

This Opinion is not a
Precedent of the TTAB

Mailed: December 12, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Cyber Group Studios

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Serial No. 79303731

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Tama L. Drenski of Renner, Kenner, Grieve, Bobak, Taylor & Weber
for Cyber Group Studios.

Ryan Cianci, Trademark Examining Attorney, Law Office 116
Heather Schubert, Managing Attorney.

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Before Kuhlke, Goodman and Lynch,
Administrative Trademark Judges.

Opinion by Goodman, Administrative Trademark Judge:

Cyber Group Studios (“Applicant”) seeks registration on the Principal Register of
the proposed mark GIGANTOSAURUS (in standard characters) for

Information relating to telecommunications;
communications by computer terminals; provision of user
access to global computer networks; providing discussion
forums on the Internet in the field of cartoons; provision of
access to databases; electronic bulletin board services;
connection by telecommunications to a global computer
network; electronic messaging services; rental of access
time to global computer networks; cartoon dissemination
services, namely, streaming of video material on the

Internet; provision of access by means of telecommunication, namely, video-on-demand transmission services of films and television programs in International Class 38.¹

The Trademark Examining Attorney refused registration on the Principal Register on the grounds that (1) the mark is merely descriptive, pursuant to Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1); and (2) Applicant's reliance on prior Registration No. 5809076, or evidence that the mark has acquired distinctiveness, is insufficient to overcome the refusal pursuant to Section 2(f), 15 U.S.C. § 1052(f).²

After the Trademark Examining Attorney made the refusal final, Applicant appealed to this Board. 1 TTABVUE. On April 25, 2023, the Board dismissed the appeal for failure to file a brief. 4 TTABVUE. On April 27, 2023, Applicant filed its appeal brief, combined with a motion to vacate the dismissal. 5 TTABVUE. The Board granted Applicant's motion, vacated the dismissal, and allowed Applicant's appeal brief. 6 TTABVUE.

¹ Application Serial No. 79303731 was filed on November 18, 2020, based upon Applicant's request for extension of protection under Section 66(a) of the Trademark Act, 15 U.S.C. 1141f(a) based on International Registration No. 1574166, issued November 18, 2020.

Page references to the application record refer to the online database of the USPTO's Trademark Status & Document Retrieval (TSDR) system. References to the briefs on appeal refer to the Board's TTABVUE docket system.

Applicant's brief is at 5 TTABVUE; the Examining Attorney's brief is at 7 TTABVUE.

² The Examining Attorney had issued a refusal that certain identified services were unregistrable activities, pursuant to Sections 1, 2, 3, and 45 of the Trademark Act 15 U.S.C. 1051-1053, 1127, but withdrew that refusal in the appeal brief. 7 TTABUVE.

Both in its November 9, 2021 Response to Office action and in the brief, Applicant has stated that it is traversing the descriptiveness refusal to which the Examining Attorney responded. Therefore, we find that Applicant has raised the Section 2(f) claim in the alternative.

We reverse the refusal to register.

I. Mere Descriptiveness

Section 2(e)(1) of the Trademark Act prohibits the registration of a mark which, when used on or in connection with an applicant's services, is merely descriptive of them. "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 Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (quoting *In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)); *see also In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987). A mark need not immediately convey an idea of each and every specific feature of the goods or services in order to be considered merely descriptive; rather, it is sufficient that the mark describes one significant attribute, function or property of the goods or services. *In re Chamber of Commerce*, 102 USPQ2d at 1219; *In re H.U.D.D.L.E.*, 216 USPQ 358, 359 (TTAB 1982); *In re MBAssociates*, 180 USPQ 338, 339 (TTAB 1973).

A mark's descriptiveness must be "considered 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." *Coach Servs.*,

Inc. v. Triumph Learning LLC, 668 F.3d 1356, 101 USPQ2d 1713, 1728 (Fed. Cir. 2012) (citing *In re Bayer*, 82 USPQ2d at 1831). The determination of mere descriptiveness must not be made in the abstract or on the basis of guesswork. *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978). The question is whether someone who knows what the good or services are will understand the term to convey information about them. *DuoProSS Meditech Corp. v. Inviro Medical Devices Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012).

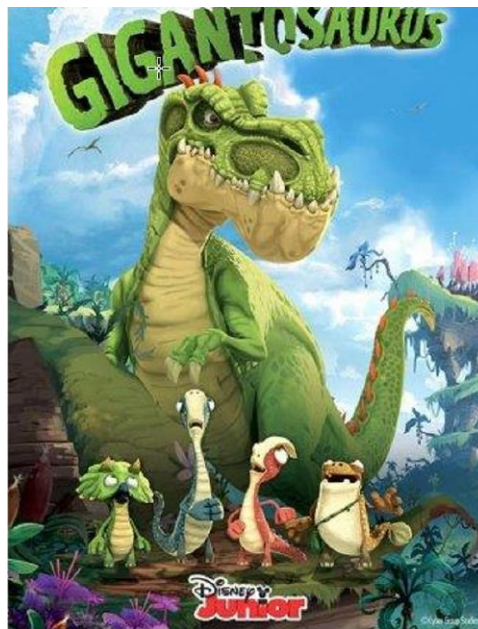
“[I]t is a well settled legal principle that where a mark may be merely descriptive of one or more items of goods [or services] in an application but may be suggestive or even arbitrary as applied to other items [of goods or services], registration is properly refused if the subject matter for registration is descriptive of any of the goods [or services] for which registration is sought.” *In re Chamber of Commerce of the U.S.*, 102 USPQ2d at 1219. (quoting *In re Stereotaxis Inc.*, 429 F.3d 1039, 77 USPQ2d 1087, 1089 (Fed. Cir. 2005)); *In re Analog Devices Inc.*, 6 USPQ2d 1808 (TTAB 1988) *aff’d without pub. op.*, 871 F.2d 1097, 10 USPQ2d 1879 (Fed. Cir. 1989).

The Examining Attorney provided evidence that Gigantosaurus was an enormous carnivorous dinosaur of the late Cretaceous period. May 11, 2021 Office action at TSDR 2-3, Lexico, lexico.com and Wikipedia, wikipedia.com.

The Examining Attorney also submitted webpages from Applicant’s website for Cyber Group Studios, cybergroupstudios.com, and a Wikipedia page entry, wikipedia.com, for the Gigantosaurus animated television series. May 11, 2021 Office action at TSDR 5, 12. Applicant’s webpage indicates that the Gigantosaurus

television show is an animated preschool television series about four young dinosaurs who live during the Cretaceous period when “Gigantosaurus, the biggest fiercest dinosaur reigns over it all.” May 11, 2021 Office action at TSDR 5, cybergroupstudios.com.

The Wikipedia page indicates that the television show is based on a bestselling book where four dinosaur friends “seek out and learn about the titular dinosaur” which is “not to be confused with the real species of the dinosaur Gigantosaurus.” May 11, 2021 Office Action at TSDR 11, wikipedia.com. In the television series, Gigantosaurus aids the young dinosaurs in their adventures but generally



communicates by growls and roars. May 11, 2021

Office action at TSDR 11; November 9, 2021 Response to Office action at TSDR 36, 49, and 54. An article from USA today indicates that Gigantosaurus is one of the main characters, and “the series develops the relationship between Giganto and the Dino kids while they experience growing up together in a new environment away from the their homes.” November 9, 2021 Response to Office action at TSDR 9.



Id.

The Examining Attorney contends that all the Class 38 services feature a GIGANTOSAURUS and are merely descriptive of them. 5 TTABVUE 5. The Examining Attorney submits that Gigantosaurus was an enormous carnivorous dinosaur of the late Cretaceous period, and Applicant's services feature a Gigantosaurus, making it merely descriptive of the services. 7 TTABVUE 4-5.

As indicated, Applicant has generally traversed the refusal, but not provided specific argument.

In the same way a term may be merely descriptive for printing and distributing magazines and television broadcasting services because it describes the content or subject matter being offered or featured, GIGANTOSAURUS is merely descriptive of Applicant's "Cartoon dissemination services, namely, streaming of video material on the Internet." GIGANTOSAURUS merely describes a featured dinosaur character in the preschool television series by using the name of the type of dinosaur depicted. *See In re Putman Publ'g. Co.*, 39 USPQ2d 2021, 2022 (TTAB 1996) (FOOD & BEVERAGE ONLINE merely descriptive of news and information services in the food processing

industry); *In re Conus Commc'ns Co.*, 23 USPQ2d 1717, 1719 (TTAB 1992) (ALL NEWS CHANNEL generic for television channel broadcasting all news); *In re Gracious Lady Serv., Inc.*, 175 USPQ 380, 382 (TTAB 1972) (CREDIT CARD MARKETING merely descriptive of a periodical pamphlet devoted to subjects of interest to those engaged in the credit card merchandising field); *In re Nippon Kokan Kabushiki Kaisha*, 171 USPQ 63, 64 (TTAB 1971) (JAPAN STEEL NOTES as applied to applicant's magazine, would immediately indicate to subscribers or recipients thereof that it contains brief items or reports pertaining to the Japanese steel industry). Therefore, we find GIGANTOSAURUS is merely descriptive of the identified cartoon dissemination services.

We now turn to whether Applicant has shown that GIGANTOSAURUS has acquired distinctiveness, based on evidence of acquired distinctiveness, or based on Applicant's prior registration.

A. Evidence of Acquired Distinctiveness

The same standards for establishing acquired distinctiveness apply whether the application is based on §1(a), §44, or §66(a). TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1212.08 (November 2023). "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." *In re Steelbuilding.com*, 415 F.3d 1293, 75 USPQ2d 1420, 1422 (Fed. Cir. 2005); *see also Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1729 (Fed. Cir. 2012). "The applicant ... bears

the burden of proving acquired distinctiveness.” *In re La. Fish Fry Prods., Ltd.*, 797 F.3d 1332, 1335 (Fed. Cir. 2015).

“The amount and character of the evidence, if any, required to establish that a given word or phrase ... ‘has become distinctive’ of the goods necessarily depends on the facts of each case and the nature of the alleged mark.” *Roux Labs., Inc. v. Clairol Inc.*, 427 F.2d 823, 166 USPQ 34, 39 (CCPA 1970). With respect to the nature of the alleged mark, “the [proving party’s] burden of showing acquired distinctiveness increases with the level of descriptiveness; a more descriptive term requires more evidence of secondary meaning.” *In re Steelbuilding.com*, 75 USPQ2d at 1424.

As the Board has explained:

[T]he greater the degree of descriptiveness, the greater the evidentiary burden on the user to establish acquired distinctiveness. The sufficiency of the evidence offered to prove acquired distinctiveness should be evaluated in light of the nature of the designation. Highly descriptive terms, for example, are less likely to be perceived as trademarks and more likely to be useful to competing sellers than are less descriptive terms. More substantial evidence of acquired distinctiveness thus will ordinarily be required to establish that such terms truly function as source-indicators.

In re Greenliant Sys. Ltd., 97 USPQ2d 1078, 1085 (TTAB 2010) (internal citations omitted).

Applicant’s mark is merely descriptive and not highly descriptive, so its burden is not commensurately high. *Cf. In re Virtual Indep. Paralegals, LLC*, 2019 USPQ2d 111512 at *11 (TTAB 2019) (for a term that is highly descriptive of Applicant’s services, “Applicant’s burden of establishing acquired distinctiveness under Section 2(f) is commensurately high.”). The Examining Attorney has not argued otherwise.

In determining whether Applicant has demonstrated acquired distinctiveness of GIGANTOSAURUS for its Class 38 services, we examine the evidence of record as it relates to six categories of facts that are evaluated together: (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 embodying the mark. *Converse, Inc. v. ITC*, 909 F.3d 1110, 128 USPQ2d 1538, 1546 (Fed. Cir. 2018); *In re SnoWizard, Inc.*, 129 USPQ2d 1001, 1005 & n.8 (TTAB 2018) (holding *Converse* applicable to Board proceedings). No single factor is determinative. *Converse*, 128 USPQ2d at 1548 (citing *In re Steelbuilding*, 75 USPQ2d at 1424; *In re Tires, Tires, Tires Inc.*, 94 USPQ2d 1153, 1157 (TTAB 2009). “Direct evidence [of acquired distinctiveness] includes actual testimony, declarations or surveys of consumers as to their state of mind. Circumstantial evidence, on the other hand, is evidence from which consumer association might be inferred, such as years of use, extensive amount of sales and advertising, and any similar evidence showing wide exposure of the mark to consumers.” *In re Ennco Display Sys. Inc.*, 56 USPQ2d 1279, 1283 (TTAB 2000).

We consider the evidence as a whole. *City of London Distillery, Ltd. v. Hayman Grp. Ltd.*, 2020 USPQ2d 11487, at *18 (TTAB 2020) (considering evidence as a whole in connection with acquired distinctiveness of a geographically descriptive term). We need consider only those factors for which evidence is in the record. *Shenzhen IVPS Technology Co. Ltd. v. Fancy Pants Products, LLC*, 2022 USPQ2d 1035, at *33 (TTAB

2022) (considering the *Converse* factors of length of use and amount and manner of advertising, which were the only factors addressed by witness testimony and evidence); *In re Guaranteed Rate, Inc.*, 2020 USPQ2d 10869, *4 (TTAB 2020) (considering the second, third, fourth and sixth *Converse* factors where applicant did not submit consumer survey evidence or evidence of intentional copying).

The Examining Attorney discounts Applicant's 2(f) evidence arguing that the evidence does "not discuss or contemplate the use of 'GIGANTOSAURUS' in connection with telecommunication services." 7 TTABVUE 9. As to Applicant's sales and advertising expenditures, the Examining Attorney submits that "none of this information indicates the applicant's sales or advertising expenditures were spent to develop distinctiveness of the proposed mark when used in connection with telecommunication services. Without additional evidence showing how applicant is educating the public to associate the proposed mark with a single source as to telecommunication services, this evidence is not probative." *Id.* at 10. The Examining Attorney reiterates this argument in respect to the social media websites, press releases and third-party websites evidence. *Id.* at 11.

The evidence of acquired distinctiveness in the record is directed to the content and subject matter of the Class 38 services, all of which is the television program GIGANTOSAURUS. As the Examining Attorney points out in arguing the descriptiveness refusal, the content that is the subject matter of the telecommunication services is GIGANTOSAURUS. Therefore, the strength of the trademark GIGANTOSAURUS in connection with the television show is relevant in

establishing public awareness and transference of its trademark function related to the content and subject matter of the various telecommunication services listed in the identification. *See Levi Strauss & Co. v. Genesco, Inc.*, 742 F.2d 1401, 222 USPQ 939, 942 (Fed. Cir. 1984) (“The strength of the tab as a trademark for pants might be relevant if there were evidence establishing public awareness and transference of its trademark function to related goods [shoes].”) Accordingly, we find this evidence is in fact probative of the distinctiveness of the identified Class 38 services.

Opposer’s witness Cecilia Bosse, Deputy Managing Director of Applicant, addressed the *Converse* factors relating to advertising, sales, and unsolicited media coverage about the GIGANTOSAURUS brand. Bosse declaration, November 9, 2021 Response to Office action at TSDR 2-6. Applicant’s witness states that consumers associate GIGANTOSAURUS with Applicant as it has been the subject of “widespread and substantial promotional efforts to a broad base of consumers, recognition in the marketplace, media attention and substantially exclusive use of the GIGANTOSAURUS mark.” *Id.* at paragraph 13.

Applicant has a licensing agreement with Disney and its animated series is shown on the Disney channel. *Id.* at paragraph 3. At the time of the declaration (February 7, 2019), Applicant had spent \$500,000 advertising the GIGANTOSAURUS brand. *Id.* at paragraph 4. Applicant had unsolicited press coverage for the GIGANTOSAURUS television show prior to the premiere date (January 18, 2019) on USA Today; these stories were picked up by other publications. *Id.* at paragraph 6. Applicant indicates the total impressions for the publicity prior to the premiere and

on the premiere day were 96,320,985. *Id.* at paragraph 8. Applicant posted previews, via the Disney Channel YouTube account of the television show (showing over 46,000 views) and more than 30 press releases were released. *Id.* at paragraph 3, 5 and at TSDR 223-224. Forbes.com, with a reach of 30 million, published a placed story on the television series. *Id.* at paragraph 9. Applicant's witness states that additional "sales success" is reflected by its licensing arrangements: Master Toy Agreement, bed linens, outdoor clothing, textiles, and videogames. *Id.* at paragraph 10. Applicant has Facebook and Instagram pages. *Id.* at paragraph 11.

The record includes information related to Applicant's Facebook account for GIGANTOSAURUS (163 followers and 154 likes prior to the premiere), and Instagram account for GIGANTOSAURUS (19 posts, 73 followers and 73 likes prior to the premiere). November 9, 2021 Response to Office action at TSDR 316-317. Popsugar Family posted about the GIGANTOSAURUS show on its Facebook account and received 2,974,015 likes; it also posted on its Twitter account about the premiere (333,000 followers). *Id.* at 248-249. The Collider Twitter account, (106,000 followers) and the IndyStar Twitter account (264,000 followers), also posted about the GIGANTOSAURUS premiere. *Id.* at 260, 272.

Also prior to the premiere of the television show, craft bloggers published craft and party ideas based on the GIGANTOSAURUS brand through sponsored promotions from Applicant. Bosse declaration, *id.* at paragraph 12. Applicant provided the follower numbers of these bloggers for their Facebook, Instagram, and Twitter accounts. November 9, 2021 Response to Office action at TSDR 325-327, 357,

360, 368-369, 371, 378, 379, 387, 388, 397, 398, 400, 412, 413, 420, 421. Influencer coverage, which included not just mommy bloggers but, among others, radio and news channels and newspaper websites, calculates total reach at 278,459,842 as of January 25, 2019. *Id.* at TSDR 308-310. Some of the other media mentions appear to be solicited or placements, e.g., Romper.com. Applicant did not provide the viewership for the GIGANTOSAURUS television premiere.

Applicant's evidence shows exclusive use, a large amount of advertising expenditure in a short period of time, and unsolicited media impressions with a tremendous amount of potential exposure, consumer impressions, and consumer reach prior to the premiere of the television series, in part due to "pickups" of the USA Today article, as well as a large amount of potential consumer exposure in the form of media impressions on the premiere date of the television series (January 18, 2019), also due to "pickups" of a second USA Today story. *Id.* at TSDR 246.

The influencer coverage, which includes solicited placements by Applicant, also show a sizeable and highly significant number of potential consumer impressions given the audience reach or followers of these sources as provided in the record. The total figures reflecting influencer coverage overall reflects widespread exposure relating to the GIGANTOSAURUS television show.

Although we have no other media mentions in the record subsequent to the television series premiere and nothing in the record relating to advertising and consumer impressions subsequent to the GIGANTOSAURUS premiere date, we find that the reach and number of commercial impressions generated in connection with

the GIGANTOSAURUS brand in this brief period to be substantial. This extensive awareness campaign shows exclusive use and widespread exposure of the GIGANTOSAURUS mark to consumers in connection with the television series.

We find the Examining Attorney's criticisms of the Section 2(f) evidence are not persuasive. After reviewing all of the record evidence, we find that the evidence submitted by Applicant is sufficient to show that GIGANTOSAURUS has acquired distinctiveness as a trademark for the Class 38 services.³

II. Conclusion

GIGANTOSAURUS is merely descriptive of a featured character with the name of the type of dinosaur depicted as used in connection with Applicant's Class 38 services, but we find that Applicant has demonstrated that GIGANTOSAURUS has acquired distinctiveness in connection with the Class 38 services.

Decision: The refusal to register Applicant's mark GIGANTOSAURUS in Class 38 is reversed.

³ In view of our finding based on the evidence of acquired distinctiveness, we need not consider whether Applicant's prior registration for services in Class 41 supports acquired distinctiveness of the identified Class 38 services.