

This Opinion is not a
Precedent of the TTAB

Mailed: March 18, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Fuel Industries, Inc.

Serial No. 86185707

Candice E. Kim of Greenberg Traurig LLP for Fuel Industries, Inc.

Raul Cordova, Trademark Examining Attorney, Law Office 114 (K. Margaret Le, Managing Attorney).

Before Zervas, Cataldo and Kuczma,
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Fuel Industries, Inc. (“Applicant”) seeks registration on the Principal Register of BRODDCAST (in standard characters) as a mark for the following goods, as amended:

Multimedia software for digital content creation of entertainment videos using electronic media; multimedia software for digital video recording, editing and playback of videos; multimedia software for digital recording, editing and playback of entertainment videos; downloadable software for digital recording, editing and playback of entertainment videos in International Class 9.¹

¹ Application Serial No. 86185707 was filed on February 5, 2014, based upon Applicant’s claim of a bona fide intent to use the mark in commerce.

The Trademark Examining Attorney has refused registration of Applicant's mark under Section 2(e)(1) of the Trademark Act, 15 U.S.C. 1052(e)(1), on the ground that the applied-for mark merely describes a function, feature or characteristic of the recited goods.

After the Trademark Examining Attorney made the refusal final, Applicant appealed to this Board. We reverse the refusal to register.

Evidentiary Matters

Before turning to the merits of the appeal, evidentiary matters require our attention.

Request for Remand or Judicial Notice

On December 9, 2015, five days prior to the due date for its reply brief, Applicant filed a request for the Board to take judicial notice or, in the alternative, to remand the involved application to the Examining Attorney for consideration of the notice of allowance of its related application Serial No. 86388876.² In an order issued on December 14, 2015, the Board denied Applicant's request for remand and deferred until final decision its request to take judicial notice.³

The Board generally does not take judicial notice of documents reflecting the status of an applicant's related application. *See* TBMP §§ 704.12(a) and 1208.04 and

² 10 TTABVUE. Citations to the briefs and filings in this appeal refer to TTABVUE, the Board's online docket system. The first number represents the prosecution history number listed in the electronic case file and, where applicable, the second represents the page number(s). Citations to the examination record refer to the Trademark Office's online Trademark Status and Document Retrieval system (TSDR), by page number.

³ 11 TTABVUE.

authorities cited therein. Accordingly, Applicant's request to take judicial notice of the publication of its related application is denied.⁴

Exhibits to Applicant's Briefs

Applicant submitted 70 pages of evidentiary exhibits to its appeal brief.⁵ The Examining Attorney objected to any evidence that was not introduced during prosecution of the involved application, and only discussed those exhibits that were properly made of record.⁶ Thereafter, Applicant submitted fourteen pages of additional exhibits to its reply brief.⁷

Trademark Rule 2.142(d) provides that the record in the application should be complete prior to the filing of an appeal. The Board ordinarily will not consider additional evidence submitted by an applicant or examining attorney after the appeal is filed.⁸

⁴ In addition, and as noted in our December 14, 2015 order, the mark in Applicant's related application was approved for publication on July 2, 2015 and published for opposition on August 25, 2015, both of which were prior to the September 25, 2015 due date for its appeal brief herein. Furthermore, as discussed below, Applicant filed with its appeal brief, *inter alia*, a copy of USPTO records showing the publication of the mark in its related application and thus was aware of the status thereof prior to briefing of this appeal. However, Applicant chose not to request remand when it first learned that its related application was approved for publication.

⁵ 7 TTABVUE 21-90.

⁶ 9 TTABVUE 7.

⁷ 12 TTABVUE 10-23.

⁸ Exhibit B to Applicant's reply brief consists of dictionary definitions of terms related to its services. Inasmuch as these definitions are not necessary to our determination herein, we decline to take judicial notice thereof. *Cf., e.g., In re White Jasmine LLC*, 106 USPQ2d 1385, 1392 n. 23 (TTAB 2013) and TBMP § 1208.04.

Any of the evidence appended to Applicant's briefs that was not made of record during prosecution of the involved application is untimely. *See, e.g., In re District of Columbia*, 101 USPQ2d 1588, 1591-92 (TTAB 2012). Furthermore, to the extent that any of the appended evidence previously was made of record, its attachment to the appeal brief is unnecessary and redundant.

Accordingly, the exhibits attached to Applicant's briefs will be given no further consideration.

Mere Descriptiveness

A term is merely descriptive of goods (or services) within the meaning of Section 2(e)(1) if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use thereof. *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012). *See also In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987). Whether a mark is merely descriptive is determined in relation to the goods for which registration is sought and the manner in which the term is used, not in the abstract or on the basis of guesswork. *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978); *In re Remacle*, 66 USPQ2d 1222, 1224 (TTAB 2002). A term need not immediately convey an idea of each and every specific feature of the goods in order to be considered merely descriptive; it is enough if it describes one significant attribute, function or property of them. *See In re Gyulay*, 3 USPQ2d at 1010; *In re H.U.D.D.L.E.*, 216 USPQ 358 (TTAB 1982); *In re MBAssociates*, 180 USPQ 338 (TTAB 1973). This requires consideration of the context in which the mark is used or intended to be used in

connection with those goods, and the possible significance that the mark would have to the average purchaser of the goods in the relevant marketplace. *See In re Chamber of Commerce of the U.S.*, 102 USPQ2d at 1219; *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007); *In re Abcor Dev. Corp.*, 200 USPQ at 218; *In re Venture Lending Assocs.*, 226 USPQ 285 (TTAB 1985).

In other words, the question is whether someone who knows what the goods are will understand the mark to convey information about them. *DuoProSS Meditech Corp. v. Inviro Medical Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012); *In re Tower Tech, Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002); *In re Patent & Trademark Servs. Inc.*, 49 USPQ2d 1537, 1539 (TTAB 1998). “On the other hand, if one must exercise mature thought or follow a multi-stage reasoning process in order to determine what product or service characteristics the term indicates, the term is suggestive rather than merely descriptive.” *Coach Servs. Inc. v. Triumph Learning LLC*, 96 USPQ2d 1600, 1616 (TTAB 2010) (quoting *In re Tennis in the Round, Inc.*, 199 USPQ 496, 497 (TTAB 1978)), *vacated-in-part on other grounds*, 668 F.3d 1356, 101 USPQ2d 1713 (Fed. Cir. 2012).

The Examining Attorney argues that

Applicant’s mark BRODDCAST, is deemed descriptive because the term is phonetically identical to BROADCAST, which is a common term used in the trade and thus viewers of the mark would have a concept of the nature of the goods being offered.⁹

In support of the refusal of registration, the Examining Attorney made of record with his May 20, 2014 Office Action the following definition of “broadcast:”

⁹ 9 TTABVUE 4.

“made public by means of radio or television;” “of or relating to radio or television broadcasting;” or “to send out (signals, programs, etc.) by radio or television.”¹⁰

The Examining Attorney further made of record the following entry from Wikipedia.org for the term “broadcasting:”

Broadcasting is the distribution of audio and video content to a dispersed audience via any audio or visual mass communication medium, but usually one using electromagnetic radiation (radio waves). The receiving parties may include the general public or a relatively large subset thereof. Broadcasting has been used for purposes of private recreation, non-commercial exchange of messages, experimentation, self-training, and emergency communication such as amateur (ham) radio and amateur television (ATV) in addition to commercial purposes like popular radio or TV stations with advertisements.¹¹

In further support of the refusal to register, the Examining Attorney made of record with his May 20, 2014 Office Action copies of the following pages from informational and commercial Internet websites displaying the term “broadcast” used in connection with software for audio and video applications:¹²

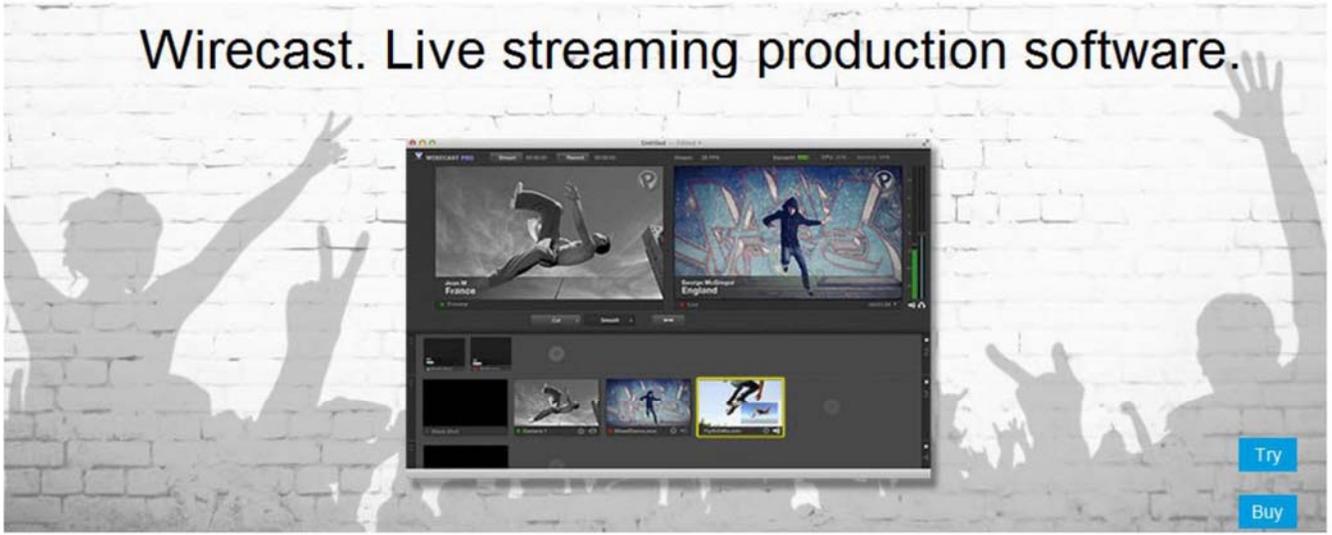
¹⁰ May 20, 2014 Office Action at 5-6. Definition from merriam-webster.com.

¹¹ *Id.* at 10. The Board gives guarded consideration to evidence taken from Wikipedia, bearing in mind the limitations inherent in this reference work, so long as the non-offering party has an opportunity to rebut the evidence by submitting other evidence that may call its accuracy into question. *See In re IP Carrier Consulting Group*, 84 USPQ2d 1028, 1032 (TTAB 2007). In the case before us, the Wikipedia evidence was submitted with the Examining Attorney’s initial Office action, and Applicant had an opportunity to rebut it.

¹² *Id.* at 17-31.



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The only cross-platform, all-in-one live streaming production software that enables capture, live production, and encoding of live streams for broadcast to multiple servers and platforms simultaneously.



What's New?

Wirecast 5 includes:

- x264
- New UI
- HD Screen Capture
- Program feed out
- Web stream sources

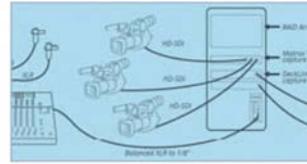
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Multi-camera turnkey solutions

Starting under \$5,000, these ready-to-use systems use Wirecast and Matrox VS4 cards to enable 4 live inputs, ISO recording & much more

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Example Setups

See [sample configurations](#) for a variety of live stream setups. Also, check out our [case studies](#) to see how others are setting up Wirecast.

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Extensive Camera Support

Capture your live feeds from multiple cameras, computer desktop, capture cards and more.

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Stream to multiple destinations

Stream live to all the places you want to broadcast - plus record to disk - with just a few clicks.

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Stream your desktop

Broadcast the desktop of any computer on your network. Show PowerPoints, software demos, Skype interviews and more.

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Stream high-quality Flash, QuickTime and Windows Media with easy-to-use presets.

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Powerful live production

Add polish to your broadcast with live switching, transitions, titles, lower thirds and more.

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We know video

Add polish to your broadcast with live switching, transitions, titles, lower thirds and more.

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Broadcasting-Software.com

Home of the Internet Broadcasting Server

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Run your own Internet Radio from your PC !



Broadcast live audio, MP3 music and photos over the Internet ! Our broadcasting software is very easy to setup and operate. [Download the software and start broadcasting NOW !](#)

Features Overview

Audio quality: you'll broadcast CD-quality music from your PC, in stereo. Broadcasts have a bandwidth ranging from 18 Kbps (AM radio) to 192 Kbps (CD quality), and sampling rates up to 44 KHz.

Many listeners: hundreds of concurrent listeners may receive your program. Such a large number of people can connect to your broadcast even if you have no broadband connection to the Internet, because your stream will be relayed by your ISP's web server (see [Concept](#) page).

Slide show: you can animate your audio broadcast with images. Simply select a folder containing your photos (jpg, bmp), and they'll be transmitted along with your audio program.

Easy to use: reading a [short tutorial](#) is enough to understand how the software works. Detailed [help pages](#) are also available to learn how to use all the features. After installing the software, simply select a folder containing your audio files (mp3, ogg or wav) and click the Start button !

Privacy: Your program is public by default - anybody can receive it. But you can protect it with a secret key to reserve it to authorized users, either your friends and family, or paying subscribers.

[Download the software and start broadcasting NOW !](#)



BroadWave Streaming Audio Software

Software to stream live audio over the Internet

BroadWave offers two different options for audio streaming

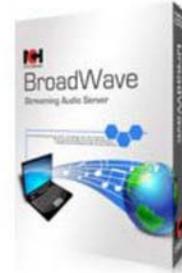
- ▶ Stream live audio instantly over the Internet
- ▶ Stream pre-recorded audio from saved files

BroadWave runs on any PC as a server to stream live audio over the web. It can also stream pre-recorded audio. Listeners do not need any special software to listen to a webcast. BroadWave streams will play directly from the default web browser.

Free if you add a link. You can use the full version of BroadWave free if you link to us on your site. If you cannot link to us you will need to [purchase](#) after 14 days.

Typical Streaming Audio Applications

- ▶ Stream live or pre-recorded company announcements
- ▶ Broadcast your own online radio program
- ▶ Air live music concerts or events to a worldwide audience
- ▶ Create and share your own Internet podcasts
- ▶ Reach a wider audience by streaming religious services
- ▶ Internet radio broadcasting and podcasting



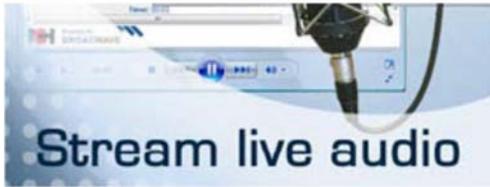
Download Now

Purchase



Audio Streaming Features

- ▶ Streams play automatically in all popular web browsers including Internet Explorer, Firefox, Safari and Chrome
- ▶ Record and save live audio streams to wav files
- ▶ Stream an unlimited number of static audio recordings
- ▶ Supports streaming from over 40 audio formats
- ▶ Pre-recorded audio can be streamed as a playlist
- ▶ Serve up to 8 separate live audio streams from one PC.



[See podcasting & radio broadcasting screenshots](#)

System Requirements

- ▶ Works on **Windows 7**, XP, Vista and 8
- ▶ Works on **64 bit** Windows

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- ▶ [Download BroadWave for Windows](#)

Purchase BroadWave Podcasting Software

- ▶ [Purchase BroadWave online here](#)

** During installation of this download you will be given the option to install Google® Chrome & Toolbar ([preview toolbar](#)) and closely related programs from the NCH Software suite. These are optional and you can select what you want depending on your requirements.*

- ▶ one PC
- ▶ Stream to any web browser with a Flash plugin*
- ▶ Display custom banners for advertising or promotions*
- ▶ Audio files are automatically converted when loaded into BroadWave for optimal streaming
- ▶ Displays number of users connected to your streams and IP addresses can be logged
- ▶ Optimized server design allows up to 500 simultaneous listeners with sufficient Internet bandwidth
- ▶ Stream live mixes from [Zulu DJ Software](#)

* Professional version only

More Audio Software



Use [WavePad Audio Editing software](#) to edit your audio files before you share them.



[Zulu DJ Software](#) integrates with BroadWave to let you stream your dj mixes over the Internet.



Produce, mix and record multi-track audio with [MixPad Audio Mixing Software](#).



Record any audio playing through your computer with [SoundTap Streaming Audio Recorder](#).



Record voice or other audio to add to any project with [RecordPad Sound Recording Software](#).

Applicant argues that its BRODDCAST mark only suggests a function, feature or characteristic of its goods and that the Examining Attorney's evidence is insufficient to support his contention that the mark is merely descriptive thereof. Applicant further argues that its "BRODDCAST mark displayed as 'BrODDcast,' is creative, whimsical, and a fun play on the words 'odd' and 'cast' to describe the odd puppeteer

cast of characters available in Applicant's software application"¹³ and thus creates a double entendre. In support of its position, Applicant made of record the following printout from its Internet webpage displaying the BRODDCAST mark in an advertisement for its identified goods:¹⁴

A BRAND NEW WAY TO CREATE

brODDcast™ is a new content creation and digital puppetry tool that gives existing YouTube creators a brand new avenue for expression, while allowing an entire new audience of would-be creators a chance to have their voices heard.

The app uses a proprietary new technology where character mouth movements mimic the actor in real-time, allowing creators to record live sketches with vibrant and hilarious puppets. Featuring fully customizable characters and sets, hilarious caricatures of world figures and celebrities, and an easy-to-learn touch interface for tablets and phones, brODDcast™ is every creative person's chance to play, experiment and share their voice in new and exciting ways. Create one-off sketches, or entire new series with recurring characters – and upload them to social channels for free.



¹³ 7 TTABVue 16.

¹⁴ November 20, 2014 response to first Office Action at 15.

Applicant further argues that the United States Patent and Trademark Office (USPTO) has registered similar marks for related goods and services. In support of this contention, Applicant made of record with its request for reconsideration copies of use-based, third-party registrations, of which the following are probative:¹⁵

Registration No. 4607358 for the mark MORE THAN JUST A BROADCAST! (standard characters) for downloadable computer software for providing music; downloadable software for providing transmission of voice, data, video, and media content via the Internet and the worldwide web; downloadable software in the nature of a mobile application for the uploading, posting, showing, displaying, tagging, blogging, sharing or otherwise providing electronic media or information over the Internet or other communication networks;

Registration No. 4091955 for the mark displayed below for, *inter alia*, downloadable software in the nature of a mobile application for creating audio recordings associated with a user's location, making said recordings searchable online and within the application, and finding and interacting with other users and locations;



Registration No. 3873131 for the mark INOVA BROADCASTER (standard characters) for computer software for creating and presenting real-time content on display screens;

Registration No. 3845077 for the mark SAM BROADCASTER (standard characters) for downloadable computer software for streaming audio for use in radio broadcasting;

¹⁵ 4 TTABVUE 14-62. We have considered only those marks which were shown to be registered and based on actual use. The marks that have been registered under the provisions of the Madrid Protocol or pursuant to Section 44(e) have no probative value because they do not require use in commerce to be registered and therefore are not evidence that the marks therein have ever been encountered by consumers in the marketplace, so as to condition consumers to perceive “Broadcast” as a mark. *See In re 1st USA Realty Professionals, Inc.*, 84 USPQ2d 1581, 1583 (TTAB 2007); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993).

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Registration No. 3795458 for the mark shown below for radio transmitters; and



Registration No. 3780057 for the mark BROADCAST1SOURCE (standard characters) for computer software for broadcasters to comply with FCC license requirements.

We agree with the Examining Attorney that Applicant's BRODDCAST mark appears to be a novel spelling of the term "broadcast." *See, e.g., Fleetwood Co. v. Mende*, 298 F.2d 797, 132 USPQ 458, 460 (CCPA 1962) ("TINTZ [is] a phonetic spelling of 'tints'"). BRODDCAST and "broadcast" would be pronounced very similarly and there is little difference in their appearance. A slight misspelling does not convert a descriptive term into a suggestive one. *In re Quik-Print Copy Shops*, 616 F.2d 523, 205 USPQ 505, 507 n.9 (CCPA 1980) (QUIK-PRINT held descriptive; "There is no legally significant difference here between 'quik' and 'quick'"). We are not persuaded that consumers encountering Applicant's mark will perceive it as "BrODDcast." First, consumers who hear Applicant's mark will not see the manner in which it is depicted. Second, the involved mark appears in standard characters and thus may be presented in any style or font, and need not be displayed with capital letters "ODD" such that consumers will necessarily view the mark as suggesting an odd cast of puppets or performers.

The Examining Attorney's evidence, excerpted above, also establishes that the term "broadcast" may be defined as relating to radio or television broadcasting, or to send out signals or programs by radio or television. The Examining Attorney's

Internet evidence is consistent with these dictionary definitions and demonstrates that consumers are exposed to third parties using the term “broadcast” to identify computer software used to capture, stream and send out, in particular, audio programs using a computer.

However, the evidence of record falls somewhat short of demonstrating that BRODDCAST merely describes a function, feature or characteristic of Applicant’s multimedia software for digital video recording, editing and playback. The evidence excerpted above clearly indicates that computer software may be used to stream and broadcast radio programs and photographs. Thus, we agree with the Examining Attorney that “broadcast...is a term commonly used in the trade.”¹⁶ Nonetheless, the evidence of record fails to show that the trade encompassed by the term “broadcast” includes a function, feature or use of Applicant’s identified goods. We acknowledge that an individual utilizing Applicant’s software to record, edit and play back a digital video recording may subsequently “broadcast” that video through various means. However, we agree with Applicant that the Examining Attorney’s evidence is insufficient to show that Applicant’s goods are used to “broadcast” the digital videos created thereby such that “viewers of the mark would have a concept of the nature of the goods being offered.”¹⁷ We observe in that regard that broadcasting is not a feature of the goods as recited, as confirmed by Applicant’s Internet evidence which describes the goods and does not refer to broadcasting. As a result, the Examining

¹⁶ 9 TTABVUE 4.

¹⁷ *Id.*

Attorney's evidence fails to demonstrate that "broadcast" is a significant feature, aspect or characteristic of the recited goods such that the mark BRODDCAST may be merely descriptive of thereof. To the extent that subsequent broadcasting of the videos created with Applicant's goods is intended to occur, imagination or additional thought is required to reach that conclusion.

We note Applicant's evidence that the PTO has registered other "broadcast" and "broadcaster" formative marks for goods related to those identified in the involved application. Certainly, uniform treatment of terms comprising marks is a laudable goal. Nonetheless, had the Examining Attorney's evidence been sufficient to show that BRODDCAST merely describes a function, feature or characteristic of Applicant's goods, the mere existence of these other registrations would not compel a contrary result. As is often noted by the Board and the courts, each case must be decided on its own merits. *See In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001). *See also In re Kent-Gamebore Corp.*, 59 USPQ2d 1373 (TTAB 2001); and *In re Wilson*, 57 USPQ2d 1863 (TTAB 2001).

Finally, if doubt exists as to whether a term is merely descriptive, it is the practice of this Board to resolve doubts in favor of the applicant and pass the application to publication. *See In re Gourmet Bakers Inc.*, 173 USPQ 565 (TTAB 1972). In this way, anyone who believes that the term is, in fact, descriptive, may oppose and present evidence on this issue to the Board.

Decision: The refusal to register Applicant's mark BRODDCAST is reversed.