

**THIS OPINION IS NOT A  
PRECEDENT OF THE T.T.A.B.**

Mailed: October 28, 2011

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re Grindmaster Corporation

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Serial No. 77834762

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John W. Scruton of Stites & Harbison for Applicant.

Simon Teng, Trademark Examining Attorney, Law Office 105  
(Thomas G. Howell, Managing Attorney).

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Before Quinn, Holtzman, and Wolfson, Administrative  
Trademark Judges.

Opinion by Wolfson, Administrative Trademark Judge:

On September 25, 2009, Grindmaster Corporation  
("applicant") filed an application to register the standard  
character mark GRIND N BREW for "electric coffee makers for  
commercial use" in International Class 11.<sup>1</sup>

The examining attorney refused registration of  
applicant's mark under the provisions of Section 2(e)(1) of  
the Trademark Act, 15 U.S.C. § 1052(e)(1), having  
determined that "(1) the proposed mark is a generic name

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<sup>1</sup> Applicant claims July 31, 1995, as the date of first use of the  
mark and first use of the mark in commerce.

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for the goods; [or, if the mark is not generic,] (2) the proposed mark is merely descriptive of the goods; and (3) the evidence of record is insufficient to establish acquired distinctiveness under Trademark Act Section 2(f), 15 U.S.C. § 1052(f)." *Examining Attorney's Appeal Brief*, unnumbered p. 1. The appeal has been fully briefed.

## **II. Applicable Law**

### **A. Standard for Genericness Refusal**

In order for a mark to be considered generic, the record must show 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. *See 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

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publications. *In re Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987); *In re Northland Aluminum Products, Inc.*, 777 F.2d 1556, 227 USPQ 961, 963 (Fed. Cir. 1985). The examining attorney has the burden of proving genericness by "clear evidence." *Merrill Lynch*, 4 USPQ2d at 1143; see also *In re Gould Paper Corp.*, 834 F.2d 1017, 5 USPQ2d 1110, 1111 (Fed. Cir. 1987); and *In re Wm. B. Coleman Co.*, 93 USPQ2d 2019 (TTAB 2010).

**B. Standard for Descriptiveness Refusal**

"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." *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007). See also, *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370, 1371 (Fed. Cir. 2004); *In re Engineering Systems Corp.*, 2 USPQ2d 1075 (TTAB 1986); and *In re Bright-Crest, Ltd.*, 204 USPQ 591 (TTAB 1979). It is well-established that the determination of mere descriptiveness must be made not in the abstract, but in relation to the goods or services for which registration is sought, the context in which the mark is used, and the impact that it is likely to make on the average prospective purchaser of such goods or services. The examining attorney has the burden to establish that a

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mark is merely descriptive. *Bayer*, 82 USPQ2d at 1831. See also, *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978).

### **C. Establishing Acquired Distinctiveness**

When an applicant claims the benefits of Section 2(f), it is applicant's burden to establish a prima facie case of acquired distinctiveness. See *Yamaha International Corp. v. Hoshino Gakki Co., Ltd.*, 840 F.2d 1572, 6 USPQ2d 1001 (Fed. Cir. 1988). As the Board has explained, in determining whether a mark has acquired distinctiveness:

... the Board may examine [intentional] copying, advertising expenditures, sales success, length and exclusivity of use, unsolicited media coverage, and consumer studies (linking the name to a source). On this list, no single factor is determinative. The amount and character of evidence required to establish acquired distinctiveness depends on the facts of each case and particularly on the nature of the mark sought to be registered. (*internal citations omitted*).

*In re Tires, Tires, Tires, Inc.*, 94 USPQ2d 1153, 1157 (TTAB 2009). (Board found applied-for phrase generic, but also found that if not generic, the phrase had not acquired distinctiveness).

"Typically, more evidence is required where a mark is so highly descriptive that purchasers seeing the matter in relation to the named goods or services would be unlikely to believe that it indicates source in any one entity."

*Id.* See also, *In re Bongrain Int'l Corp.*, 894 F.2d 1316, 13 USPQ2d 1727, 1727 n. 4 (Fed. Cir. 1990), citing *Yamaha Int'l*, 6 USPQ2d at 1008 ("the greater the degree of descriptiveness the term has, the heavier the burden to prove it has attained secondary meaning").

**I. The Record**

**A. The Examining Attorney's Record**

In support of his position, the examining attorney submitted the following:

1. Dictionary definitions of the words "grind" and "brew," purportedly showing that the words are descriptive, if not generic, when used in connection with electric coffee makers;

2. Printouts of advertisements from a Google.com/products search for "grind and brew coffee makers," purporting to show that manufacturers of coffee makers that automatically grind and brew coffee beans use the phrase "grind and brew" to designate a type of coffee maker;

2. Printouts from websites containing customer reviews of coffee makers, purportedly showing that "grind and brew" is used by consumers to describe a type of coffee maker; and

3. Printouts from the Lexis/Nexis database of newspaper articles that refer to electric coffee makers, purportedly showing that "grind and brew" is generic for a type of coffee maker.

**B. Applicant's Record**

Applicant's evidence consists of the following:

1. The June 23, 2010 declaration of John W. Scruton, attorney of record for applicant, and attached Exhibits 1-12, purporting to show that the mark is not generic and, if descriptive, the mark has acquired distinctiveness;

2. The January 10, 2011 declaration of John W. Scruton, and attached Exhibits 1-16, purporting to show that "grind and brew" is not a type of coffee maker; and

3. The declaration of Suzannah Stephens, applicant's Marketing Manager, purporting to show that applicant's mark has acquired distinctiveness.

**III. Analysis**

**A. The Mark is Generic for Coffee Makers**

In determining whether applicant's mark is generic, we first must decide the genus of goods at issue. Next we must determine whether members of the relevant public view the term "grind and brew" as a common name for such genus of goods. If the evidence shows that the proposed mark

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"GRIND N BREW"<sup>2</sup> is perceived by the public as a common descriptive or generic designation for a type of coffee maker, the term is unregistrable under any circumstances. Compare *In re Bel Paese Sales Co.*, 1 USPQ2d 1233, 1235 (TTAB 1986) (magazine and newspaper excerpts do not sufficiently and clearly show that DOLCELATTE is the generic name of a type of cheese) with *In re Cooperativa Produttori Latte E Fontina Valle D'Aosta*, 230 USPQ 131, 133 (TTAB 1986) (newspaper articles and dictionary definitions show that FONTINA is the generic name for a type of cheese).

The genus of goods at issue in this case is adequately defined by applicant's identification of goods, "electric coffee makers for commercial use." The examining attorney argues that a "'Grind and brew' is a type of electric

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<sup>2</sup> We take judicial notice of the fact that the "n" in "GRIND N BREW" may be read as the word "and," as noted in the online dictionary excerpt attached to the examining attorney's appeal brief from <http://dictionary.cambridge.org>. See *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983). "During an appeal, the Board may take judicial notice of dictionary definitions retrieved from online sources when the definitions themselves are derived from dictionaries that exist in printed form." *In re Petroglyph Games, Inc.*, 91 USPQ2d 1332, 1334 n.1 (TTAB 2009); *cf. In re Red Bull GmbH*, 78 USPQ2d 1375, 1378 (TTAB 2006) ("The Board has a long history of taking judicial notice of definitions excerpted from print dictionaries and submitted after appeal"); *see also* TBMP § 1208.04 (3d ed. 2011) (The Board will take judicial notice of "definitions or entries from references that are the electronic equivalent of a print reference work").

coffee maker that can grind coffee beans and make coffee.”<sup>3</sup>

Applicant contends that the evidence proffered by the examining attorney “falls short of the ‘clear evidence’ burden,” thus failing to establish that the mark is generic.<sup>4</sup>

We start by considering the definitions of the words “grind” and “brew.”

GRIND: 1. *transitive and intransitive verb*  
**pulverize:** to crush something into very small pieces by rubbing it between two hard surfaces, or be crushed in this way ... 4. *transitive verb*  
**chop something into tiny pieces:** to chop food, especially meat, into tiny pieces, using a mechanical device.

BREW: 2. **make tea or coffee:** to prepare tea or coffee for drinking by infusing it to develop its flavor, or infuse to develop flavor.”<sup>5</sup>

When used in connection with applicant’s coffee maker, the words “grind” and “brew” retain their dictionary meanings to adequately describe a device that grinds coffee beans and brews the beans by infusion to make coffee.

Applicant advertises its “Grind’n Brew™ Series” coffee makers (the “Dual Bean Grinderbrewers” and the “Single Bean Grinderbrewers”) as featuring a “space-saving design [that] eliminates the need for both grinder and brewer.” It is

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<sup>3</sup> *Examining Attorney’s Appeal Brief*, unnumbered p. 3.

<sup>4</sup> *Applicant’s Appeal Brief*, p. 6.

<sup>5</sup> Office Action dated December 23, 2009. From the online Encarta World English Dictionary 2009, printed at <http://encarta.msn.com/encnet/features/dictionary> on 12/23/09.



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possible to program the "brew temperature, brew volume [and] grind portions" from the front display of the device.<sup>6</sup> It is also possible to set the device to "grind only," "brew only" or "Grind'n Brew™."<sup>7</sup> By using the term "grind'n brew" in the manner of a verb, equating it to the verbs "grind" and "brew" standing alone, the above indicates generic use rather than trademark use. Further, making minor changes to a term (such as substituting "'n" for "and" does not automatically remove it from the category of generic terms. A minor misspelling of a generic term does not transform it into a trademark. See *Nupla Corp. v. IXL Manufacturing Co.*, 114 F.3d 191, 196, 42 USPQ2d 1711, 1716 (Fed. Cir. 1997) (CUSH-N-GRIP, "which is merely a misspelling of CUSHION-GRIP, is also generic as a matter of law"); Cf. *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 965-6, 82 USPQ2d 1828, 1831-32 (Fed. Cir. May 24, 2007) (mere addition of letter "a" at the end of the generic term 'aspirin' insufficient to transform ASPIRINA into an inherently distinctive mark for analgesics). Finally, the use of the "tm" symbol does not by itself convert a term that does not function as a trademark into one that does. See *In re Crystal Geyser Water Co.*, 85 USPQ2d 1374, 1379

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<sup>6</sup> June 23, 2010 Scruton Dec., para. 10, Ex. 9.

<sup>7</sup> Id.

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n.4 (TTAB 2007) ("We further note that use of the TM designation does not in itself elevate descriptive matter to a trademark").

To support his assertion that the mark is generic, the examining attorney has submitted printouts from third-party websites showing that various manufacturers sell electric coffee makers and use "grind and brew" as part of the name of their coffee makers. Representative entries are listed below.

1. **Cuisinart** advertises --

At [www.google.com/products](http://www.google.com/products): the Cuisinart Grind & Brew Coffeemaker (DGB-600BC) and the Cuisinart 12-Cup Grind & Brew Automatic Coffee Maker (DGB-625BC).

At <http://amazon.com>: the Grind-and-Brew Thermal 12-Cup Automatic Coffeemaker (DGB-900BC)

At [www.nextag.com](http://www.nextag.com): the Cuisinart Programmable Burr Grind & Brew with Automatic Burr Grinder (DGB-900BC), the Cuisinart Grind & Brew Thermal - 12 Cup, and the Cuisinart Grind & Brew Thermal 10-cup Coffeemaker (DGB-600BC).<sup>8</sup>

2. **Conair** advertises --

At [www.google.com/products](http://www.google.com/products): the Conair DGB-900BC 12-cup Grind & Brew Thermal Automatic Coffee Maker, the Conair DGB-700BC 12-cup Grind & Brew Automatic Coffee Maker, and the Conair DGB-650BC 10-cup Grind & Brew Thermal Automatic Coffee Maker.

3. **Krups** advertises --

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<sup>8</sup> Applicant argues that Cuisinart uses "grind and brew" as a trademark, following the words with a ™ symbol on its product. Applicant submitted photographs of the actual unit in support of this assertion. We make no determination herein as to Cuisinart's purported assertion of trademark rights. As explained *supra*, use of the ™ symbol does not convert a term into a trademark.

At [www.google.com](http://www.google.com): the Krups KM7000 Grind and Brew 10-cup Coffeemaker.

At [www.jlhufford.com](http://www.jlhufford.com): the KM 7000 Pro Grinder and Coffee Brewer featuring an "Auto-On Grind and Brew" function that can be used to "grind coffee beans and brew at the set time;"

4. **Capresso** advertises --

At [www.coffeemakers.com](http://www.coffeemakers.com): the Jura Capresso Coffee TEAM GS 10 Cup Grind & Brew.

At [www.grindandbrewcoffeemakerssale.com](http://www.grindandbrewcoffeemakerssale.com): the Capresso 464.05 GS 10 cup Programmable "grind and brew coffee maker" and the Jura Capresso ENA4 Automatic Grind and Brew Coffee Maker, the latter with the following description: "this bean to cup grind and brew coffee maker makes gourmet coffees just like at you (sic) favorite Café Bar."

5. **Saeco** advertises --

At [www.grindandbrewcoffeemakerssale.com](http://www.grindandbrewcoffeemakerssale.com): the Saeco Grind and Brew 10 cup automatic Drip Coffee Machine and the Saeco Vienna Plus Super Automatic Espresso Machine, the latter of which is advertised as having a "patented removable brew group" that "allows the grind and brew machine to tamp, brew and dispense the coffee in one cycle." Also at the website, the espresso machine is described as a "grind and brew coffee maker."

6. **Gaggia** advertises --

At [www.grindandbrewcoffeemakerssale.com](http://www.grindandbrewcoffeemakerssale.com): the Gaggia Platinum Vision 90951 "grind and brew cappuccino machine."

7. **Bosch** advertises --

At [www.grindandbrewcoffeemakerssale.com](http://www.grindandbrewcoffeemakerssale.com): the Bosch Benvenuto B30 Programmable Grind and Brew Coffee Maker that "performs just like the espresso machines at your favorite coffee bar."

8. **DeLonghi** advertises --

At [www.grindandbrewcoffeemakerssale.com](http://www.grindandbrewcoffeemakerssale.com): the DeLonghi 3500 Magnifica Grind and Brew Coffee Maker, described as "a real espresso machine for the home."

The fact that a large number of companies use the phrase "grind and brew" as part of the name for their product supports the examining attorney's position that the phrase is not source-identifying.

Newspaper stories also illustrate generic use of the phrase "grind and brew" in connection with electric coffee makers. Representative samples follow.

Knowles, Francine, *Early copy machine, dollar-bill reader among engineer's projects*, Chicago Sun-Times, Inc., July 2, 2010.

While at the engineering company, Mr. Wislow was involved in many innovative prototype designs, including ... one of the first fresh-grind and brew coffee vending machines.

By the Editors of Consumer Reports, *CR tests show that pricey coffee makers don't necessarily brew the best java*, Fort Worth Star-Telegram, December 31, 2009.

For grind-and-brew models, which are typically a hassle to clean, the Mr. Coffee GBX23 (\$50) has a blade grinder and is a CR Best Buy.

Fair, S.S., *Singing the Brews*, the New York Times, April 19, 2009.

The Samurai doesn't need coffee makers to announce the time. Nor does she cotton to combination grind-and-brew makers or anything dependent on pod packets of preground coffee.

Foster, Robin, *Resale stores offer deals*, The Houston Chronicle, December 18, 2008.

Many items donated to the store are brand new, Hawthorne said. She mentioned ... grind-and-brew coffee makers and children's shoes.

Ritchie, Erika I., *Landmark home to be rebuilt; San Juan business owners Diane and Jim Carter look to the future while helping out fellow equestrians*, The Orange County Register, November 1, 2007.

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On Oct. 22, the Carter's evacuated their home. They took the house's blueprints, photographs and a Grind & Brew coffee maker - on Diane's insistence.

Finz, Stacy, *Stuff you need*, Orlando Sentinel (Florida), December 10, 2006.

When my friends and co-workers ridiculed me for buying a cocoa-Latte machine (I already have a grind-and-brew coffeemaker and an espresso machine), I got defensive.

Scattergood, Amy, *Capresso wins all-in-one crown*, Orlando Sentinel (Florida), November 19, 2006.

All-in-one grind-and-brew coffee makers ... are a coffee-lover's dream.

Ortiz, Vikki, *Holiday gift Guide: Last in a series*, Milwaukee Journal Sentinel (Wisconsin), December 20, 2004.

There won't be any more arguing over who makes the coffee for the couple that gets this present: a stylish automatic grind and brew coffeemaker.

Elder, Jeff, *A Few Fundamentals for brewing a better cup of joe*, The Charlotte Observer, August 4, 2003.

So Pearl bought an all-in-one, grind-and-brew coffeemaker for \$100. "The coffee had exactly the same taste," he says.

Erskine, Chris, *the guy chronicles; everything is connected to the cosmic generator*, The Los Angeles Times, January 24, 2001.

Here's why there isn't enough electricity:

...

3. Your automatic bread maker kicks on at 4 a.m.; your gigantic grind-and-brew coffee maker kicks on at 6.

Goldsmith, Diane, *Wrapping it up if you haven't finished your holiday shopping, you can still find impressive and affordable gifts for the home*, The Philadelphia Inquirer, December 15, 2000.

Other hits include pizzelle irons and grind-and-brew coffeemakers that can be programmed.

Marter, Marilyn, *Santa, dear...here's a wish list of food gifts that covers everybody from fine diners and weekend*

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*cooks down to the preschool set*, The Philadelphia Inquirer, December 13, 2000.

Addressing that question of popularity, Rick Kratchman, vice president of the 11-store Kitchen Kapers chain, ticked off his top-seller list in a snap... There were grind-and-brew coffeemakers, stick blenders ("a huge resurgence"), infused oils and vinegars.

These reviews show that the media refers to "grind and brew" as a generic term for a type of coffee maker. The articles do not discriminate with regard to only one manufacturer, but use the phrase to describe the type of machine without regard to which manufacturer it refers. As the following illustrates, customer reviews from third-party websites further show that the public considers the term to be generic for a type of electric coffee maker.

A consumer report from [www.consumersearch.com](http://www.consumersearch.com) subtitled "Grind-and-Brew models get middling marks" discusses "this type of coffee maker" and specifically reviews the Cuisinart Grind & Brew DGB-550BK and the Cuisinart Burr Grind & Brew Thermal DGB-900BC models.

An online article from <http://www.coffeedetective.com> explains:

What are grind and brew coffee makers? They are coffee brewers which also include a grinder.

...

The benefits of grind and brew...

...

Which grind and brew coffee maker to choose...

...

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If you would rather have a grind and brew brewer with a conical grinder, there are one or two of those available too. To help you choose, we have put together a small Amazon.com store, devoted just to grind and brew coffee makers.

At [www.thedeets.com](http://www.thedeets.com), in an article dated February 7, 2008, and titled "Grind & Brew Coffee Maker Reviews," author Ed Kohler wrote:

Every (sic) since discovering grind and brew coffee makers, I've been hooked on them.

...

I figured there must have been a few changes to the grind & brew coffee scene over the past 5 years. Sure enough, the models have changes (sic) a bit.

...

Then I discovered this: The Krups KM7000 Grind & Brew.

Several comments were posted in response to this article.

**The Freeto wrote:**

I should've told you to ... run out of your house, grind-n-brew in tow.

**Moe wrote:**

So many of the grind and brew systems are top heavy and ugly.

**Andrea wrote:**

[L]ooks like we will be looking for a new grind and brew.

Additional comments were posted on other webpages. For example, on [www.amazon.com](http://www.amazon.com), direct online customer reviews illustrate consumers' use of "grind and brew" to identify a type of coffee maker.

**Nellivs wrote:**

We bought this after returning the similar grind and brew model with the 10 cup insulated carafe...Yes, there are a lot of parts to clean, but I think it goes with the territory of grind and brew units.

**Lisa wrote:**

This is my second grind and brew coffee maker.

**Animeswords wrote:**

I have been looking for a good grind and brew coffee maker for almost a year... Over all (sic) I am VERY satisfied with this Grind and Brew and I would recommend it...

**Jack R. Cox wrote:**

I started using grind and brew units years ago.

**Cheryl Lore wrote:**

Finally...A Grind and Brew that WORKS well! ... I was surprised how quite (sic) this machine is compared to the other grind and brews. ... If you have owned one of the multiple piece grind and brew machines you will love the ease of clean up on this one!!!

**Dr. Randolph Becker wrote:**

When our old Cuisinart Grind and Brew bit the dust ... I researched the options.

**Rabinnh wrote:**

I have had a number of grind and brew coffeemakers...

**DEJ wrote:**

This is my first grind and brew machine, so I cannot compare against other grind-and-brew machines.

**Edward J. Hyder wrote:**

After a good deal of research, I settled on the Krups grind and brew and I am glad I did.

**Colin P. Westcott wrote:**



This is my second Grind and Brew, the first lasted about 18 months...

**D. Hamilton wrote:**

After going crazy trying to find the right grind and brew coffee maker, I first tried the Cuisinart grind and brew.

**I AD wrote:**

...after owning the Capresso Grind and Brew was looking for a similar set-up...

**Bekka wrote:**

My husband bought this coffee maker for me after I research [sic] every grind & brew currently available.

**Sandra R. Peterson wrote:**

I looked at the cuisinart (sic) grind & brew as well as the krups (sic) version;...

**Darrel wrote:**

This is a great grind and brew coffee maker. My old grind n brew is now in the trash.

**Steven Dennis wrote:**

Best Grind & Brew, Although It is a Bit Loud. ... This is not my first grind and brew.

**Theboss wrote:**

As good as it gets (in grind&brew) ... I'm writing from the perspective of someone who has owned more grind&brew coffeemakers than the typical coffee addict. This one is as good a grind&brew machine as anyone makes.

**M. Hartung wrote:**

I owned 2 Cuisinart grind and brews.

**Rich N wrote:**

After 2 generations of Cuisinart (sic) Grind and Brew frustrations I took a shot on this Capresso unit.

Finally, on <http://chowhound.chow.com>, in a post dated 12/23/2009, the writer stated: "I'm looking for

a grind and brew for my BF around the \$200 or so range." These excerpts show that purchasers of electric coffee makers have been exposed to the phrase "grind and brew" used as a generic term to describe a type of coffee maker.

However, applicant argues that the evidence does not show that *commercial* electric coffee makers are referred to as "grind and brews" by members of the *relevant* purchasers of coffee makers, which, it argues, are "restaurants, hotels, and other entities that require the ability to reliably produce large quantities of coffee." *Stephens Dec.*, para. 3. According to applicant, the relevant public in the present case is not the average retail consumer, but rather a more sophisticated buyer, such as would be found in a restaurant or hotel. Applicant's coffee makers "are not sold through retail outlets and would be impractical for home use." *Stephens Dec.*, para 3.

In response, the examining attorney argues that "grind and brew" is generic in the commercial market, contending that:

Both products produce coffee for human consumption. Commercial establishments can use consumer coffee makers. Moreover, applicant has not provided any evidence or explanation as to why consumer coffee makers

are completely different from commercial coffee makers.<sup>9</sup>

A close examination of the evidence presented by the examining attorney shows widespread use, by competitors, of the term "grind and brew" as a generic term for coffee makers. In the news articles and customer reviews submitted by the examining attorney, one of the website product reviewers indicates that he is a coffee "addict" and another claims to be an aficionado and former barrister, but none claim to be purchasing a commercial-scale coffee maker. Nonetheless, the evidence shows a cross-over in the market. While the typical price of a home coffee maker is under \$200, some models rival the \$2,920 cost of applicant's coffee maker,<sup>10</sup> such as the Bosch TCA6301 Benvenuto B30 Digital Espresso and Coffee Center ("at just the touch of a button, the Benvenuto gourmet coffee maker grinds the beans and brews the coffee...") is advertised at "\$1,179 to \$1,450"<sup>11</sup> and the Miele CVA4062SS 24" Built-In Whole Coffee Bean System is advertised for "\$2,749 to \$2,849."<sup>12</sup> Moreover, the class of purchasers

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<sup>9</sup> *Examining Attorney's Appeal Brief*, unnumbered p. 6.

<sup>10</sup> Applicant submitted a copy from [www.1st-line.com](http://www.1st-line.com), advertising its 11H Grind'n Brew Single Bean Grinderbrewer for \$2,920. The 21-Series Dual Bean system was advertised at \$3,382. The webpage is attached to the June 23, 2010, Scruton Dec., para. 10, Ex. 11.

<sup>11</sup> At [www.nextag.com/grind-and-brew-coffee-maker](http://www.nextag.com/grind-and-brew-coffee-maker), printed 12/23/2009.

<sup>12</sup> *Id.*

that make up restaurant and hotel purchasing agents comprise members of the public who would be likely to purchase household electric appliances, such as grind-and-brew coffee makers for home use. In one news article, Rick Kratchman, vice president of the 11-store Kitchen Kapers chain, was interviewed. He "ticked off his top-seller list in a snap.... There were grind-and-brew coffeemakers..."<sup>13</sup> The usage of the term "grind n brew" as generic for a type of coffee maker is pervasive.

Because the term "grind and brew" identifies a type of electric coffee maker both at retail and with commercial buyers, and because the term names a central focus of the coffee maker and has the same meaning whether used for a household electric coffee maker or a commercial-use maker, we find that the examining attorney has met his substantial burden of establishing that GRIND N BREW is generic for, and hence incapable of identifying and distinguishing the source of, the identified goods.

The fact that the words have been combined into the phrase "grind n brew" does not change the result. The meaning of the mark as a whole is "no less generic than its

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<sup>13</sup> Marter, Marilyn, *Santa, dear...here's a wish list of food gifts that covers everybody from fine diners and weekend cooks down to the preschool set*, The Philadelphia Inquirer, December 13, 2000.

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constituents." *In re American Fertility Soc.*, 51 USPQ2d 1832, 1837, 188 F.3d 1341, 1348, (Fed. Cir. 1999); *see also In re Active Ankle Systems, Inc.*, 83 USPQ2d 1532, 1537 (TTAB 2007) (finding DORSAL NIGHT SPLINT generic for "orthopedic splints for the foot and ankle"); *In re Computer Store, Inc.*, 211 USPQ 72 (TTAB 1981) (finding THE COMPUTER STORE generic for computer outlet services).

The language "for commercial use" in applicant's identification of goods may limit the market for applicant's coffee maker and perhaps affect the size, capacity and/or the price of the coffee maker, but it does not change the fundamental nature of applicant's product as a coffee maker. Simply put, the distinction between "domestic" and "commercial," when essentially the same product is involved, is insignificant. The many examples of generic use by producers of coffee makers is strong evidence of the need by others in the trade to use the term generically and that it would be perceived as a generic term by consumers and commercial users alike.

**B. The Mark Is Merely Descriptive of a Coffee Maker**

Although we have concluded on the record before us that GRIND N BREW is generic for applicant's goods, should this conclusion be found in error in any appeal that may follow, we now consider the issue of mere descriptiveness,

and whether applicant's proffered evidence of acquired distinctiveness is sufficient to support registration under Section 2(f).

We again refer to the meanings of the words "grind" and "brew." Each word adequately describes a function of a coffee maker that acts on coffee beans by first crushing them into very small pieces (grinding) and then infusing them with water (brewing) to make coffee. Moreover, applicant has admitted that its mark is descriptive. "With respect to the genericness refusal, the Examining Attorney accurately notes that the Applicant's goods grind coffee beans and brew coffee. That renders the term descriptive, but it does not render it generic." *Applicant's Response to Office Action*, June 23, 2010, p. 1.

The evidence also supports a descriptiveness refusal. As noted above, applicant advertises that its "Grind'n Brew™ Series" coffee makers eliminate the need for both grinder and brewer.<sup>14</sup> They grind full and half batch portions of beans, and brew them to make coffee,<sup>15</sup> and as noted above, the devices may be set to "grind only," "brew only" or "Grind'n Brew™."

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<sup>14</sup> June 23, 2010 Scruton Dec., para. 10, Ex. 9.

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

The meaning of the phrase "grind and brew," as used throughout the third-party advertising, newspaper articles, and customer reviews is also plain: it refers to the primary functions of an "all-in-one" coffee maker that automatically grinds coffee beans and then brews the beans to make coffee.<sup>16</sup> The mark is merely descriptive pursuant to Section 2(e)(1) of the Trademark Act.

**C. Applicant's Evidence of Acquired Distinctiveness**

In its brief, applicant restates its position: "'Grind n Brew' describes the function of the goods, so it is properly considered descriptive. Because applicant has made a sufficient showing of acquired distinctiveness, registration is appropriate."<sup>17</sup>

Applicant has a heavy burden to prove acquired distinctiveness because applicant's mark is highly descriptive of a coffee maker that grinds coffee beans and then brews the beans to make coffee. To support its claim that the mark has acquired distinctiveness, applicant provided the declaration of its Marketing Manager, attesting to use of GRIND N BREW coffee makers since 1995,

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<sup>16</sup> See, e.g., the advertisement for Krups KM7000 Pro Grinder and Coffee Brewer at [www.jlhufford.com](http://www.jlhufford.com): "simple to use programming allows you to grind and brew 2 to 10 cups of coffee"; see also the product description at [www.coffeemakers.com](http://www.coffeemakers.com) of the Capresso 455 CoffeeTEAM Thermal Carafe coffee Maker with Grinder: "The high-contrast LCD display shows ... how many cups the machine is programmed to grind and brew."

<sup>17</sup> *Applicant's Appeal Brief*, p. 4.

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and sales of "over \$19,700,000" since 1995.<sup>18</sup> Applicant also submitted product literature advertising its GRIND N BREW coffee makers, a copy of its prior, now expired, registration for the mark GRIND'N BREW, and evidence that one of the primary makers of the household grind and brew coffee makers marks its use of the term with a "tm" symbol, purportedly to show that it considers "grind and brew" to be its trademark. Taken as a whole, the evidence is insufficient to show that the mark has acquired distinctiveness.

It has long been held that the fact that an applicant has used its mark for a long time does not necessarily establish that the mark has acquired distinctiveness. *In re Tires*, 94 USPQ2d at 1158. While applicant claims use since 1995, there is no indication of the nature of such use; i.e., whether sales increased over time, fluctuated sporadically, or remained constant. Likewise, applicant has not provided a context for its assertion that since 1995, close to \$20 million was earned from sales of the product. We have no means of discerning the scope of these sales, either geographically or in terms of yearly production. Moreover, the prevalence of use of the term among applicant's competitors indicates that applicant's

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<sup>18</sup> Stephens Dec., para. 5.



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use has not been substantially exclusive as required by the statute. See Trademark Act Section 2(f), 15 U.S.C. §1052(f), and Trademark Rule 2.41(b) (Proof of distinctiveness under section 2(f)). The evidence falls short of what is required to show that consumers have come to recognize the highly descriptive term "grind n brew" as a trademark.

Finally, we note applicant's ownership of now-cancelled Registration No. 2655857,<sup>19</sup> submitted for the purpose of showing the "suggestive nature" of the term "grind n brew." The fact that this registration issued under Section 2(f) is considered a concession that the term is not inherently distinctive. *In re Cabot Corp.*, 15 USPQ2d 1224, 1229 (TTAB 1990) ("[A]pplicant's initial filing of this application under the provisions of Section 2(f) is tantamount to an admission that this package lacks inherent distinctiveness"); see also TMEP 1212.02(b) (8<sup>th</sup> ed. 2011) (Section 2(f) Claim Is, for Procedural Purposes, a Concession that Matter Is Not Inherently Distinctive). Moreover, the registration was cancelled on July 11, 2009, and thus is entitled to little probative value. See *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) ("Even if some prior registrations had some characteristics similar to

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<sup>19</sup> Reg. No. 2655857 was registered for "electric coffee makers" on the Principal Register under Section 2(f); first use and first use in commerce claimed as of July, 1995.

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[applicant's] application, the PTO's allowance of such prior registrations does not bind the board or this court"). We have, however, considered it for whatever probative value it may have. *Nike, Inc. v. Peter Maher and Patricia Hoyt Maher*, 100 USPQ2d 1018, 1021 (TTAB 2011).

Given the highly descriptive nature of the designation GRIND N BREW, we would need substantially more evidence (especially in the form of direct evidence from customers) than what applicant has submitted in order to find that the designation has become distinctive of applicant's goods. *In re Lens.com Inc.*, 83 USPQ2d 1444 (TTAB 2007).

*Decision:* The refusals under Section 2(e)(1) of the Trademark Act on the grounds that the proposed mark is generic or merely descriptive, and the refusal based on the examining attorney's finding that the Section 2(f) showing is insufficient, are affirmed.