TMEP §1209.03(j). This alternate spelling therefore does not eliminate the probative value of the websites.

In sum, applicant's identification of services states its activities are performed on CRAWLSPACEs, the third-party registrations show CRAWLSPACE is disclaimed as descriptive for similar maintenance and repair services, and the third-party websites demonstrate the wording CRAWLSPACE is used in a descriptive manner to denote where such services take place. Taken together, the evidence proves the mark CRAWLSPACE is merely descriptive of a significant characteristic and feature of applicant's maintenance, remediation, and repair services, which are performed on shallow basement areas.

CONCLUSION

Applicant's brief states merely "[t]here is no reason to reject the registration of the above mark." As shown by the evidence of record, however, the proposed mark CRAWLSPACE immediately and directly conveys knowledge of a characteristic and feature of applicant's services "building maintenance and repair of crawlspaces under houses, namely, encapsulating crawlspaces for waterproofing, installation of building insulation, and removal of surface water and groundwater to facilitate the repair of structures, structural drying, and dehumidification" in Class 37 and "mold and mildew remediation in crawlspaces under houses, odor neutralization services for crawlspaces under houses" in Class 42, namely, that applicant's services are performed on the shallow areas under buildings known as crawlspaces. Consumers of repair and remediation services would understand that the term CRAWLSPACE directly conveys information about where those activities are performed. For the foregoing reasons, the trademark examining attorney respectfully requests the refusal to register applicant's proposed mark pursuant to Section 2(e)(1) of the Trademark Act be affirmed.

Respectfully submitted,

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