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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	86044889
Applicant	LogixHealth, Inc.
Applied for Mark	DOCTORPAYMENTS
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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In re Application of: LogixHealth, Inc.

Mark: DOCTORPAYMENTS

Serial Number: 86044889

Filing Date: August 22, 2013

Examining Atty: Linda M. Estrada, Law Office 104

APPLICANT'S APPEAL BRIEF

TABLE OF AUTHORITIES

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I. INTRODUCTION

Applicant appeals the Examining Attorney's refusal to allow the mark DOCTORPAYMENTS to proceed to registration on the Supplemental Register. The application covers "Bill payment services provided through a website enabling payors to make payments to payees and view their account balances, their transaction histories, their insurance information, and documents regarding their accounts to assist them in making such payments," in Class 36. The mark was first used in April 2013 and was first used in commerce in April 2013, and is entitled to registration on the Supplemental Register for the following reasons.

Applicant's appeal is ripe for consideration because it follows from a final Office Action. TBMP § 1201.01.

II. BACKGROUND

A. The Examining Attorney's December 2013 Office Action

The Examining Attorney's December 9, 2013 Office Action stated that "Registration is refused because the applied-for mark merely describes a feature and purpose of applicant's services." The Examining Attorney further stated that, "In addition to being merely descriptive, the applied-for mark appears to be generic in connection with the identified services and, therefore, incapable of functioning as a source-identifier for applicant's services. [Citations omitted.] Under these circumstances, neither an amendment to proceed under Trademark Act Section 2(f) nor an amendment to the Supplemental Register can be recommended."

B. Applicant's January 2014 Response to Office Action

Applicant's January 17, 2014 Response to Office Action amended Applicant's identification of services from "Bill payment services provided through a website" to "Bill payment services provided through a website enabling payors to make payments to payees and view their account balances, their transaction histories, their insurance information, and documents regarding their accounts to assist them in making such payments."

Applicant's response also sought to amend the application to seek registration on the Supplemental Register on the ground that the term DOCTORPAYMENTS is not generic.

First, Applicant argued that the term DOCTORPAYMENTS is not the common commercial name for making payments to doctors. As Applicant noted, "People send payments to doctors, but no one is asked to make 'doctorpayments' and no one says they are sending 'doctorpayments' to their doctors. The terms 'doctor' and 'payments' are generic, but the combination is not." As the term DOCTORPAYMENTS is not generic for making payments to doctors, it cannot be generic for making payments to doctors through websites.

Second, Applicant argued that the Examining Attorney's evidence does not support the conclusion that DOCTORPAYMENTS is generic. As Applicant stated, "The Office Action contains several examples of the use of the terms 'doctor' and 'payments,' but no examples of the use of the term 'doctorpayments.'"

Third, Applicant argued that the USPTO has long allowed the registration of PAYMENT-formative trademarks analogous to Applicant's DOCTORPAYMENTS mark. "This shows that marks containing the word 'PAYMENT[]' and other descriptive words identifying payment-related services are not generic. The registrations in question include CONVENIENT PAYMENTS, EXPRESSPAYMENT[], GLOBAL PAYMENTS, OFFICIAL PAYMENTS, PROPERTY PAYMENTS, SIMPLE PERSONAL PAYMENTS, SMARTPAYMENTS, and U.S. PAYMENTS. (See Exhibit A. [attached to January 17, 2014 response]) As these marks are entitled to registration, so is Applicant's DOCTORPAYMENTS mark."

Fourth, Applicant argued that the term DOCTORPAYMENTS is not generic for Applicant's services, as amended, which include various services to assist in making payments, including the ability to view account balances, transaction histories, insurance information, and

documents. Even if the term DOCTORPAYMENTS could be considered generic for making payments to doctors, it cannot possibly be considered generic for these services.

C. The Examining Attorney's February 2014 Office Action

The Examining Attorney's February 5, 2014 Office Action stated that "Registration is refused on the Supplemental Register because the applied-for mark is generic and thus incapable of distinguishing applicant's services." The Examining Attorney noted that "Determining whether a mark is generic requires a two-step inquiry: (1) What is the genus of goods and/or services at issue? [and] (2) Does the relevant public understand the designation primarily to refer to that genus of goods and/or services?"

According to the Examining Attorney, "In the present case, the identification, and thus the genus, is "Bill payment services provided through a website enabling payors to make payments to payees and view their account balances, their transaction histories, their insurance information, and documents regarding their accounts to assist them in making such payments." As for the second part of the inquiry, the Examining Attorney stated that evidence of the meaning of the words "doctor" and "payment" showed that DOCTORPAYMENTS is generic. The Examining Attorney also stated that, "contrary to applicant's arguments, [the] enclosed evidence indicates that 'doctor payments' is commonly used by third parties to identify goods and services for bill payment in the field of healthcare. The wording is in common use in the medical field." The Examining Attorney's evidence consisted of the following examples of the use of the word "doctor payments."

1. Evidence from <http://www.revolutioninfosystems.com/Hospital%20ERP.aspx> advertising software services for "doctor payment."
2. Evidence from <http://www.amcno.org/index.php?id=724> indicating "The proposal would make a major change in doctor payments, in that rather having a system that would pay physicians for volume the system would use financial incentives to

encourage physicians to move to alternative payment models emphasizing quality care.”

3. Evidence from <http://www.marketwatch.com/story/tenet-healthcare-gets-more-subpoenas-in-billing-probe> indicating “Tenet Healthcare [], under investigation by federal officials for its billing practices, has received two more subpoenas from a federal prosecutor in New Orleans. The subpoenas seek information from the hospital operator about certain doctor payments and service denials, as well as other data. The requests were disclosed in a regulatory filing Friday with the Securities and Exchange Commission.”
4. Evidence from <http://www.hfxcard.com/gold-membership.html> indicating “Gold Cards are issued regardless of Insurer and can maintain updated insurance status in the event cardholder changes insurer. The card also has unique features such as a monthly payment option for doctor payments not covered by insurance (deductible, out of pocket expense) if necessary due to personal financial hardship.”

The Examining Attorney stated that “For a mark that is a generic ‘compound term,’ . . . the evidence of record must show that each of the constituent words is generic, and that each word retains its generic meaning when combined such that the composite formed is generic and does not create a different, non-generic meaning.” However, the Examining Attorney did not analyze whether the composite term DOCTORPAYMENTS is generic, other than to provide four examples of the use of this term as evidence of the “common use” of this term in the medical field. Nor did the Examining Attorney consider Applicant’s evidence that DOCTORPAYMENTS is not generic, namely, Applicant’s evidence of third-party registrations for PAYMENT-formative marks previously accepted for registration by the PTO.

D. Applicant’s March 2014 Response to Office Action

Applicant’s March 7, 2014 Response to Office Action noted that the Examining Attorney did not consider Applicant’s evidence and requested issuance of a final Office Action if the evidence was not considered persuasive.

E. The Examining Attorney’s April 2014 Final Office Action

The Examining Attorney’s April 10, 2014 Office Action stated that “the term PAYMENTS retains its generic meaning when combined with the wording DOCTOR such that

the composite formed is generic and does not create a different, non-generic meaning,” and that the following additional examples of the use of the words “doctor payments” supported this contention.¹

1. Evidence from <https://www.totalepay.com/account-to-account.jsp> advertising bill payment services which provide the consumer to make doctor payments.
2. Evidence from <http://www.apsworkflow.com/solution/> indicating “Using this workflow model, APS Workflow is able to pay the BGA’s for their time in making the phone calls. This allows BGA’s to control their own time service and get paid for it! APS Workflow in this model still makes all of the doctor payments, images the records, and bills the carriers.”
3. Evidence from <http://accountablecareanswers.com/category/media-coverage/> indicating “The biggest U.S. health insurer plans to more than double the amount it pays to health-care providers under deals that involve quality and efficiency goals, with such contracts set to represent \$50 billion in annual spending by 2017. The planned move by UnitedHealth Group Inc. marks an acceleration of the broader shift away from traditional fee-for-service methods, which tie hospital and doctor payments solely to each medical procedure performed.”
4. Evidence from <http://www.washingtontimes.com/news/2011/mar/31/sc-house-debating-bill-reduce-doctor-payments/> indicating “S.C. House debating bill to reduce doctor payments.”
5. Evidence from <http://blog.aarp.org/tag/doctor-payments/> featuring articles and news related to doctor payments.

The Examining Attorney also stated that Applicant’s evidence regarding third-party registrations containing the term “PAYMENTS” was unpersuasive and made the refusal of registration final.

III. Issue

The issue on appeal is whether the term DOCTORPAYMENTS is generic for the recited services or entitled to registration on the Supplemental Register.

¹ The Office Action attached several additional examples of the use of the words “doctor payments,” which are discussed in Section V below.

IV. Standard

A mark is a generic name if it refers to the class or category of goods and/or services on or in connection with which it is used. *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 57 USPQ2d 1807 (Fed. Cir. 2001), *citing H. Marvin Ginn Corp. v. International Association of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528 (Fed. Cir. 1986). The test for determining whether a mark is generic is its primary significance to the relevant public. Trademark Act § 14(3); *In re American Fertility Society*, 188 F.3d 1341, 51 USPQ2d 1832 (Fed. Cir. 1999); *Magic Wand Inc. v. RDB Inc.*, 940 F.2d 638, 19 USPQ2d 1551 (Fed. Cir. 1991).

Further, compound terms consisting of descriptive words must be analyzed according to the test set forth in *In re American Fertility Society*. According to the Federal Circuit, “where the proposed mark is a phrase (such as ‘Society for Reproductive Medicine’), the board ‘cannot simply cite definitions and generic uses of the constituent terms of a mark’; it must conduct an inquiry into ‘the meaning of the disputed phrase as a whole.’” *In re American Fertility Society*, 51 USPQ2d at 1836.

Finally, the USPTO has the burden of establishing by clear evidence that a mark is generic and, thus, unregistrable. *In re Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 828 F.2d 1567, 4 USPQ2d 1141 (Fed. Cir. 1987). *See also In re American Fertility Society, supra; Magic Wand Inc. v. RDB Inc., supra.* “Doubt on the issue of genericness is resolved in favor of the applicant.” *In re DNI Holdings Ltd.*, 77 USPQ2d 1435, 1437 (TTAB 2005).

V. Argument

The class or category of Applicant’s services (i.e., the genus of Applicant’s services) is clear from the record. The genus of Applicant’s services is fully defined by Applicant’s identification of services, which covers “Bill payment services provided through a website enabling payors to make payments to payees and view their account balances, their transaction

histories, their insurance information, and documents regarding their accounts to assist them in making such payments” (“Web-Based Payment Services”).

Thus, the remaining question is whether the term DOCTORPAYMENTS is understood by the relevant purchasing public as primarily referring to Web-Based Payment Services. The relevant purchasing public, by definition, consists of people who make web-based payments.

The Examining Attorney has introduced several website printouts purporting to show the public’s understanding of the term DOCTORPAYMENTS. Much of the Examining Attorney’s evidence consists of definitions of the words “doctor” and “payments.” While relevant to the meaning of the terms “doctor” and “payment,” this evidence is not directly relevant to the issue on appeal, namely, whether the term DOCTORPAYMENTS is generic. Under *American Fertility Society*, as the term DOCTORPAYMENTS is a phrase composed of descriptive words, it cannot be analyzed in terms of its constituent parts, i.e., DOCTOR and PAYMENTS; it must be analyzed in terms of how the term, as a whole, is understood by the relevant public. As for the meaning of the term DOCTORPAYMENTS, as a whole, the Examining Attorney evidence consists of 13 examples of the use of this term.

None of these examples of use is from a member of the relevant purchasing public (i.e., people who make web-based payments). All of these examples of use are from companies discussing various topics relating to the general subject of making payments to doctors.

Moreover, none of these examples of use shows that the term DOCTORPAYMENTS is generic for Web-Based Payment Services. Just because two words can be found next to each other does not mean they are understood by the relevant consuming public to be a generic

phrase. A careful examination of the Examining Attorney's evidence shows that these examples of use do not apply the genus of Web-Based Payment Services.²

1. The Revolution Infosystems webpage contains a list of software modules, including one called Doctor Payments, but there is no indication of what this this module does, including whether it can be used to make payments, track payments, or simply provide information about payments, etc. As such, this webpage does not show use the term "doctor payments" to refer to Web-Based Payment Services.
2. The Academy of Medicine of Cleveland & Northern Ohio ("AMCNO") webpage, which states "[t]he proposal would make a major change in doctor payments, in that rather having a system that would pay physicians for volume the system would use financial incentives to encourage physicians to move to alternative payment models emphasizing quality care," refers to the concept of making payments to doctors in general, and does not use the term "doctor payments" to refer to a class of products or services.
3. The MarketWatch webpage, which states "[t]he subpoenas seek information from the hospital operator about certain doctor payments and service denials, as well as other data," also refers to the concept of making payments to doctors in general, and does not use the term "doctor payments" to refer to a class of products or services.
4. The Healthcare Financial Exchange, which states "[t]he card also has unique features such as a monthly payment option for doctor payments not covered by insurance (deductible, out of pocket expense) if necessary due to personal financial hardship," refers to the concept of making payments to doctors by credit card, and does not use the term "doctor payments" to refer to a class of products or services, let alone web-based products or services.
5. The APS WORKFLOW webpage, which states that "APS Workflow . . . still makes all of the doctor payments, images the records, and bills the carriers," refers to the concept of making payments to doctors in general (i.e., it simply states that one of the capabilities of APS Workflow is to make payments to doctors), and does not use the term "doctor payments" to refer to a class of products or services.
6. The Family of Four Debt Blog webpage, in which a blogger states that a monthly charge will go to "ambulance and doctor payments," also refers to the concept of making payments to doctors, and does not use the term "doctor payments" to refer to a class of products or services.
7. The Moneylife webpage, which is entitled "Doctor payments on the decline," refers to the concept of "[p]harmaceutical company payments to health care professionals," and does not use the term "doctor payments" to refer to a class of products or services.

² The Examining Attorney's evidence is discussed in the order it appears in the February 5, 2014 and April 10, 2014 Office Actions (unless previously discussed).

8. The UnitedHealthcare webpage, which states that “traditional fee-for-service methods . . . tie hospital and doctor payments solely to each medical procedure performed,” refers to the concept of making payments to doctors in general, and does not use the term “doctor payments” to refer to a class of products or services.
9. The Washington Times webpage, which contains the headline “S.C. House debating bill to reduce doctor payments,” also refers to the concept of making payments to doctors in general, and does not use the term “doctor payments” to refer to a class of products or services.
10. The AARP BLOG webpage does not “feature[e] articles and news related to doctor payments,” as the Examining Attorney contends. Rather, it contains the heading “DOCTOR PAYMENTS,” followed by two articles, entitled “New Website to Post Payments to Doctors From Health Industry” and “Medicare Doctor Pay: Why Is It So Hard To Fix?” The titles of the articles do not contain the word “doctor payments.” Further, the heading refers to the concept of making payments to doctors in general, and does not use the term “doctor payments” to refer to a class of products or services.
11. The Wire webpage, which discusses Medicare’s “historic data release of doctor payments” for ophthalmologists, also refers to the concept of making payments to doctors, and does not use the term “doctor payments” to refer to a class of products or services
12. The Minneapolis/St. Paul BUSINESS JOURNAL webpage, which is entitled “Medtronic starts disclosing doctor payments,” also refers to the concept of making payments to doctors, and does not use the term “doctor payments” to refer to a class of products or services.
13. Finally, the TotalePay webpage, which indicates that Automated Clearing House (ACH) systems can be used for many purposes, including to make “Doctor payments,” also refers to the concept of making payments to doctors in general, and does not use the term “doctor payments” to refer to a class of products or services, let alone Web-Based Payment Services.

As such, the Examining Attorney’s evidence is inapposite. While the evidence purports to show that the term DOCTORPAYMENTS is generic for Web-Based Payment Services, it does not. It merely shows that the words “doctor payments” are often used to refer to the concept of making payments to doctors. There is no dispute that the words “doctor payments” are used to refer to the concept of making payments to doctors, but there is no evidence that the

term DOCTORPAYMENTS is used to refer to a particular class of products or services, let alone *websites used to make payments to doctors*—the genus of Applicant’s services.

Put somewhat differently, the Examining Attorney has used the wrong genus. The Examining Attorney has analyzed Applicant’s mark as if the genus was “the concept of making payments to doctors,” when in fact the genus is Web-Based Payment Services.

Further, Applicant’s evidence shows that the PTO has long allowed the registration of PAYMENT-formative trademarks combined with other descriptive terms for payment-related services. These include the following live registrations:

- 1) Registration No. 4211744 for the mark CONVENIENT PAYMENTS for “Providing secure financial commercial transactions and payment options for processing of electronic funds transfers, ACH, credit card, debit card, electronic check, convenience fees, and electronic payments; electronic payment, namely, electronic payment processing of bill payment data via electronic transmission, wireless transmission, telephone and a global computer network” (Supplemental Register, PAYMENTS disclaimed)
- 2) Registration No. 2904786 for the mark EXPRESSPAYMENT for “Electronic bill payment services, financial services, namely processing of consumer's payments to third parties” (Principal Register, 2(f))
- 3) Registration No. 2793590 for the mark GLOBAL PAYMENTS for “Debit and credit card processing services” (Principal Register, 2(f), “PAYMENTS” disclaimed)
- 4) Registration No. 4174873 for the mark OFFICIAL PAYMENTS for “Electronic payment and processing services, namely, processing electronic payments made through prepaid cards, credit cards, debit cards, electronic funds transfer, ACH, electronic check and electronic payments, and transmission and processing of bill payment data," among other services (Principal Register, “PAYMENTS” disclaimed)
- 5) Registration No. 4394159 for the mark PROPERTY PAYMENTS for “ Providing the temporary use of online nondownloadable software for landlords to collect, track and report on, rent payments from tenants; providing a website featuring technology for landlords to collect, track and report on, rent payments from tenants” (Supplemental Register)
- 6) Registration No. 4129376 for the mark SIMPLE PERSONAL PAYMENTS for “Banking Services” (Principal Register, “PERSONAL PAYMENTS” disclaimed)

- 7) Registration No. 3946374 for the mark SMARTPAYMENTS for “Computer software for processing, monitoring and management of financial transactions” (Supplemental Register)
- 8) Registration No. 4014740 for the mark U.S. PAYMENTS for “Payment processing services, namely, electronic payment transaction processing services and transmission of payment data; and processing electronic payments made through prepaid card,” among other services (Principal Register, 2(f) in part, “PAYMENTS” disclaimed)

These registrations show that marks containing the word “PAYMENT” or “PAYMENTS” combined with other descriptive words identifying payment-related services is not necessarily generic. Applicant’s mark is entitled to registration no less than the above marks.

The Examining Attorney ignores the above evidence by citing the principle that “each case must be decided on its facts.” Applicant does not dispute this principle. However, rejecting Applicant’s evidence of record, without any discussion of the evidence whatsoever, even a general discussion regarding why it the Examining Attorney contends the evidence is irrelevant, should not be considered sufficient. Applicant has stated why the evidence of record is relevant, and the Examining Attorney has not refuted Applicant’s reasoning. The Board should therefore consider Applicant’s evidence, as the evidence is highly relevant to the issue of whether Applicant’s DOCTORPAYMENTS mark is generic.

Applicant’s evidence shows that PAYMENT-formative trademarks combined with other descriptive terms—e.g., convenient, express, global, official, property, simple personal, smart, and U.S.—are fully capable of functioning as trademarks for payment-related services. As such, Applicant’s evidence is probative of the issue on appeal, namely, whether Applicant’s mark should be considered generic. Like the above marks, Applicant’s mark combines the term PAYMENTS with a descriptive term—i.e., doctors—and is entitled to registration to the same extent as those marks.

Finally, consumers are likely to perceive DOCTORPAYMENTS as a trademark given that the mark is displayed as one word instead of two word. In other words, Applicant's mark is likely to be perceived as a trademark because it has the "look and feel" of a trademark.

VI. Conclusion

As noted above, the USPTO bears the burden of proof and genericness must be shown by clear evidence. Further, any doubts must be resolved in Applicant's favor. The Examining Attorney's evidence is insufficient to show that the term DOCTORPAYMENTS is generic for the genus of Web-Based Payment Services, and Applicant's evidence suggests that Applicant's mark is entitled to registration. Finally, Applicant's mark is likely to be perceived as a mark because it is displayed as two words. Taking all of the above into consideration, Applicant respectfully submits that its DOCTORPAYMENTS mark is entitled to registration on the Supplemental Register.

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Respectfully submitted,

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